THE GOVERNMENT MINUTE

IN RESPONSE TO

THE 21st ANNUAL REPORT OF
THE OMBUDSMAN 2009

Government Secretariat
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THE GOVERNMENT MINUTE IN RESPONSE TO THE 21st ANNUAL REPORT OF THE OMBUDSMAN 2009

Introduction

The Chief Secretary for Administration presented the 21st Annual Report of The Ombudsman to the Legislative Council at its sitting on 8 July 2009. This Government Minute sets out the Administration's response to the Annual Report.

ii. While The Ombudsman's Annual Report reveals that there is room for the Administration to improve in certain areas, our comprehensive responses in this Minute demonstrate our commitment to be an open and efficient government. We will continue our endeavour in this respect.

iii. This Minute comprises three parts – Part I responds generally to issues presented in the section *The Ombudsman's Review* of the Annual Report; Part II and Part III respond specifically to those cases with recommendations made through The Ombudsman's full investigation and direct investigation respectively.

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

Cooperation and Coordination, Review of Legislation

The Ombudsman is concerned with the compartmental mentality and "minimalistic approach" among some Government departments. It also considers that changes in many facets of community life signify the need to update policies and legislation for proper administration. When situations such as on-street promotional activities become intolerable for both the community and the administering departments, it is time to grapple with those systemic issues and forge a way forward for improvement.

2. The Government has taken note of The Ombudsman's remarks. We fully recognise the importance of proper coordination among government departments, particularly on issues requiring joint actions by various parties. Recommendations made by The Ombudsman, including those concerning more than one department, have generally been accepted. We will continue to strive to provide quality public services having regard to the development and demands of the community.

3. Street management is an issue that often involves different departments. The Administration would take suitable and proportionate measures to control on-street promotional activities to ensure smooth pedestrian flow and prevent public obstruction, taking into account the views of the respective District Councils ("DCs").

4. For instance, in the case of easy-mount frames, since October 2008, the Food and Environmental Hygiene Department has launched enforcement operations against easy-mount frames in districts. As of June 2009, enforcement has commenced in the Wan Chai, Central and Western, Southern, Yau Tsim Mong, Kowloon City, Kwun Tong, Tsuen Wan and Yuen Long districts. The Administration would continue to work closely with DCs in taking proportionate measures against on-street promotional activities.

Access to Government Information

5. The Ombudsman considers that some departments are still refusing requests for information without due regard to the Code on Access to Information ("the Code").

6. As an open and accountable Government, our established policy is to make available as much information as possible so that the public can better understand how policies are formulated and implemented, and can monitor Government performance more effectively.

7. Experience so far demonstrates that the Code provides an effective framework to provide access by members of the public to a wide range of information held by the Government. In 2008/09, government bureaux and departments received a total of 1 643 requests for information held by them; 95% of these requests were met in full and 2% in part, while 3% were refused. Regarding the cases in which the request was not met in full or refused, the major reasons include, for instance, the requested information involved information held for or provided by a third party or privacy of an individual. These are in line with the reasons for not providing requested information, as provided for in the Code.

8. Measures on various fronts have been taken by the Administration to enhance the awareness of and compliance with the Code. We have stepped up compliance monitoring and, where necessary, instituted remedial actions, such as clarifying any misunderstanding or grey areas in the application of the Code. The Administration has also organized training sessions, experience-sharing session and train-the-trainer briefings on the Code for staff. We have commenced a publicity programme from September 2009 to promote public awareness of the Code, by broadcasting Announcements in the Public Interest and displaying posters or banners in public places.

9. In connection with The Ombudsman's direct investigation into the administration of the Code, we have been cooperating fully with The Ombudsman in the investigation process. The Administration will carefully study the findings of the investigation and consider the recommendations when they are available.

Logistical Planning

10. The Ombudsman considers that the Administration should place importance on adequate resources and support for front-line customer services. Examples are telephone enquiry hotlines of departments particularly exposed to public calls for answers or assistance.

11. The Administration places great emphasis on the quality of front-line customer services and will continue to place attention to this at every level. The Ombudsman's concerns on the level of resources and support being given to this, particularly for telephone public enquiry services, are noted. Better use of technology and better institutional

arrangements for efficient support of these services are being developed and deployed.

Outsourcing

12. The Ombudsman considers that departments remain ultimately accountable for services contracted out. The Government must be mindful of the need to closely monitor the performance of and provide guidance for contractors as necessary, as well as to manage public expectations.

13. The Administration is in full agreement with The Ombudsman's observation that Departments are accountable for services that are contracted out. To strengthen the quality of management of outsourcing arrangements, training sessions have been conducted for those responsible for preparation and management of contracts. A User Guide to Contract Management has been widely distributed and is subject to a continuing process of review and updating. The importance of properly assessing the value of outsourcing arrangements and the conditions required for contracts to work well so as to ensure that benefits are achieved is stressed in the guidance and training given.

Accountability

14. The Ombudsman considers that many people do not understand the underlying principle of responsibility at different levels as stated in the Code for Officials under the Political Appointment System, i.e. "collective responsibility" and the "principal officials accountability". The Ombudsman suggests that the Administration may well need to explain more fully the principles of accountability and the determination of responsibility.

15. The Political Appointment System has been implemented since 2002. Under the system, the Secretaries of Department and Directors of Bureau are both politically appointed officials and Members of the Executive Council ("ExCo"). As politically appointed officials, they assume political responsibility for matters within their respective portfolios. This has enhanced the accountability of the Government. At the same time, as ExCo Members, the Secretaries of Department and Directors of Bureau have the opportunity to take part in the Government's decision-making at the most senior level. They shall, therefore, be bound by and are collectively responsible for the decisions taken by the Chief Executive-in-Council.

16. The Government has explained this in public on various occasions and will continue to make the necessary explanations, as and when required, in the context of specific situations.

Jurisdictional Review

17. The Ombudsman mentions that it has presented Part 1 and Part 2 of the Report on the Jurisdictional Review for the Government's reference and consideration.

18. The Administration has fully addressed both parts of the Jurisdictional Review conducted by The Ombudsman. We briefed the Legislative Council Panel on Administration of Justice and Legal Services of our position in December 2007, February 2008 and April 2009 respectively. We have submitted legislative amendments to include four public bodies[1] under The Ombudsman's jurisdiction in November 2009 to LegCo for consideration.

[1] These four public bodies are –
(a) Auxiliary Medical Service;
(b) Civil Aid Service;
(c) Consumer Council; and
(d) Estate Agents Authority.

Part II
– Responses to recommendations in full investigation cases

Agriculture, Fisheries & Conservation Department and Government Secretariat – Chief Secretary for Administration's Office

Case No. 2007/6013 and Case No. 2008/0067 : Unreasonably euthanising the complainant's lost dog before she could reclaim it and failing to handle properly the complainant's enquiries on her lost dog

Background

On an afternoon in November 2007, the complainant telephoned the 1823 Call Centre under the Efficiency Unit ("EU") to report the loss of her brown-white Shih Tzu that morning. She pointed out that the dog, not microchipped or licensed, had a flea collar and a blue nylon collar around its neck. An officer of one of the Animal Management Centres ("AMC") of the Agriculture, Fisheries and Conservation Department ("AFCD") called her back within 30 minutes, saying that they did not have her dog but would contact her when it was found.

2. Two days later, the complainant telephoned the Call Centre again. The staff indicated that her call would be transferred to the AFCD staff concerned. The latter then advised that there was no need for her to enquire every day because AFCD would contact her when her dog was found. However, The Ombudsman's inquiries revealed that in fact the staff was not "AFCD staff", but a Call Centre staff manning the AFCD hotline. Moreover, he did not refer the complainant's enquiry to AFCD for action.

3. Eight days after reporting the loss, the complainant received a call from Staff A of the AMC, that her dog had been found the very afternoon she reported its loss and she could claim it back. Thirty minutes later, however, Staff B called to say that since the dog had contracted serious dermatosis, it had been euthanised before she could be notified. The complainant queried how her dog could have contracted such disease as it was found on the same day it was reported lost. She went over to inspect its carcass but saw no sign of skin disease or any obvious wound.

4. The complainant was dissatisfied that AFCD had never given her a proper explanation of the incident. Subsequently, she lodged a

complaint to The Ombudsman against AFCD and EU for not handling her case properly.

The Ombudsman's observations – AFCD

5. The Ombudsman noted that according to Staff A's statement, she could see a flea collar and nylon collar on its neck without brushing aside its fur. Had other AMC staff been more observant, the dog would have been identified earlier.

6. While miscommunication was one of the factors, the actual cause of the complainant's dog being wrongly euthanised was deficiencies in AFCD's procedures for handling animals caught and reported lost. Instead of setting down the procedures to ensure that the animals to be euthanised were not those reported lost, the flow chart in the Procedures for Handling Stray Dogs Caught only listed the conditions for animals to be euthanised. In the absence of clear AFCD guidelines to staff, Staff B had ignored the risk of possible errors and took Staff A's draft disposal list for checking.

7. According to the normal procedures, both Staff A and the vet, responsible for preparing the disposal list and conducting the euthanasia respectively, had to verify and sign on the list. However, Staff B was not required to sign, while Staff A did not have to witness the process of euthanasia. As a result, she only discovered afterwards that Staff B and the vet had failed to heed her request to retain the dog.

8. This case had revealed problems in both the AFCD's practice in handling and disposing lost animals and the attitude of its staff in carrying out such duties. It was against the principle of caring for animal welfare.

9. Nevertheless, had the complainant taken her dog to be microchipped and licensed, AFCD would have been able to verify its identity from computer records and inform the complainant to claim it back. This incident of euthanasia by mistake could have been avoided. In view of the above, The Ombudsman concluded that the complaint against AFCD partially substantiated.

The Ombudsman's observations – EU

10. According to the service agreement between the EU and AFCD, public enquiries would generally be handled first by Call Centre staff on behalf of AFCD, unless they were rather special or complicated and no answer was available in EU's database.

11. The Ombudsman considered that in answering enquiries, EU should ensure the information in its database is accurate. If the information is "outdated", the information would not show the actual situation and thus would reduce the chance of finding the lost pets. This was a case in point.

12. The Ombudsman further considered that the Call Centre staff's way of expression tended to mislead the complainant into believing that the officer who took her call on transfer was from AFCD. Had the complainant realised that the officer was in fact a Call Centre staff, she would have demanded direct contact with AFCD.

13. The Ombudsman, therefore, considered the complaint against EU substantiated.

Administration's response

14. EU and AFCD have accepted The Ombudsman's recommendations and have taken/will take the following actions –

(a) AFCD has briefed the AMC staff about their duties and work procedures and reminded them to adhere to the relevant operational guidelines. AFCD has also been conducting a review on the operational procedures and guidelines for handling cases of reported lost animals and euthanasia of animals in AMC, including studying the implementation and technical details of using animal photos to facilitate identification of reported lost animals;

(b) AFCD had successfully recruited three Veterinary Officers for the AMCs and has been conducting a recruitment exercise with a view to filling the one vacant Veterinary Officer post currently remaining in the AMC;

(c) AFCD will continue its efforts to publicise about relevant works on animal control. The Department will also further strengthen its publicity to dog owners about the importance of having their dogs microchipped and licensed. Publicity activities conducted recently include disseminating messages through pet magazines and production of television and radio Announcements in Public Interest;

(d) AFCD and EU have jointly reviewed the role of the Call Centre and consider that the Call Centre should continue to answer public enquiries on lost animals on behalf of AFCD. The Call Centre

will provide callers with the telephone numbers of AMCs for making enquiries direct;

(e) For lost animal reports referred by the Call Centre, AFCD will inform the Call Centre of its reply as soon as possible, so that the latter can update its records accordingly; and

(f) Staff of the Call Centre will identify themselves as "staff responsible for answering the hotline of AFCD" to avoid any misunderstanding that they are staff of AFCD.

Buildings Department

Case No. 2007/3441 : Unreasonably issuing demolition order and Warning Notice to the complainant

Background

15. When the complainant bought 1/F Flat C of the subject building in 1992, he found that a toilet had been constructed in the lightwell of 2/F Flat C, which caused water seepage. Besides, a ceiling had been constructed at the ground floor shop underneath, which connected with the complainant's "assigned balcony" and people could easily gain access to his unit through such connection. In view of this, the complainant built a concrete structural wall at the "assigned balcony" when he moved into the premises so as to prevent water seepage from the upper floor toilet and peel off of concrete. He also built a brick wall to prevent burglary.

16. Around 1999, serious water seepage from the upper floor toilet caused water penetration and mildewing at the concrete structural wall built by the complainant. He therefore demolished the concrete structural wall.

17. Around 2003, the complainant received a Buildings Department ("BD")'s order requiring demolition of UBWs. He called the consultant company engaged by BD to understand the situation. Staff of the consultant company inspected the premises and informed the complainant that only the brick wall at the unit was unauthorised but there was no need to demolish it immediately.

18. On 6 March 2007, BD issued two letters to the complainant. One of the letters said the relevant building works had been altered and hence BD would not take further enforcement action and would withdraw the above-mentioned order. The other letter said the remaining building works including "the additional building works in the lightwell of the building" was illegal and the Department would issue a warning notice to the complainant.

19. On 31 May 2007, BD issued a warning notice to the complainant.

20. The complainant explained that he had not built any structures in the lightwell and he was the victim due to the unauthorised buildings works ("UBWs") on the upper and lower floor units. The complainant considered it unreasonable for BD to issue a removal order and warning notice to him requiring removal of UBWs.

The Ombudsman's observations

21. The Ombudsman was of the opinion that there were UBWs in the complainant's premises. It was reasonable for BD to issue an order to require demolition of the UBWs. Therefore, the complaint against BD for unreasonably issuing a removal order to the complainant was not substantiated.

22. Nevertheless, the complainant had not observed the order and did not take any action on the UBWs erected in the lightwell since the issuance of the order. It was difficult to understand why BD withdrew the order and issued a warning notice.

23. BD's explanation for tolerating the lightwell UBWs at 1/F Flat C, withdrawing the removal order and issuing a warning notice that "the original overlapping lightwell UBWs had been modified to an UBW on flat roof" was not agreeable to The Ombudsman. The Ombudsman considered that tolerable UBWs should only exist before the issuance of removal orders. BD had by then issued removal orders to the owners of 1/F Flat C, 2/F Flat C and 3/F Flat C respectively. It was apparent that the overlapping UBWs were regarded as three (and not one piece of) UBWs. Therefore, the respective owners of 2/F Flat C and 3/F Flat C had complied with the orders and demolished the lightwell UBWs attached to their units. This should not be regarded as that the lightwell UBWs attached to the complainant's unit (i.e. 1/F Flat C) had been "modified", particularly since the demolition process did not involve the complainant.

24. Since BD had issued an order to the complainant in accordance with the law, it should follow through the enforcement until the UBWs had been completely demolished. Otherwise, not only had the law not been enforced, it was unfair to the owners of the other two units. It was difficult to comprehend the justifications for the subsequent issuance of a warning notice. Therefore, the complaint against BD for unreasonably issuing a warning notice to the complainant was substantiated.

25. Overall speaking, The Ombudsman found the complaint partially substantiated.

Administration's response

26. According to its consultant's inspection report of February 2002, BD noted that there were lightwell UBWs at 2/F Flat C and 3/F Flat C of the complainant's building. There were also UBWs on the approved flat roof (i.e. the "assigned balcony" claimed by the complainant) in the

lightwell of the complainant's unit (i.e. 1/F Flat C), which is an enclosed space with concrete wall connecting the upper and lower parts where the upper part was the floor of the unauthorised toilet of 2/F Flat C and the lower part was a concrete floor. The said lightwell UBWs were built on the approved flat roof and were accessible through the door of the complainant's unit.

27. On 10 January 2003, BD issued removal orders to the owners of 1/F Flat C, 2/F Flat C and 3/F Flat C for removing the UBWs constructed at the lightwell of the respective units. These three units' lightwell UBWs were suspected to be an overlapping structure. It was noted that next to 1/F Flat C, there was a single-storey lightwell UBWs at 1/F Flat B, which might be structurally connected with the lightwell UBWs at 1/F Flat C. However, as this single-storey lightwell UBWs did not fall within the immediate enforcement category under BD's prevailing enforcement policy against UBWs, BD had not issued any similar removal order to the owner of 1/F Flat B.

28. In late 2004, the owners of 2/F Flat C and 3/F Flat C had demolished their lightwell UBWs and their respective removal orders had thus been discharged. The remaining lightwell UBWs at 1/F Flat C had not been demolished. Following the demolition of the lightwell UBWs at 2/F Flat C, it could then be ascertained that clearly there was no separation between the lightwell UBWs at 1/F Flat C and those at 1/F Flat B, thus, confirming that these two UBWs were structurally connected. BD then considered the following factors:

(a) demolition of the lightwell UBWs at 1/F Flat C would very likely endanger the structural safety of the UBWs at the adjacent Flat B; and

(b) the original overlapping UBWs had been modified to single-storey flat roof UBWs which was a tolerable item.

29. Therefore, BD withdrew the removal order, issued a warning notice and subsequently sent the warning notice to the Land Registry for registration.

30. BD had reviewed this case and supplemented further information to The Ombudsman on 11 November 2008 to explain in further detail why BD initially issued a removal order to the complainant to require the demolition of his lightwell UBWs at 1/F Flat C. Prior to the issuance of the removal order, it was not certain to BD whether there was any separation between the adjacent UBWs at 1/F Flat C and 1/F Flat B. In view of the then condition of the three-storey UBWs and after assessing the risk to

public safety, BD decided to issue removal orders to the owners of the three units. It was only until the demolition of the lightwell UBWs at 2/F Flat C could BD confirm that there was no separation between the UBWs at 1/F Flat B and 1/F Flat C. Therefore The Ombudsman's recommendation on total demolition of the lightwell UBWs at 1/F Flat C would very likely endanger the safety of the UBWs at the adjacent 1/F Flat B, unless the two UBWs are to be demolished altogether. However, this will be inconsistent with BD's prevailing enforcement policy on UBWs. According to the relevant policy, single-storey lightwell UBWs are tolerable items.

Buildings Department and Food and Environmental Hygiene Department

Case No. 2008/0155(I) and Case No. 2008/0156(I) : Delay in replying and unreasonably refusing to provide the complainant with a copy of the investigation report on water seepage

Background

31. The Joint Office ("JO") of Buildings Department ("BD") and Food and Environmental Hygiene Department ("FEHD") had conducted a test in the complainant's unit for water seepage. FEHD staff of JO (Sha Tin Sub-office) received the complainant's request for information on 30 July 2007. Since the case had been referred to the regional JO for more than two months and presumably the complainant requested for a seepage investigation report rather than a laboratory test report, the request was referred to the regional JO.

32. Upon receiving the referral, BD staff of the regional JO replied to the complainant verbally on 10 August 2007, explaining to him the investigation procedures of the JO and advising him that the seepage investigation report would not be provided. The JO issued an acknowledgement letter on 13 August 2007 and received the consultant's report on 23 October 2007. However, it was not until 29 February 2008 that the JO issued a notification letter to the complainant giving him the investigation summary and findings, and the reasons of refusing his request for the report.

33. BD explained that due to staff changes and wastage, the JO needed more time to reply to the complainant. BD indicated that the part of the laboratory test report involving neither personal information nor professional analysis could be disclosed. But the seepage investigation report which contained information of the category described in paragraph 2.10 of the Code on Access to Information ("the Code") could not be disclosed. As such, only the investigation summary and findings would be provided to allow the parties concerned to understand the cause of seepage and thus arrange for repair works.

The Ombudsman's observations

34. The Ombudsman considered that if the staff of JO (Sha Tin Sub-office) had taken the initiative to contact the complainant at the outset to explain that the laboratory test report could be released, and that the

investigation summary and findings would also be provided after the investigation, the complainant might not feel discontented.

35. The Ombudsman noted that on 10 August, BD staff of the regional JO contacted the complainant immediately upon receiving the referral to explain to him their procedures and position. However, undoubtedly there was a delay in writing back to the complainant after more than four months subsequent to receiving the consultant's report.

36. On the other hand, BD staff of the regional JO refused the complainant's request for a copy of the report without consulting the Access to Information Officer ("AIO") of BD. The refusal was not decided at the directorate level, nor provided with a reason listed in Part 2 of the Code, and no channels for review and complaint were given. The Ombudsman is of the view that the complaint was badly handled.

37. According to the internal guidelines of BD, if the request for information is not lodged on a proper form, it is not necessary for the staff responsible for handling the request to list out the relevant paragraph numbers of the Code or the channels for review. The Ombudsman considered that such a practice, however, would not help the staff concerned to be aware of whether the grounds of refusal comply with the requirements of the Code. This would also inhibit the applicants who are members of the public from understanding clearly whether the decisions made by BD are reasonable and whether they should request for review of the decisions.

38. With reference to this case, some of the justifications given by BD were quite vague. For example, the report was said to contain seepage test information, was considered an internal document and so on. These were not within the context of Part 2 of the Code and hence did not constitute valid grounds for refusal of releasing the information. It is also unclear whether paragraph 2.10 in Part 2 of the Code would be quoted in respect of the report containing the professional opinions of the investigation team, and whether paragraph 2.15 in Part 2 of the Code would be quoted in respect of the report containing information on the interior condition of the flat involved and some personal information. These have rendered it difficult for the applicant to understand why his request was refused, and he could not object with grounds even if he was dissatisfied. Such was in contradiction to the spirit of the Code.

39. In this connection, The Ombudsman advised that BD should amend its departmental guidelines to remind its staff to list out the relevant paragraph numbers of the Code and the channels for review when they refuse to release information. In addition, it should note the intent and

spirit of the Code, with the aim to make information available as far as possible to achieve transparency in administration and to respect the public's right to know.

40. Furthermore, in its reply to the complainant, BD did not quote the relevant paragraphs of the Code. But in its reply to The Ombudsman, it quoted paragraph 2.10 in Part 2 of the Code. However, quoting this paragraph was not appropriate. While the report would undoubtedly contain information on professional analysis by the investigators, the claim that disclosing such information would inhibit frank discussion internally was groundless and confounding.

41. Even if the report could not be released in full, the complainant had only requested for releasing the results of tests conducted in his flat and the location of the colour dye so that he could know and conduct the repair works. This showed the complainant was a responsible and proactive owner. Therefore, BD should at least give help and release the relevant information. In fact, the JO has subsequently (on 12 March 2008) issued an internal working guideline, stating that although the JO would not release the whole investigation report, it would release the relevant parts of the reports depending on the circumstances.

42. All in all, The Ombudsman considered this complaint substantiated.

Administration's response

43. BD and FEHD have accepted The Ombudsman's recommendations and have taken/will take the following actions –

(a) BD sent a letter of apology to the complainant on 8 October 2008;

(b) In BD's letter of 8 October 2008 to the complainant, the complainant was invited to fill in a form giving details of his request for a copy of the investigation report, and informed that suitable information would be released in accordance with the Code while a fee would be charged for copying of such information he requested. The complainant ultimately withdrew his request for information; and

(c) BD is reviewing its internal departmental instructions on the Code, and has sought legal advice and comments from the relevant parties. BD is studying the comments received and will further revise the internal departmental Instructions where appropriate.

Buildings Department and Fire Services Department

Case No. 2008/0419(I) and Case No. 2008/0420(I) : Refusing to provide the complainant with the photographs taken in his building and copies of the relevant correspondence

Background

44. In mid-2007, maintenance work was carried out at the building in which the complainant resided. On 3 December 2007, the complainant complained to the Buildings Department ("BD") that some guy ropes of the scaffolding for repair works had been tied to the drying racks, causing safety problem. On the same day, BD's staff inspected the building and took some photos for follow-up action.

45. On 20 December 2007, the complainant slipped in the building and was injured. The complainant requested the Fire Services Department ("FSD") to conduct on-site investigation into the fire safety of the building and to take photographs of the rear staircase. On 3 January 2008, the complainant requested BD and FSD in writing to provide photographs taken in the building as well as copies of correspondence between the respective departments and the owners' corporation of the building.

46. On 10 January 2008, BD replied to the complainant that the relevant photo records were internal documents and could not be made available as requested.

47. FSD was of the view that the complainant did not make an explicit request for the photographs or the correspondence in his letter of 3 January 2008 and issued a reply without attaching any photographs or correspondence. On 13 February 2008, the complainant lodged a complaint with The Ombudsman against BD and FSD.

48. On 18 February 2008, the complainant met with FSD staff at Fire Services Headquarter and again requested for the photographs. As the complainant indicated in his letter to FSD dated 20 December 2007 that the chairman of the owners' corporation should be held responsible for his injury, FSD believed that the requested photographs would be presented in civil proceedings between the complainant and the owners' corporation. On 22 February 2008, FSD informed the complainant that the Department of Justice ("DoJ") would be consulted in respect of his request. Having confirmed that it was legally in order to accede to the complainant's request, FSD sent the photographs to the complainant on 28 March 2008.

49. FSD revisited the case file and sought clarification from the complainant in respect of his request for copies of the correspondence between FSD and the owners' corporation of the building on 2 June 2008. It was clarified that the complainant would like to obtain a copy of the two fire hazard abatement notices and the advisory letter issued by FSD to the owners' corporation. FSD sought the advice of DoJ on the release of the requested documents. Having confirmed that it was legally in order to do so, FSD provided with the complainant with a copy of the fire hazard abatement notices on 3 June 2008, and a copy of the advisory letter on 28 August 2008.

The Ombudsman's observations – BD

50. Regarding the request for information on 3 January 2008, the Code is made to effect the Government's policy of making Government-held information as open and accessible as possible. As stated in the introductory paragraph (v) of the Guidelines for Departments on the Code ("the Guidelines") - "The approach to release of information under the Code should be positive; that is to say, departments should work on the basis that information requested will be released unless there is good reason to withhold disclosure under the provisions of Part 2 of the Code."

51. BD took "internal documents" as the reason and on 10 January 2008 hastily refused to provide the complainant with the photos. However, "internal documents" is not a good reason to withhold disclosure specified under Part 2 of the Code. Hence, BD's decision obviously did not comply with the above Guidelines to make information as open and accessible as possible.

52. Besides, BD quoted a paragraph of its internal departmental instruction, pointing out that as the complainant did not specifically make his request under the Code, it was a request for "general information" and therefore BD was not required to handle the request according to the Code. However, the original wording of the quoted paragraph reads: "Officers should not regard every request for information or advice as a formal request under the Code … If in doubt, officers should consider it an informal request rather than insisting on a formal application under the Code. Information should always be provided as promptly and helpful as possible."

53. That means staff should not insist that applicants had to lodge a formal request but should try their best to provide information as promptly and helpful as possible. The Ombudsman considered that BD had seriously

misinterpreted its internal departmental instruction and its argument did not hold.

54. In fact, according to paragraph (iv) of the introduction to the Guidelines, departments could categorise requests into "requests made under the Code" and "non-Code requests" for monitoring purposes. However, "non-Code requests should be considered on the same basis as that applicable to requests under the Code, i.e. in deciding the release or otherwise of the requested information, consideration should be made in accordance with the provisions of the Code."

55. Hence, it is apparent that BD's decision contravened the requirements of the Guidelines, i.e. non-Code requests should be handled in the same way as those made under the Code.

56. As for another paragraph of the BD Instruction which states that "It is normally not necessary … to invite the person or organisation concerned to ask for a departmental review or complain to The Ombudsman", paragraph 2.1.2 of the Guidelines actually stipulates that when a request for information is to be refused or partially refused by departments, the applicant concerned must be informed of:

(a) the reasons for refusal quoting all the relevant paragraph(s) in Part 2 of the Code on which the refusal is based;

(b) the avenue of internal review by the senior management of the department if the applicant is not satisfied with the department's decision; and

(c) the option of lodging a complaint to The Ombudsman and how to go about doing it.

57. The Ombudsman considered that BD's instruction was obviously not in line with the Guidelines, and BD should amend it immediately to conform with the Guidelines. BD should not withhold disclosure of the relevant avenue to keep the applicant from lodging appeals or complaints.

58. After scrutinising BD's internal discussion records, The Ombudsman discovered that BD did not fully understand paragraphs 2.6(b) and (c) of the Code and did not analyse whether releasing the photo records taken at public places would actually "harm the impartial adjudication" or affect investigation work.

59. In conclusion, BD's rationale for refusing the complainant's request was paradoxical. It showed that BD had seriously misinterpreted

the Code and made decisions without deliberation. It also showed BD's negative attitude in making information accessible which was against the high transparency policy of the Government.

60. Regarding the repeated request for information on 17 April 2008, The Ombudsman, after scrutinising BD's files, confirmed that BD had decided to provide the photos to the complainant only after learning FSD had upon legal advice sent the department's photos to the complainant and checking its own legal advice sought on similar cases in 2002.

61. The Ombudsman considered that BD had inadequate knowledge about the Code, did not react to seek legal advice timely, and also failed to learn from past experience, causing delay and blunder. In fact, BD should categorise those items of information already released as the "generally available" type of information under a procedure to avoid the need to consider individual cases belonging to the same type of information.

62. After months of unproductive processing, when BD became aware of what the complainant was requesting, and agreed to release the photos, BD asked the complainant to lodge a formal request by filling in an application form. The Ombudsman considered this practice bureaucratic and unnecessary.

63. BD argued that asking the complainant to lodge a formal application was to verify details of the requested information. Nevertheless, The Ombudsman confirmed after checking BD's files that there were only 3 photos for the subject building taken on 3 December 2007, which did show the scaffolding for repair works with guy ropes tied to the drying racks (i.e. the photos the complainant had requested for). As a matter of fact, in BD's letter to the complainant on 2 June 2008, it was stated clearly which two photos could be provided. Therefore, The Ombudsman considered BD's argument ungrounded.

64. BD also imposed a restriction on the use of the photos when it agreed to release them. The Ombudsman considered such restriction unnecessary.

65. It is expressly stated in paragraphs 1.9.2 and 1.10.2 of the Guidelines that the purpose of the request, or refusal to reveal the purpose on the part of the requestor, should not be a reason for withholding the information requested in part or in full.

66. Accordingly, departments should not impose any restriction on the use of information to be released. If there are queries on the legal aspect

regarding this practice, BD should further consult the Department of Justice.

67. It is true the complainant did not specify in his letter to BD on 3 January that he would like to request the correspondences between BD and the OC. However, the caption of the (Chinese) letter was "Re: photos and letters relating to claims". And in the letter, it read "Could the department make available … to me pursuant to the Code". The Ombudsman opined that BD should have taken the initiative to proactively seek information and understand the complainant's needs and provide assistance under the spirit of serving the public.

The Ombudsman's observations – FSD

68. The caption of the complainant's letter to FSD dated 3 January 2008 was "Request for Photographs and Correspondence", and "…photographs and correspondence…" was also mentioned in the letter. FSD did not try to find out what information the complainant was asking for until 22 February 2008 and 2 June 2008. FSD's response to the complainant's requests was not proactive enough and was delayed. Nonetheless, it was noted that FSD had acted promptly after the complainant's requests were clarified.

69. In view of the above observations and considerations, The Ombudsman considered that the complaint against FSD partially substantiated.

The Administration's response

70. BD and FSD have accepted The Ombudsman's recommendations and has taken/will take the following actions –

(a) BD issued letters to the complainant to explain its procedures on access to information on 3 and 23 April 2008. The complainant had subsequently completed the application procedures (including payment of the relevant fee) and received copies of the relevant photos;

(b) In order to better understand the complainant's request for "letters relating to claims" made in his letter of 3 January 2008, BD had called the complainant and enquired about the information he needed. The complainant said that the owners' corporation of his building had refused to provide him with the scope of works assessed by the consulting company for the maintenance works of the building, and he knew that the owners' corporation had

submitted a copy of the assessment to the Comprehensive Building Safety Improvement Loan Scheme Unit ("BSLS Unit") of BD to apply for building maintenance loans. He therefore wished to obtain the relevant documents from BD. The complainant had subsequently completed the application procedures. The BSLS Unit of BD had processed the application in accordance with the Code and the relevant procedures;

(c) BD is reviewing its internal departmental instructions on the Code, and has sought legal advice and comments from the relevant parties. BD is studying the comments received and will further revise the internal departmental instructions where appropriate;

(d) BD has incorporated the suggestion in the training and development programme for its staff to enhance their understanding of the Code and BD's internal instructions; and

(e) FSD has updated its procedures for handling enquires and unclear requests for information.

Case No. 2008/1747(I) and Case No. 2008/1748(I) : Unreasonably refusal to provide the complainant with a copy of the investigation report on water seepage

Background

71. The Joint Office ("JO") of Buildings Department ("BD") and Food and Environmental Hygiene Department ("FEHD") received the seepage complaint in June 2006 and identified the seepage source after several tests. On 18 February 2008, the JO issued a letter to require the complainant to repair the floor slab of the bathroom.

72. The complainant claimed that the JO had refused to provide him with a copy of the test report on the investigation of the water seepage complaint. Since the case officer was no longer on the job, the JO could not confirm whether it had received any request from the complainant on phone. As for a written request sent by the complainant on 10 April 2008, the JO indicated initially that no such letter was received. However, after checking the fax log of the JO, The Ombudsman confirmed that the complainant did fax the letter. Then the JO admitted that the letter could not be found.

73. On 22 July 2008, The Ombudsman faxed that letter to JO(BD) again, and asked JO(BD) to process the written request lodged by the complainant. The JO pointed out that since the seepage investigation report comprised records of internal discussion and advice as described in paragraph 2.10 of the Code on Access to Information ("the Code"), the report could not be disclosed. The JO reckoned that it had already provided the investigation summary and findings in its letter of 18 February 2008 to the complainant.

74. JO(BD) reiterated that the seepage investigation report contained the test information, interior condition of the premises involved, professional analysis of the investigators and some personal information. JO(BD) regarded the report as an internal document of the JO and thus would not release it. However, it would inform the parties concerned of the investigation findings to facilitate the carrying out of repair works. JO(BD) also indicated that the report contained technical terms of the engineering and surveying profession which might not be comprehensible to the general public and would easily lead to misunderstanding, not facilitating the carrying out of repair works.

The Ombudsman's observations

75. The intent and spirit of the Code are to make information available as much as possible so as to achieve transparency in administration and to respect the public's right to know. Hence, a refusal to disclose information is an important decision which has to be carefully considered at the directorate level. The decision should only be made after confirming that the information concerned falls within the scope of Part 2 of the Code. In addition, the procedures stipulated under the Code must be followed and explanation given to members of the public who request for the information.

76. The Ombudsman has no intention, and cannot represent the JO, to decide on whether the seepage investigation report should be disclosed. The Ombudsman's concern is the attitude of the JO and whether it acts in accordance with the intent and spirit of the Code.

77. The phone request made by the complainant might be hard to trace back, but the letter of 10 April was a solid proof. Obviously the JO lost the letter and defended itself by claiming that it did not receive the letter. Moreover, the JO did not make a written reply to the complainant even after receiving the letter concerned from The Ombudsman on 22 July 2008. These implied carelessness and a lax attitude, which were unacceptable.

78. JO(BD) has previously quoted paragraph 2.10 in Part 2 of the Code as the justification for refusing disclosure. However, The Ombudsman considered that quoting this paragraph was not appropriate. While the report would undoubtedly contain information on professional analysis by the investigators, the claim that disclosing such information would inhibit frank discussion internally was groundless and confounding.

79. JO(BD) has put forward other reasons to The Ombudsman without quoting Part 2 of the Code. Surprisingly, the JO is still unaware that any refusal to disclose information must be grounded on a reason listed in Part 2 of the Code. In fact, though the JO's practice complies with its internal guidelines, it contravenes the requirements of the Code and inhibits those who apply for access to information to understand the reason(s) of being refused, and make it hard for the applicants to raise objection with justifications. In short, BD's guidelines and actions were in contravention to the spirit of the Code.

80. Besides, JO(BD) did not consult the Access to Information Officer ("AIO") and did not ask for decision at the directorate level of BD before it rejected the complainant's request for the report. This complaint was badly handled.

81. In sum, the JO did not handle the complainant's request in accordance with the spirit of the Code, which implied carelessness and a lax attitude. Hence, the complaint was substantiated.

Administration's response

82. BD and FEHD have accepted The Ombudsman's recommendations and have taken/will take the following actions –

(a) JO(BD) sent a letter to the complainant on 29 October 2008, apologising in writing for failing to handle his request for information properly and for losing his letter;

(b) The JO has reviewed its procedures of receipt/dispatch and filing of fax documents so as to ensure proper handling of fax documents. JO staff have been reminded to adhere to the departmental guidelines when dealing with incoming mails from the public and to make timely replies;

(c) BD has, based on the requirements of the Code and its internal guidelines, identified the portions of the information that could be released and provided the same to the complainant; and

(d) BD is reviewing its internal departmental Instructions on the Code, and has sought legal advice and comments from the relevant parties. BD is studying the comments received and will further revise the internal departmental Instructions where appropriate.

Environmental Protection Department

Case No. 2008/0074 : (a) Unreasonably refusing an application for exemption from the smoke emission test for a retired Government vehicle; and (b) Failing to inform the complainant of his right of appeal against the Department's decision

Background

83. On 12 July 2007, the complainant acquired a retired Government goods van from a public auction held by the Government Logistics Department ("GLD"). He realised afterwards that the concerned vehicle had to pass an exhaust emission test before it could be registered and licensed by the Transport Department ("TD"). As the concerned vehicle failed to pass the test, the complainant could not register the vehicle and hence suffered financial loss.

84. The complainant alleged that the Government used to exempt similar type of vehicles from the exhaust emission test. He was dissatisfied that GLD did not inform him of the cancellation of this exemption arrangement and, as a result, he was misled into buying the concerned vehicle.

85. On 19 July 2007, the complainant submitted to the Environmental Protection Department ("EPD") an application for exemption from complying with the exhaust emission requirements, which was subsequently refused. The complainant opined that the refusal was unreasonable on the grounds that the retired Government vehicle had been operating in Hong Kong for six years and was still in good condition. He considered it unfair that EPD had double standards as local second hand cars could enjoy the exemption arrangement.

86. Furthermore, the complainant was also dissatisfied that EPD did not inform him of his right to appeal and the deadline of appeal in its refusal letter dated 31 July 2007. As such, he was deprived of the opportunity to file an appeal to the Air Pollution Control Appeal Board.

The Ombudsman's observations

87. Unlike general local vehicles, Government vehicles do not need to be first registered. However, if the new owner of a retired Government vehicle acquired through public auction wants to use it in Hong Kong, he must have the vehicle first registered with the TD. In effect, the vehicle

will have to comply with the emission requirements set out in the Air Pollution Control (Vehicle Design Standards) (Emission) Regulation (Cap. 311) for newly registered vehicles so as to further improve roadside air quality. Since September 2005, GLD has set out this requirement in the auctioning conditions.

88. The exhaust system of the concerned vehicle was designed many years ago. At that time, the standard was more relaxed and allowed the amount of exhaust emissions about 1.5 times more than the prevailing statutory standard. The actual exhaust emissions of the concerned vehicle were even much higher due to aging of its mechanical parts. As such, EPD refused the complainant's exemption application.

89. In fact, the vehicle was tested on 20 September 2007 and the results showed that it failed to meet the statutory emission standard.

90. According to EPD, acceding to the emission exemption application of the complainant so as to enable it to be registered for local operation would be unfair to those people who were also interested in bidding for the vehicle.

91. The Ombudsman considered that the above explanation provided by EPD for the refusal of the exemption application was not unreasonable. The concerned vehicle did not comply with the requirements of the relevant environmental regulations since it could not pass the emission test.

92. The Ombudsman was also of the view that the public could find it difficult to comprehend or accept the differential treatment that retired Government vehicles needed to be tested for exhaust emission before it could be registered by the TD whereas other local second-hand vehicles of similar age did not need to do so. However, The Ombudsman had also taken note that GLD had already informed potential bidders of retired Government vehicles that these vehicles had to pass an emission test before they could be registered in Hong Kong. It also held the view that the bidders should understand the terms and conditions of the auction to protection their own interests. Thus, the alleged unfairness to the complainant was not substantiated.

93. On the other hand, The Ombudsman found it improper for EPD not to inform the complainant promptly of his right to appeal such that the complainant had missed the statutory deadline to lodge an appeal. The Ombudsman considered that the general public might not be familiar with statutory regulation or understand their right to appeal. Therefore, EPD had the responsibility to inform the complainant of the appeal procedures and deadline.

94. In summary, The Ombudsman considered that the complaint against EPD was partially substantiated.

Administration's response

95. EPD has accepted The Ombudsman's recommendations and has taken the following actions –

(a) EPD has started informing applicants the right and deadline to lodge an appeal when refusing similar exemption applications; and

(b) EPD has initiated discussion with GLD. The latter has put up a poster at a conspicuous location in the auction venue to remind bidders that retired Government vehicles seeking first registration must comply with the requirements as stipulated in the Air Pollution Control (Vehicle Design Standards) (Emission) Regulation and Noise Control (Motor Vehicles) Regulation.

Case No. 2008/0234 : Failing to take enforcement action against illegal breeding of pigeons on the rooftop of a building

Background

96. To reduce the risk of avian flu, the Government enacted legislation in early 2006 banning backyard poultry keeping. An Animal/Birds Exhibition Licence ("Exhibition Licence") must first be obtained from the Agriculture, Fisheries and Conservation Department ("AFCD") for keeping of poultry. Officers from AFCD will conduct inspection to confirm that the pigeon cage complies with the licensing requirements and that no building or land ordinances have been breached, as well as no nuisance will be created before considering the issue of an Exhibition Licence.

97. A complainant lodged complaints with various departments in early 2006 about the keeping of pigeons on the roof level of a building near his premises in To Kwa Wan. The pigeons were found to be owned by the occupier of the top flat and roof of the building, who was at the time applying for an Exhibition Licence from AFCD and had fabricated a purpose-made cage to house the pigeons. Inspections by AFCD and Environmental Protection Department ("EPD") revealed that the hygienic condition of the site was satisfactory and no pigeons' faeces were found in the vicinity. However, the pigeon owner's application was refused in February 2007 for the reason that the cage on the roof was regarded as an unauthorized building work by the Buildings Department. The pigeon owner subsequently modified the cage and reapplied for the Exhibition Licence, but was again refused in June 2008 for the same reason. Eventually, an Exemption Permit was issued by AFCD in October 2008 to allow the pigeon owner to keep the pigeons inside his own flat. Nonetheless, since the pigeon owner was found keeping pigeons during the period prior to the issue of the Exemption Permit, he was in breach of the Waste Disposal Ordinance (Cap. 354) and was prosecuted by EPD and fined $500 by the court in October 2008 for keeping livestock in a livestock waste prohibition area.

The Ombudsman's observations

98. The Ombudsman opines that EPD has the following inadequacies in handling the above complaint –

(a) Lack of clear instruction – it had been two months since the referred case was received from AFCD in February 2007 before the first inspection was carried out.

(b) Lack of proactive attitude towards procuring evidence –

(i) After failing to enter the rooftop of the building during several surprise visits, the staff still relied on long-distance surveillance by using a camera and did not consider using binoculars or other technical aids to procure more concrete evidence of illegality.

(ii) From the pictures taken at some of the visits, The Ombudsman noticed that birds were apparently kept inside the pigeon cage. But EPD did not further confirm that these birds were pigeons covered by the poultry ban so as to decide whether a court warrant should be applied for conducting a search at the rooftop of the building.

(c) Incomplete record – The Ombudsman requested to obtain the details and copies of records of the staff orally seeking legal advice from the Central Prosecution Unit, but EPD replied that there was no record of the oral discussion in question.

As a matter of fact, such record is very important because it is related to the decision to lay charge. The non-existence of such record not only gives an impression of lack of seriousness in handling the case, but also raises doubts.

99. After receiving the referral from AFCD in February 2007, EPD adopted a lax attitude which resulted in delayed inspections. Even though a number of surprise visits were carried out in the following year, only simple equipment was used for long-distance surveillance and photo-taking. Although birds were suspected to be kept inside the pigeon cage, further evidence procuring action was not taken as soon as possible. This not only stalled the investigation and made it futile, but also wasted time and resources. Had it not been for AFCD's sending the pigeon-finding report to The Ombudsman in May 2008 and the latter's referring the case to EPD, EPD might not have considered taking prosecution action against the party involved.

100. The Ombudsman is of the view that EPD did not adopt a proactive attitude in the investigation and the investigation itself was not thorough enough. Neither was any careful analysis of the evidence taken. The case was therefore delayed for more than one year before any prosecution action taken. Although expert opinions evaluated that the risk of catching avian flu by pigeons was not high, an outbreak of avian flu at that time and place

would have extremely serious consequences and EPD could hardly absolve itself of all blame.

101. The Ombudsman, therefore, considers the complaint substantiated.

Administration's response

102. EPD has accepted The Ombudsman's recommendations and has taken the following actions –

(a) The Departmental Administrative Circular (DAC) concerned was revised in July and October 2008 respectively in response to The Ombudsman's recommendations to the effect that clearer instructions on handling and following up on referrals from other departments have been put in place. The newly revised DAC was explained in detail to the staff during two experience-sharing workshops;

(b) For this case, the supervisor concerned, upon receiving The Ombudsman's report, immediately re-examined the incident in detail with the responsible officers whereby the staff's ability to identify evidence and their enforcement awareness were strengthened. They were also requested to take the initiative to further investigate into any doubts and procure more evidence, as well as make detailed record accordingly. Moreover, the two staff members responsible for the case were invited to explain the areas needing improvement to other staff during an experience-sharing session held on 5 September 2008. Staff members of the Central Prosecution Unit were also invited to explain the case to other staff during the Environmental Compliance Division's experience-sharing workshop held on 25 September 2008. Likewise, new entry on how to follow up on possible illegalities was made to the above-mentioned DAC;

(c) EPD has reminded its staff that before setting off for duty, they should ensure that suitable equipment has been prepared for the operation and that long-distance surveillance and high-definition appliances (including digital video recorder, camera and binoculars, etc.) should be added if necessary for procuring evidence; and

(d) All staff members have been reminded to take down the details and results of seeking legal advice as instructed. If legal advice is to be sought from the Central Prosecution Unit, it will be made in written form and the Central Prosecution Unit will also provide their replies in written form in return.

Home Affairs Department

Case No. 2008/0972 : Unreasonably requiring the complainant to pay additional hire charge

Background

103. According to the complainant, she paid the hire charges on 26 November 2007 for using a multi-purpose function room in the Kennedy Town Community Complex under the management of the Central & Western District Office ("C&WDO") in January 2008. However, on 14 January 2008, the staff of the management company notified her that there was an adjustment in the hire charges starting from January 2008 and she had to pay the difference. The complainant considered it maladministration on the part of C&WDO for failing to inform her of possible adjustment in hire charges beforehand, and it was unreasonable to require her to pay the difference retrospectively.

The Ombudsman's observations

104. Regarding the case concerned, it was not stated in the guideline nor the application form on the use of community hall or centre facilities that the complainant might be required to pay the difference following a subsequent increase in the hire charges. The verbal notice made by the staff of the management company to the complainant in mid-September 2007 was not clear and should not be deemed as an agreement between the management company and the complainant. When the complainant signed the application form and paid the charges, a contract was formed in effect. It was grossly unfair and without legal basis for C&WDO to require the complainant to pay the difference in charges subsequently.

105. Also, the improved measures of C&WDO were inadequate. While applicants would be formally informed before they signed the application forms that they might be required to pay the difference in charges in the event of subsequent upward adjustment, neither the range nor the criteria for adjustment were available in the information provided to them. So, venue users would not be able to assess the financial burden resulting from subsequent increase in charges. Such a contract cannot be regarded as fair.

106. The Ombudsman considered the C&WDO's practice of recovering the difference in hire charges had insufficient legal basis and was not value for time. The Ombudsman suggested that HAD consider

simplifying things and scrap the practice of requiring users to pay the difference in hire charges.

107. In other words, if an application is submitted and the hire charges paid before the Government announces the imposition of new rates, the applicant would not be required to pay the difference in hire charge.

108. The Ombudsman, therefore, considered this complaint substantiated.

Administration's response

109. HAD has accepted The Ombudsman's recommendation to scrap the practice of requiring users to pay differences in venue charges retrospectively and decided not to pursue with the demand for such payment from the complainant. The Department has also comprehensively reviewed cases in various districts throughout the territory for the period concerned. For cases similar to this one (i.e. the applicants are not clearly informed of the possibility to pay a difference in charges beforehand), the Department will follow up individually and make appropriate arrangements.

Home Affairs Department and Lands Department

Case No. 2007/5860 & Case No: 2007/2632 : Failing to take proper action against illegal widening of a footpath which was misused as vehicle access

Background

110. A footpath flanking a park had been illegally widened to become a thoroughfare for heavy vehicles, thus affecting pedestrian safety. The park was managed by the local rural committee ("RC") as licensee of the site. The local District Council ("DC") had funded the installation of some facilities there, with maintenance responsibilities taken up by the District Office ("DO") under the Home Affairs Department ("HAD"). Upon receiving the complaint, the District Lands Office ("DLO") first asked DO to take appropriate action, as DO had constructed a water channel along the footpath. DO advised that since it was a land control issue, DLO should deal with the complaint as such. DO further advised that in respect of the water channel, it would continue to take up responsibility for its maintenance. DLO then asked RC to reinstate the footpath, but received no reply.

111. At the request of a village representative, DLO decided to install an emergency crash gate at the entrance of the footpath to prevent vehicles from entering. However, the works encountered strong opposition from some villagers and had to be suspended. DLO then considered some residents' request for regularising the use of the widened footpath as a driveway. DO, however, pointed out that some other residents opposed the proposal and suggested that DLO liaise with them to seek a consensus first. DLO again asked RC to reinstate the footpath and the RC carried out some landscaping works.

The Ombudsman's observations

112. DLO should have pressed RC as licensee of the site to reinstate the footpath. DLO's procrastination had given people an impression of tacitly allowing the illegal widening of the footpath. By failing to take prompt land control action, DLO had landed itself in a dilemma, caught between residents supporting and those opposing regularisation. The Ombudsman found the complaint against LandsD substantiated.

113. The Ombudsman considered that DO had appropriately acted as the bridge of communication between Government departments and residents, assisted DLO in local consultation and reflected views gathered to DLO for consideration. DO was able to mediate among the local people to eliminate disputes as far as possible and resolve the problem collectively. The Ombudsman considered the complaint against HAD unsubstantiated.

Administration's response

114. HAD and LandsD have accepted The Ombudsman's recommendations and have taken/will take the following actions —

(a) DLO was initially led to believe that the footpath had been newly converted into vehicular use in 2005. Hence, DLO took land control action. However, the first land control action did not proceed due to strong local resistance on the spot. DLO solicited police support for another land control action;

(b) Nevertheless, DLO subsequently found that the access was one of those existing village accesses built and used by local communities (for pedestrian/vehicular use). As an established practice, existing village accesses are allowed to continue to be used except where there are safety concerns and in this particular case the Transport Department has advised that there are no such concerns; and

(c) DO will continue to work closely with DLO and assist in mediating as far as possible in the liaison process between the Government and the local people with a view to resolving the problem. Following LandsD's intention to regularise the access after due consideration of The Ombudsman's recommendations and request to consider conducting improvement works, DO is planning to resurface the damaged paving of a section of the access and reinstate some drainage channels. The local community is being consulted on the works.

Hospital Authority

Case No. 2007/5624 : Unreasonably asking the complainant for payment of her new-born baby's hospitalization charges 13 years ago

Background

115. The complainant made a complaint against the Hospital Authority ("HA") for HA's groundless allegation about her failure to settle the hospital maintenance fees of her daughter 13 years ago. The relevant HA staff claimed that they could not contact the complainant successfully in the past and so was unable to serve the payment notice to her. The complainant paid her "debt" unwillingly, but was skeptical of the "debt" which she was only asked to pay after so many years.

The Ombudsman's observations

116. The Ombudsman, having reviewed the medical records, confirmed that the paediatrician had indeed provided service to the complainant's daughter between 31 August and 6 September 1994. On this, there was ground for HA to charge the complainant for $162 according to its policy.

117. The Ombudsman also agreed to HA's position. As healthcare expenses were mostly subvented by public money, HA was duty bound to try its best to recover outstanding debts.

118. After checking the relevant computer records of HA, The Ombudsman found that apart from the three letters and one telephone call between September and November 1994, HA had not taken any recovery action for over ten years.

119. HA advised that subsequent to the enhancement of computer systems for outpatient registration and hospital admission, the computer systems could provide information about patient's outstanding bills. HA staff had therefore chased for the outstanding payment of $162 on 5 September 2007 when the complainant's daughter was discharged from hospital. Given HA's policy is to keep accounting records for seven years, all relevant supporting documents, including the bills, letters and telephone records, had been destroyed and HA could not provide any proof and documents to clarify the doubts of the complainant. The Ombudsman considered that there was no adequate evidence for HA's case based only on the computer records. Thus it would not be unreasonable if the

complainant insisted not to pay. Moreover, if the complainant's daughter had not continued to use HA's services, HA would not have been able to recover the debt.

120. The Ombudsman considered that HA lacked efficiency in debt recovery. In addition, HA on the one hand insisted that it should not relinquish the duty and right to recover the debt, but on the other hand had destroyed all relevant paper records which rendered the debt recovery groundless. Besides, it was learnt that HA has not taken any action after chasing for payment in 1994. HA suddenly took recovery action without relevant proof only after more than ten years. The Ombudsman could not ascertain whether HA did actually ask for payment in 1994 just based only on the computer records. If the medical record had not been preserved, it was virtually impossible for the HA to prove that the complainant's daughter did receive paediatric treatment. Since more than ten years had lapsed, the complainant's memory was blurred and it was unfair to and improper for her if she were to argue her case.

121. Based on the above, The Ombudsman considered that there had been maladministration on the part of HA for taking recovery action after more than ten years and yet was unable to provide detailed record and document to support its action. The complaint was found substantiated.

122. The Ombudsman was pleased to learn that HA had issued new guidelines on debt recovery in 2007 and had enhanced the proactiveness of its debt recovery actions.

Administration's response

123. HA has accepted all recommendations of The Ombudsman and enhanced its debt recovery procedures in accordance with the spirit of the OMB's recommendation. At present, HA's debt recovery procedures are as follows –

(a) "Interim Bills" are delivered to individual in-patients by hand on a weekly basis. Non-eligible persons will receive "Interim Bills" at a more frequent interval;

(b) A "Final Bill" will be issued to the patient by hand upon discharge from hospital or by mail after the patient was discharged. A reminder with information on administrative charge will be mailed to the patient if the bill is not settled within 14 days from issuance of the "Final Bill";

(c) Telephone calls to the patient or his/her next of kin will be made to urge for early settlement of outstanding bill before and after discharge;

(d) If the bill remains outstanding 60 days after issuance of the "Final Bill", an "Administrative Charge Notice" will be mailed to the patient with the first administrative charge imposed. If the bill remains outstanding 90 days after issuance of the "Final Bill", a "Final Warning" notice imposing the second administrative charge will be mailed sent to the patient; and

(e) Legal action may be instituted after the above-mentioned actions fail, except for small value bills (mostly equal to or below $150) and those with low chance of recovery. In addition, the shroff staff would continue to remind patients with outstanding bills upon their future visits to the hospitals.

124. Based on HA's past experience, the chance of successful recovery of debt after seven years is rather low. HA is planning to revise its accounting policy to stop debt recovery actions and destroy the relevant accounting records for cases after seven years. HA will proceed to revise its relevant accounting guidelines after the major update to HA's computer systems is completed in 2009.

Case No. 2008/0005 : Failing to provide proper non-emergency ambulance transfer service

Background

125. The complainant's mother ("the patient"), a paralyzed patient with speech impairment, was a resident of an old age home ("OAH"). On 20 December 2007, the complainant booked the Non-emergency Ambulance Transfer Service ("NEATS") for transporting the patient from OAH to attend a medical appointment at Queen Elizabeth Hospital ("QEH"). According to the complainant, she was informed by NEATS' staff that the ambulance would pick up the patient at the OAH at 12:00 noon but the ambulance arrived at 1:25 p.m. At 2:45 p.m., the complainant booked the return trip through the hospital and was informed that the ambulance would pick up the patient at 4:30 p.m. After a long wait until 5:00 p.m., the complainant phoned the NEATS Control Centre. Upon enquiry, the complainant was informed that the ambulance could only arrive at 5:30 p.m. The ambulance finally arrived at 6:00 p.m. and the patient arrived at the OAH at 6:26 p.m.

126. According to the complainant, similar incidents happened many times requiring the patient to wait for long hours. Frustrated by the unsatisfactory service, she complained to The Ombudsman against the NEATS of HA.

The Ombudsman's observations

127. The Ombudsman appreciated that there were times that the ambulance might not be able to arrive at the pick-up points at the scheduled time due to a number of factors including traffic condition.

128. The Ombudsman noted that the scheduled pick up time for the complainant's mother was 12:30 p.m. The NEATS team was arranged to take rest and lunch until 12:35 p.m., made a trip to pick up another patient before attending to the complainant's mother. Despite knowing in advance that it was impossible to arrive on time, the team made no effort to flexibly arrange the rest time and lunch break of staff, nor inform the patient about a more realistic arrival time. There was obvious maladministration in the case.

129. Having reviewed the working schedule of the day, The Ombudsman noted that the ambulance returned to QEH depot at 10:55 a.m. The NEATS team had taken up one hour and 40 minutes to tidy up the compartment and take lunch before making a trip to pick up patient. In

other words, the NEATS team had made no efforts to be on time by shortening the rest time. The Ombudsman questioned therefore whether the problem was due to the lack of flexibility on the part of the NEATS Control Centre, absence of guidelines for staff, or team members' rigid adherence to rules and procedures without regard to patients' needs.

130. Arrangement for the return trip in the afternoon was also inappropriate. It was already 4:41 p.m. when the ambulance returned to QEH, which was already later than the scheduled pick up time of 4:30 p.m. Yet the team failed to proactively inform the complainant and her mother that the ambulance would be late. This was also inappropriate.

131. The Ombudsman considered that the complainant's claim that similar incidents had happened many times credible. The complaint was found substantiated and the NEATS required urgent improvement.

Administration's response

132. HA has accepted all recommendations of the OMB and has taken/will take the following actions –

(a) When the NEATS teams fail to arrive at the scheduled time and expect a delay of more than 15 minutes, they will call the waiting patients or their family to advise on the more realistic arrival time;

(b) HA has reviewed the arrangement and considered it necessary to maintain the a 30-minute intermission after each trip, to allow enough time for cleaning and tidying up the compartment, replacing bed-sheets and oxygen flasks and sufficient rest of staff (after heavy manual labour in transporting the patients). The intermission is important as it could ensure safe transfer of patient of subsequent trips;

(c) The teams would also adopt a more flexible approach in arranging breaks in order to meet patients' needs; and

(d) In the long term, HA will consider setting up patient waiting areas in hospitals for NEATS, and arrange staff to station at the areas, with a view to enhancing both efficiency of the service and communication with patients.

Housing Department

Case No. 2007/0310 : Unreasonably refusing to refund to the complainants the rent deposit paid by their late son

Background

133. The complainants were the parents of a public housing tenant found dead in his unit in October 2006. The complainants requested Housing Department ("HD") to postpone its recovery of the unit to allow more time for Police investigation. They wrote to HD for refund of the rent deposit that their son had paid.

134. The property management agent ("PMA") rejected their request as the deposit had already been used to offset the rent for the period of their retention of the unit. The complainants, therefore, complained that HD had unreasonably refused to refund the rent deposit of the public housing unit to them on behalf of their late son.

135. Normally, HD allows flexibility when dealing with recovery of a unit after the tenant has passed away. The Department accepts late surrender of such housing units so that the tenant's family has time to remove the tenant's belongings. Legally, a tenancy does not automatically end with the death of the tenant.

136. In this case, the complainants insisted on keeping the unit until the Police could ascertain the cause of their son's death. The PMA accepted their request because the complainants were emotional. It had, nevertheless, "verbally" informed them that they would have to pay rent while keeping the unit.

137. Although the Police confirmed at the end of October that there was no need to keep the unit for investigation, the complainants asked HD in early November for a further extension of 15 to 30 days. Some two weeks later, the complainants handed over their keys without clearing out the unit. The PMA called the complainants several times to ascertain their intentions, but in vain. Finally, the PMA formally recovered the unit. With HD's agreement, the PMA used the deposit paid by the late tenant to offset the rent for November.

The Ombudsman's observations

138. The Ombudsman agreed that that the tenancy could not be terminated until the complainants had formally surrendered the unit. It was, therefore, not unreasonable of HD to use the deposit to offset the outstanding rent. However, since the complainants were not party to the tenancy agreement, HD or the PMA should have explained to them clearly that rent was payable for keeping the unit.

139. However, the PMA had only reminded the complainants verbally of this. The lack of a written agreement had then led to disputes.

140. The Ombudsman, therefore, considered this complaint partially substantiated.

141. The Ombudsman understands that the complainants were in grief and it was not easy for HD to recover the unit. However, since the Police had made it clear that keeping the unit was no longer necessary, HD should have taken recovery action earlier, so that the unit could be allocated to the Waiting List applicant.

Administration's response

142. HD has accepted The Ombudsman's recommendations and has taken the following actions –

(a) A seminar was arranged on 24 June 2008 to train HD's frontline staff and PMAs in handling cases of similar nature. The case was uploaded to The Ombudsman Case Library on HA's e-housing portal for experience sharing; and

(b) Departmental guidelines for handling request by families of deceased tenants to postpone surrender of public housing units was revised on 27 May 2008.

Case No. 2007/4217 : Unreasonably requiring the complainant to transfer to another flat soon after she moved into her flat

Background

143. The complainant lived in a public rental housing ("PRH") block without lift facility. Housing Department ("HD") decided in October 2006 to improve the estate environment by installation of lift tower in the PRH block concerned. The works programme was launched in late December 2008.

144. When the PRH flat in the block concerned was allocated to the complainant in December 2006, the exact location of lift tower was not yet confirmed. According to the initial plan, the complainant's flat would not be affected by the improvement works. However, the location of the works was revised in late July 2007 after the completion of structural survey. The complainant's family was required to move as her flat was confirmed to be affected by the works. Hence, the complainant complained that HD unreasonably required her to move to another flat soon after she had moved into the flat within one year.

The Ombudsman' observations

145. As the complainant's flat was not affected by the initial plan of the works in October 2006, hence, there was no fault associated with HD's flat allocation to her at that time. It was unpredictable that the complainant's family was required to transfer due to the later revision of the works location. As the family of the complainant suffered from having to move out soon after intake, they should have suitable compensation and assistance for their loss and inconvenience encountered.

146. In this case, HD had arranged in accordance with the prevailing policy to provide domestic removal allowance and rent free period to the complainant. The complainant's family was also allowed to stay in her present flat for a total of two years i.e. sufficient time to prepare for the removal and was given priority in flat selection for their transfer. Thus, HD had provided all suitable assistances to the complainant. The Ombudsman, therefore, considered this complaint unsubstantiated. Yet, The Ombudsman has made a recommendation for HD to follow up.

Administration's response

147. HD has accepted the recommendation of The Ombudsman and issued the information pamphlet on "Flat Transfer Schemes for Public Housing Tenants" to all in-coming tenants for intake or transfer cases with effect from 19 March 2008 to alert prospective tenants of the possibility of future involuntary transfers due to launch of major repair or improvement programme.

Case No. 2007/4948 : Failing to refund the rates for the relevant period to the complainant in accordance with Government's decision on rates concession

Background

148. The complainant lived in a public rental housing ("PRH") unit. He received a monthly rent allowance under the Social Welfare Department ("SWD")'s Comprehensive Social Security Assistance ("CSSA") Scheme. Since his rent allowance could not cover the rent in full, he had to pay the difference of some $100 each month.

149. In 2007, Government decided to waive the rates for April to September for the whole territory. When the complainant moved out at the end of August 2007, he argued that as he had paid part of the rent, HD should refund him part of the rates for the PRH unit. He complained to The Ombudsman against HD for refusing to make such a refund.

150. For a CSSA household whose rent allowance equalled the monthly rent of the PRH unit, HD would transfer the full amount of rates concession to SWD. Where the CSSA recipient had to pay part of the rent, he was, theoretically, entitled to a rates refund on a *pro rata* basis. In practice, however, HD would first refund the rates in full to the CSSA recipient and SWD would later deduct any excess from his CSSA.

151. In this case, the complainant had in fact refused to move out of the PRH unit after his divorce in December 2005. Hence, he was no longer an authorised resident of the unit. HD had sent him a letter notifying him so and demanded payment of "mesne profits" for illegal occupation of the unit.

152. Not being an authorised resident of a PRH unit, the complainant was actually not entitled to any rates refund. However, HD later, on review, found that it had wrongly used the term "use and occupation charges" (instead of "mesne profits") in its letter to the complainant, such that the latter might have misunderstood that he was licensed to stay in the PRH unit and was thus eligible for rates refund. In the event, the Department exercised discretion and refunded him part of the rates for the period concerned.

The Ombudsman's reservations

153. The Ombudsman considered it reasonable of HD not to make any rates refund to the complainant since he was not an authorised PRH resident. His complaint was, therefore, unsubstantiated.

154. However, HD's subsequent change of mind was not made on good grounds. The misused terminology in HD's letter did not warrant anything more than clarification of the matter and an apology to the complainant. There was absolutely no need to refund him part of the rates. The Ombudsman, therefore, considered this case substantiated other than alleged.

Administration's response

155. HD has accepted the recommendations of The Ombudsman and uploaded the case summary to Housing Authority's e-Housing portal in July 2008 as case study and for reference by HD staff.

Case No. 2008/2677 : Failing to monitor the licensed operator of a market, thus resulting in confusion in rates assessment

Background

156. The complainants had rented certain market stalls from Housing Department ("HD")'s market licensee in a public housing estate and had been paying rates through the licensee for some years. They discovered lately that the rateable values of their stalls had never been assessed by Rating and Valuation Department ("RVD") and, therefore, suspected that the licensee had appropriated the rates.

157. The complainants complained to The Ombudsman against –

(a) RVD for failing to check the requisition forms submitted by the licensee to provide the necessary details for assessment of rateable values; and

(b) HD for failing to monitor the licensee's submission of the requisition forms.

The Ombudsman's observations

158. Under its agreement with the licensee, HD each month collected from the licensee the rates for the whole market and then paid RVD. Before RVD finished assessing all the rateable values, HD would charge the licensee 5% of the rents as "provisional rates" for all market stalls, including those vacant. After RVD's assessment of the rateable values, HD would calculate the difference between the actual rates payable and the "provisional rates" and settle it with the licensee. The tenants of all stalls had already paid their shares of the "provisional rates" to the licensee.

159. When RVD first assessed the rateable values of the market several years ago, vacant stalls were excluded. Later, some of the vacant stalls were rented out, but RVD still failed to assess their rateable values. Thus, the rates paid by HD for the market did not cover those stalls.

160. On receiving this complaint, RVD immediately arranged rate assessment. However, the Department was time-barred from collecting some $400,000 of the outstanding rates.

161. After completing its initial assessment of the market stalls, RVD had kept a record of the vacant stalls for subsequent revaluation. However, the filing staff subsequently failed to bring up the case for revaluation. Furthermore, RVD failed to detect from the requisition forms annually submitted by the licensee that assessment of rateable values had not been conducted for some stalls.

162. For its negligence, the complaint against RVD was substantiated.

163. Meanwhile, the licensee had not appropriated any of the rates paid by the complainants. In fact, after RVD's assessment, any rates paid in excess had been refunded to them.

164. The Ombudsman found the allegation against HD unfounded because the licensee had been submitting requisition forms directly to RVD. HD was not in a position to monitor the licensee's submission of the forms. Nevertheless, HD could have checked the relevant information attached to RVD's quarterly demand notes for rates.

165. The complaint against HD was, therefore, substantiated other than alleged.

Administration's response

166. HD has accepted the recommendation made by The Ombudsman, and issued new guidelines on rates or Government rent of new properties on 13 February 2009 to remind its staff to notify RVD for rating assessment upon the handover of the properties. In case no assessment for rates or Government rent was received six months after the notification, an enquiry with RVD should be made and a review of the progress must be conducted every two months until the rates or Government rent were assessed.

Immigration Department

Case No. 2008/3397 : Wrongly issuing the same identity card numbers to two persons

Background

167. The complainant alleged that Immigration Department ("ImmD") had mistakenly issued the same identity card number to him and another person.

168. When the complainant was born in 1987, ImmD assigned "Z" as the prefix for his birth certificate number.

169. A few years later, the complainant's mother applied for him a Hong Kong Special Administrative Region Passport. He was required by law to apply simultaneously for an identity card for minors under the age of 11. According to ImmD practice, his identity card number should be the same as that for his birth certificate. However, the officer concerned mistakenly entered the prefix "Y' instead of "Z" in his identity card.

170. When the complainant reached the age of 11, he applied for a juvenile identity card. This time, another officer failed to check his birth certificate carefully, thus continuing the error. When the complainant eventually applied for an adult identity card, he was required to produce only his juvenile identity card, and not his birth certificate, for verification. The discrepancy between his identity card number and his birth certificate number, therefore, again went unnoticed.

171. In 2008, the complainant's application for a Home Visit Permit at the China Travel Service was rejected because his identity card number was the same as the number of the birth certificate of a child. Upon the complainant's query, ImmD searched its records and discovered the error. It had indeed allocated the same birth certificate number (i.e. the future identity card number) prefixed "Y" to the aforementioned child.

The Ombudsman's observations

172. The mistake was due to the negligence of ImmD staff. In particular, issue of birth certificates with the prefix "Y" only began in 1989. Hence, when the complainant applied for his juvenile identity card at the age of 11 in 1998, ImmD staff should have focused and detected the anomaly.

173. The Ombudsman, therefore, considered this complaint substantiated.

Administration's response

174. ImmD has accepted the recommendations of The Ombudsman and has taken the following actions –

(a) To prevent recurrence, internal instruction has been issued and staff of the Registration of Persons offices has been briefed to be more alert and cautious in the input of personal particulars, especially on the accuracy of the applicant's birth certificate number, when processing first time identity card applications. Besides, starting from March 2009, the relevant process has been automated in processing first time identity card applications from juveniles aged 11 where the birth certificate number is used for retrieval of the applicant's personal particulars for confirmation by the staff and subsequent allotment of identity card number in the computer system. Such procedures have been stipulated in an internal instruction for compliance of the staff, which will minimize human error and ensure accuracy in the data input;

(b) Through special computer programs, ImmD has checked the database. Eleven similar cases were identified among the nine million plus registration of person records. ImmD will implement special measures to make sure that no person in the cases will be given an existing identity card number; and

(c) ImmD will consider the compensation in accordance with the existing regulations and mechanism upon receipt of a written request from the complainant.

Intellectual Property Department

Case No. 2008/3417 : Unreasonably rejecting an application for registration of trademarks

Background

175. On 25 July 2007, the complainant made an application for registration of trademarks to the Intellectual Property Department ("IPD") and paid the application fee. IPD, in response, explained in its letter dated 20 August 2007 that the trademarks in question are in two series. The complainant thus separated the application into two.

176. On 19 September 2007, IPD issued a Notice of the Registrar of Trade Marks' Opinion ("Notice of Opinion"), requesting the complainant to file written submissions or to amend the application before 20 March 2008 in response to the Trade Marks Registry ("Registry")'s objection to its application for trademark registration. Since the complainant had not responded before the expiry of the time period, IPD wrote to the complainant on 20 June 2008 informing that its application was refused.

177. Until the complainant received the letter concerning the refusal of his application, he believed that the fees were duly paid and his application was still being processed by IPD. The complainant maintained that he had no knowledge about the Notice of Opinion issued on 19 September 2007. The complainant opined that IPD was irresponsible in refusing his application on the assumption that the complainant must have received the Notice of Opinion posted by local mail, and that the complainant did not reply within the prescribed period.

The Ombudsman's observations

178. The Ombudsman considered that the centre of the problem was IPD's practice of sending out important documents such as Notice of Opinion by local mail without setting up any risk management mechanism. Such mechanism could help guard against the risks of non-receipt that might result in the applicants' failure to respond to a Notice of Opinion.

179. The Ombudsman considered that having a requirement under the law and the Notice of Opinion that the applicants must reply within the prescribed period did not mean the Registry had properly notified the applicants. In the present case, the complaint was exactly on the non-receipt of the Notice of Opinion.

180. In fact, there could be different reasons for receiving no response from the applicant other than inaction on his/her part. For example, it might be due to mailing mistakes in relation to the Notice of Opinion or the applicant's reply.

181. IPD's records showed that only a few applicants claimed that they failed to receive IPD's correspondence. However, The Ombudsman opined that the number of such cases was not the crux of the issue. According to the existing mechanism, applications would be refused and considerable fees paid by the applicants would be forfeited if no response to the Notice of Opinion was received. In light of the serious consequences, The Ombudsman opined that IPD should have made more careful arrangements and adopted reasonable and practical measures to ensure correspondence by mail could be delivered to the applicants.

182. The Ombudsman cited the example of Inland Revenue Department ("IRD") which, like IPD, also sent out tax returns by local mail. Instead of immediately imposing penalties on members of the public who failed to complete and send back the tax return, IRD would first send out a reminder to these persons.

183. Besides, The Ombudsman stated that other departments which had direct communication with the public, such as IRD and Rating and Valuation Department, would let the public know their working agenda, or provide answers on their websites to frequently asked questions related to the issuance of demand notes and payment. IPD could make reference to the practices of these departments. The Ombudsman took the view that even if IPD continued to send out letters by mail, it should take active steps (such as follow-up mail or phone call) to remind the applicants to respond before the deadline expired.

184. IPD pointed out that over 80% of applications for trademarks registration were handled by intermediaries with their own reminder mechanisms. The issuance of reminders by the Registry would not serve any practical purpose in such cases but might prolong the time taken by the applicants in dealing with the applications and indirectly lead to higher agents' charges paid by the applicants. The Ombudsman disagreed with this view.

185. Overall speaking, The Ombudsman considered IPD's procedures in processing applications for trademark registrations had not fully taken into consideration the needs of the applicant, and therefore considered this complaint substantiated.

Administration's response

186. IPD has put forward the following views to The Ombudsman –

(a) Since December 2003, IPD has provided the option for its customers to file applications for registration of intellectual property rights by either paper or electronic mode. If an application is filed electronically, IPD will communicate with the e-filer electronically and all notifications will be sent to that e-filer's designated electronic mail box. IPD will know whether the notifications have been accepted and recorded in the e-filer's designated mail box. Hence the e-filers (about 60% of all customers at present) will not experience the problem of misdelivery or missed notifications.

(b) As regards customers who file their applications by paper mode, under the existing arrangement, IPD will issue notifications by standard mail. The reasons for non-receipt of mail could be either –

(i) the address for service provided by the applicant is incorrect or no longer valid; or

(ii) there is a failure to deliver on the part of the postal service or the delivery is interrupted in some other ways.

Any new reminder system that IPD introduces to rectify the problem will only be applicable to the second situation but not the first one. In fact, the applicants could have declared, by statutory declarations or affidavits, that the notification had genuinely not been received, so that the Registry may consider reviving the processing of the application.

(c) IPD has sought the comments of professional bodies which handle applications on behalf of the applicants. While noting that the issuance of reminders could help reduce the risk of non-response by the applicants, the professional bodies opined that IPD should take into account the following points in considering whether or not to issue reminders –

(i) The onus should be on the applicant and its agent to keep track of the deadlines. They should not 'rely' on the Government reminders. The Government does not owe any duty to issue reminders and should refrain from setting up such a practice;

(ii) It is unclear what the legal effect (in terms of trademark law) will be if the reminder system was to be implemented and the applicants had built up reliance on the reminder system. There will be legal uncertainty if the Registry fails to issue a reminder and the applicant does not take any action after the deadline;

(iv) If a reminder system for trademark-related notifications was to be introduced, why does the Government not introduce a similar system for other situations where there exist statutory deadlines before which actions have to be taken?

(v) For those applicants who make their applications for trademark registration through agents, the agents might levy additional charges for handling the reminders.

(d) Overall speaking, the introduction of a reminder system can only solve part of the problem (i.e. when the address for service provided by the applicant is correct but he or she fails to receive the notification). Such a problem may already be remedied by the applicant making a free, simple statutory declaration. If a reminder system was introduced, it may result in increased costs for the majority of applicants who make applications through agents. It may also cause confusion to the public as regards the legal effect of such a reminder system when there are errors or if the system is not applied universally.

187. IPD proposes an alternative measure to address The Ombudsman's concerns by adding a note to the Registry's note informing the applicants the accorded filing dates. The note informs the applicants the lead time required before the Registry issues a further correspondence, and reminds the applicants to contact the Registry if they have not received further correspondence within that time frame. The Ombudsman accepts such an alternative solution.

Labour Department

Case No. 2007/5889 : Mishandling a labour dispute claim against the complainant

Background

188. On 9 November 2007, the complainant's domestic helper approached the Labour Relations Division ("LRD") of the Labour Department ("LD"), lodging a claim against the complainant for annual leave pay.

189. On 13 November 2007, LRD sent a Notice of Conciliation Meeting to the complainant, inviting her to attend a conciliation meeting on 22 November 2007. The Notice stated that "the claimant has recently lodged claim at this department against you for annual leave pay", but made no reference to the amount claimed. Later that day, the domestic helper informed LRD that she wished to withdraw the claim against the complainant. On 14 November 2007, LRD sent a Withdrawal Letter to the complainant, notifying her of the domestic helper's withdrawal of the claim and cancellation of the conciliation meeting.

190. On 22 November 2007, the complainant went to the office of LRD as per the Notice of Conciliation Meeting and was then informed by the officer concerned that the domestic helper had already withdrawn the claim and the case was closed.

191. On 30 November 2007, the complainant lodged a complaint with The Ombudsman that LD had failed to -

(a) verify and provide the complainant with particulars of her domestic helper's claim before calling a conciliation meeting; and

(b) inform the complainant, before she turned up for the conciliation meeting, that her domestic helper had withdrawn the claim against her.

The Ombudsman's observations

192. Regarding complaint (a), The Ombudsman noted that LRD's conciliation service aims at assisting employers and employees in labour disputes to resolve their differences through simple and informal procedures and participation in a conciliation meeting is voluntary. When a

claimant lodges a claim with LRD, he/she is required to fill in a claim form stating the items and amount claimed. No exchange of documents between the parties will take place at this stage. If a prima facie claim can be established, LRD will arrange a conciliation meeting. However, given its neutral conciliator role, LRD will not take steps to "verify" the claim. Neither is it appropriate for LRD to do so as it has no input from the respondent at this stage. LRD invites the parties in dispute to attend a meeting by serving a Notice of Conciliation Meeting. According to the established practice at that time, the amount of claim was not stated in the Notice of Conciliation Meeting to the complainant in order to avoid –

(a) any possible misunderstanding that the amount had been verified by LD;

(b) any possible false impression that LD had accepted the correctness of the claim; and

(c) any possible confusion as the claimant might still amend the claim before or during the conciliation meeting.

193. The Ombudsman considered that LRD had followed these established procedures in taking up the case of the complainant's domestic helper and in arranging a conciliation meeting for the two parties.

194. In view of the above, The Ombudsman accepted that there were reasons for LRD not to verify the claim of the domestic helper before arranging the conciliation meeting and not to provide the complainant with information on the amount of the claim.

195. Regarding complaint (b), The Ombudsman noted that in line with its established procedure, LRD had notified the complainant by mail about the withdrawal of the claim and cancellation of the conciliation meeting. The Withdrawal Letter had been sent to the same address as that on the Notice of Conciliation Meeting and it had not been subsequently returned by the Post Office.

196. To prevent occurrence of similar incidents, LRD has instructed staff to collect the telephone number of the respondent from the claimant at the intake of each case and, after sending out the Withdrawal Letter, to telephone the respondent notifying him/her of the withdrawal of the claim and cancellation of the conciliation meeting.

197. Given that there was a week between sending the notification of cancellation and the arranged meeting, The Ombudsman considered it not

improper for LRD to issue the Withdrawal Letter to the complainant by post. It was unfortunate that the letter had not reached her.

198. Overall speaking, The Ombudsman found the complaint unsubstantiated. Yet The Ombudsman has made a recommendation for LD to follow up.

Administration's response

199. LD has accepted The Ombudsman's recommendation and has revised its claim form in consultation with the Department of Justice by incorporating an important notice/disclaimer that LD does not represent or endorse the accuracy or reliability of any of the information or content of the claim stated therein. In order to facilitate conciliation, with the claimant's consent, a copy of Part II of the claim form with information on the items and amount claimed will be sent to the respondent together with the Notice of Conciliation Meeting. The revised claim form has been put into use with effect from 2 January 2009.

Lands Department

Case No. 2007/2180 : (a) Failing to properly follow up a complaint about flooding problem; and (b) Failing to inform the complainant of the progress of her case

Background

200. The complainant had complained to the Lands Department ("LandsD") about frequent flooding on a street during the rainy season. The Department allegedly promised to look into the matter, but the problem persisted.

201. The flooding was caused by a car park on Government land at one side of the street. One of the standard conditions of the Short Term Tenancy ("STT") required the car park operator as tenant to provide drainage channels, but the District Lands Office ("DLO") under LandsD had failed to enforce that condition.

202. LandsD stated that there had never been any report of flooding in the area before the site was put out to tender. During the discussion at the District Lands Conference regarding the proposed letting of the site by open tender, none of the representatives from other departments suggested that the tenant be required to provide drainage channels. As a result, although such was a standard condition in the General Conditions of all Tenancy Agreements, such requirement had not been made a special condition of the STT in question. It would, therefore, be illogical to assume tenderers to have included the cost of constructing drainage channels in their bids. Accordingly, LandsD did not consider it appropriate to take action against the car park operator for failure to provide drainage channels.

203. In the event, at DLO's request, the Drainage Services Department ("DSD") carried out overall improvement to the drainage of the street.

The Ombudsman's observations

204. The standard and special conditions of a STT should both carry force and the parties signing the STT should comply. All tenderers should, therefore, be aware of the tenant's obligation to construct drainage channels. Cleary, DLO had the responsibility to enforce that lease condition. Even if DLO wished to waive this requirement for the car park operator, it should have sought proper authority for it, instead of exempting

the car park operator on the lame excuse that such a requirement was not stated in the special conditions in the STT.

Administration's response

205. LandsD generally accepted The Ombudsman's recommendations and has taken the following actions –

(a) DLOs have been reminded to take enforcement actions against tenants who breached the conditions stipulated in STTs, and not to relax tenants' obligations without justifications and proper authorisation;

(b) Consideration is being given to adding a new special condition for "Construction of drains and channels" to the master document so that the tenant's obligation in this respect will be clearly defined under the Tenancy Agreement. It is now under legal scrutiny; and

(c) LandsD would continue to remind their staff from time to time to keep in touch with complainants, so that they would be informed of the progress of their cases and the remedial measures taken.

Lands Department and
Leisure and Cultural Services Department

Case No. 2007/2501 and Case No. 2006/4311 : Failing to take lease enforcement action against a private estate and failing to resolve the problem of management and maintenance responsibility for a recreational park

Background

206. The complainant alleged that the park near a private estate had been closed for many years and the public could not gain access to the facilities there. She considered this a waste of public resources owing to the failure of Leisure and Cultural Services Department ("LCSD") and Lands Department ("LandsD") to resolve the problem of management and maintenance responsibility for the park.

207. In March 1997, LandsD and the developer of the private estate executed a new land grant in which the special conditions required the developer to provide at its own cost public facilities in the local open space where the park was located. The developer should ensure that the facilities would meet the requirements of the Director of Lands. Moreover, the developer was to be responsible for managing and maintaining the site and bear all the expenses.

208. In November 2000, having consulted the relevant departments, LandsD issued a Certificate of Compliance to confirm the developer's compliance with all the conditions of the new grant. In December, the Owners' Committee ("the Committee") and property management company of the estate asked Government to take over the park.

209. LCSD refused to do so while LandsD pointed out that the special conditions of the new grant stipulated that Government authorities had no obligation to take back the local open space or any part thereof. As the owners of the estate were unwilling to continue with the responsibility to manage and maintain the park, the management company decided to close it.

210. Through LandsD, LCSD had repeatedly reminded the Committee and management company to comply with the special conditions and to improve the substandard playground equipment. However, they made no positive response. LCSD held that Government should not waive the

responsibility of the developer or property owners just because they refused to comply with the lease conditions.

211. At the Committee's request, LandsD consulted the Town Planning Board ("TPB") in December 2007. TPB replied that even if the playground equipment was removed, the planning requirement would not be contravened so long as the site remained a local open space available to Government and the public at all reasonable times. The Committee finally agreed to reopen the park, but would fence off the playground equipment temporarily until a consensus on a long-term arrangement could be reached among the property owners.

The Ombudsman's observations

212. The Ombudsman agreed with LCSD that Government should not unconditionally waive the responsibility of the private developer or property owners and use public money to manage those recreational facilities. However, LCSD could have given timely comment on the safety standard of the facilities. It was not until November 2002 when LCSD was considering taking over the park that it found the facilities substandard.

213. LandsD had been tolerant towards the developer and property owners and adopted a conceding attitude. Without such a complaint, the problem would have remained unresolved. The Ombudsman was aware that LCSD wanted to be fair and reasonable and did not wish to take over the park too hastily. However, had LCSD managed to explain clearly at the right time, the public would not have gained the wrong impression that Government was slipshod.

214. LandsD emphasised that re-entry on leased land was a very drastic measure that should not be taken lightly. Suspension of enforcement action was not justifiable even though due regard had to be given to the sentiments and expectations of the residents. The Ombudsman considered the complaint against LCSD partially substantiated and that against LandsD substantiated.

215. The Ombudsman was pleased that the Development Bureau ("DEVB") had begun a comprehensive review of its policy on the provision of public facilities and open space in private developments. It is hoped that similar situations could be avoided in future.

Administration's response

216. Lands D has accepted The Ombudsman's recommendations and has taken the following actions –

(a) The District Lands Office ("DLO") of LandsD has carried out monthly inspection to ensure that the area is open to the public. The park is now open to the public between 9:00 a.m. to 10:00 p.m. daily;

(b) The LandsD Headquarters has conducted a check on whether there are other similar cases. Part of an open space at another private estate was once found not open to the public because it was needed for carrying out maintenance works. The works however have been completed recently and the entire open space is now open to the public;

(c) The policy of requiring developers to provide and manage public open space in their private developments is being reviewed by DEVB. The Legislative Council Panel on Development discussed the subject thrice on 22 April 2008, 8 December 2008 and 26 May 2009.

217. LCSD has also accepted the recommendation and completed a review on the adequacy of public playground equipment for children in the district. While currently it has not been laid down in the Hong Kong Planning Standards and Guidelines any standard on the provision of public playground equipment for children, LCSD seeks to provide playground equipment in open spaces as far as possible under normal circumstances.

218. At present, LCSD provides a total of 42 public playgrounds for children in sitting-out areas and parks under its management for use by the public in the district. In addition, there are also around 136 children's playgrounds provided in public housing estates by the Housing Department and around 102 children's playgrounds provided in private housing estates. They are for use by the public housing tenants and the private housing residents respectively. In response to the request of the District Council, LCSD has also recently incorporated children's playground equipment in a new district open space project under planning.

219. Children's playground equipment is also available in a park and two playgrounds managed by LCSD just a few minutes' walk from the housing estate in question. Moreover, children's playground equipment is also provided in public and private housing estates for use by the tenants and residents.

220. Since the Committee concerned has not opened the public playground equipment for children in the housing estate's sitting-out area to the public for years, even if the Committee demolishes the existing

substandard public playground equipment for children in that sitting-out area, LCSD is of the view that the public playground equipment for children currently available in the district, including those in the sitting-out areas and parks near that housing estate, can meet the demand from the public. LCSD will continue to respond to the views of the District Council and the local community and take into account major factors such as the development in the district, changes in the population, age distribution, provision of existing facilities and their utilisation rate when providing new public playground equipment for children in suitable open spaces for use by the public.

Planning Department

Case No. 2008/3034(I) : Unreasonably refusing to provide the minutes of a Town Planning Board meeting

Background

221. On 27 June 2008, the Kennedy Road Protection Group ("the Group") complained to The Ombudsman against the Planning Department ("PlanD") for refusing to provide the minutes of a Town Planning Board ("TPB") meeting. The minutes sought by the Group were classified as confidential and related to a meeting in November 1989, where TPB decided to –

(a) impose a standard condition on planning approval, requiring all permanent development projects to commence within a time limit (normally two years); and

(b) adopt as a general guideline the approval of building plans to constitute commencement of development.

222. On 22 April 2008, the Group wrote to the TPB Secretary to request the above minutes. The TPB Secretary refused the request on 16 June 2008 on the grounds that "the minutes of the Board meeting in November 1989 on the matter are confidential and hence cannot be made available". The TPB Secretary also advised the Group that the gist of TPB's decision in November 1989 had been incorporated in the relevant TPB Guidelines promulgated to the public.

223. On 27 June 2008, the Group repeated the request to PlanD, which holds a copy of the minutes. PlanD rejected it on 14 July 2008 on the same grounds as given by the TPB Secretary.

224. On 22 July 2008, The Ombudsman informed PlanD about the complaint from the Group and requested PlanD to provide responses to his inquiries.

225. On 4 November 2008, The Ombudsman decided to conduct a full investigation to examine the issues in greater depth.

226. Upon The Ombudsman's further inquiries, PlanD argued that since the gist of TPB's decision in November 1989 had already been promulgated as TPB Guidelines, there was no compelling public interest to

justify disclosure of the minutes on the deliberations. PlanD further explained that provided that the TPB Secretariat handles public enquiries in accordance with TPB's practices and guidelines, it is not necessary and not practicable for the Secretariat to submit all public enquiries to TPB for deliberation. The minutes in question were graded "confidential". Accordingly, the Secretary rejected the Group's request without consulting TPB; so did PlanD.

227. Upon The Ombudsman's insistence, the TPB Secretary consulted TPB on the Group's request on 3 and 12 December 2008. After considering legal advice, TPB on 12 December 2008 confirmed that the minutes should not be disclosed. It is TPB's long-standing practice not to make public papers and minutes containing legal advice protected by legal professional privilege. This practice was adopted before the meeting in November 1989.

The Ombudsman's observations

228. The Ombudsman stated that given TPB's confirmation that the minutes should not be disclosed, for the reasons stated, it is evident that PlanD is not in a position to accede to the Group's request. However, The Ombudsman considered it inappropriate for PlanD not to have focused on its position as a Government department governed by the spirit and principles of the Code on Access to Information ("the Code"). It was also presumptuous of it to have simplistically repeated the grounds given by the TPB Secretary when rejecting the Group's request for the minutes, without ascertaining whether TPB still wanted to maintain confidentiality.

229. The Ombudsman accepted that it should not be necessary for the TPB Secretary to submit all public enquiries or requests to TPB itself for decision. However, the TPB Secretary cannot purport to be representative of the TPB on all matters either. In this particular case, since PlanD was holding the requested information and at the same time serving as TPB's Secretariat, the Department should consult TPB itself, the real owner of the information.

230. As PlanD had not fully taken account of the requirements of the Code when handling the Group's request for the TPB minutes, The Ombudsman, therefore, considered this complaint partially substantiated.

Administration's response

231. PlanD has accepted The Ombudsman's recommendation and will carefully follow both the letter and spirit of the Code in handling requests for information.

Social Welfare Department

Case No. 2006/4299 : Mishandling a complaint about 16 cases of abuse of mentally handicapped service users by staff in a sheltered workshop operated by a non-government organisation

Background

232. The complainant was a staff member of a non-governmental organisation ("NGO") from 2004 to 2005. He first wrote to The Ombudsman in May 2006 stating that he had uncovered 16 incidents of staff abuse of mentally handicapped service users in a sheltered workshop operated by the NGO. Although he had reported the incidents to his senior management, the NGO failed to comply with its own Service Quality Standards ("SQS") in notifying the parents or guardians of the victims or to properly deal with the staff members concerned.

233. As the NGO is not subject to The Ombudsman's jurisdiction, the complainant took The Ombudsman's advice and complained to the Social Welfare Department ("SWD"), which is responsible for monitoring the operation of Government-subvented NGOs, in June 2006.

234. In November 2006, the complainant wrote again to The Ombudsman, alleging that SWD had mishandled his complaint about the cases of abuse.

235. He commented that the NGO should, under its SQS, inform parents or guardians of the victims and, under certain circumstances, report the abuse cases to the Police. Meanwhile, SWD has a duty to ensure that subvented NGOs meet their SQS.

The Ombudsman's observations

236. The Ombudsman is empowered to investigate complaints from persons who allegedly have sustained injustice in consequence of maladministration by Government departments and certain specified public organisations.

237. In this case, the complainant was not one of the service users concerned, or a parent or guardian of any of them. As he was not a victim of the alleged abuse, he could not be regarded as having suffered injustice from the outcome of SWD's investigation of the cases. The Ombudsman therefore adjudged his complaint purely from the angle of whether SWD

had duly responded to and taken action on a report from him as someone who claimed to have had knowledge of abuse cases in an NGO.

238. The Ombudsman considered that SWD had promptly responded to the complainant's report by referral to the NGO and later diligently investigated into the alleged abuse. From the angle stated in paragraph 237 above, The Ombudsman, therefore, found the complaint unsubstantiated.

239. However, The Ombudsman considered that there were certain deficiencies in SWD's handling of complaint against the NGO concerned about abuse of service users. SWD's guidelines on handling complaints against NGOs did not specifically cater for complaints about abuse of service users. For vulnerable clients, whether they were minors or disabled persons, mental or physical, the Ombudsman believed they were owed a higher duty of care. The Ombudsman considered that the guidelines should stipulate that if a complaint is about abuse, SWD should immediately commence investigation.

240. While the nature of those individual cases followed up by the NGO concerned varied, from verbal harassment to assault, under the NGO's SQS, The Ombudsman considered that they should have been regarded at least as non-serious cases of abuse. The Ombudsman was puzzled by SWD's acceptance of the NGO's assessment that they only amounted to "improper handling or manner or language of staff".

241. The Ombudsman considered that SWD should not simply rely on the NGO's assertion and accept the NGO's investigation results. SWD should have sought to interview all 16 service users (on a confidential basis) for its own assessment and take follow-up action as appropriate.

242. For consistent and proper handling of alleged cases of abuse among subvented NGOs, SWD should devise procedural guidelines on crucial aspects, viz –

(a) requiring NGOs to notify the victim's parent or guardian of any alleged abuse whether "serious" or not, and report the incidents to SWD; and

(b) setting out provisions on how to follow up on the allegations of abuse (including investigation, interview with the parties concerned and record-keeping) and what proper attention and aftercare to give to alleged victims.

243. In the light of SWD's inadequacies in the above respects, The Ombudsman considered the case substantiated other than alleged by the complainant.

Administration's response

244. SWD has accepted the Ombudsman's recommendations and has taken the following actions –

(a) SWD has requested the NGO concerned to implement improvement measures and report in three months' time its implementation progress. Based on the observations made in SWD's visit to the sheltered workshop in question in September 2008 and the NGO's report of 1 November 2008, SWD considered that the improvement measures pledged by the NGO concerned have been carried out. In fact, no alleged abuse incident in the workshop has been reported since the NGO concerned pledged to make improvement in January 2007;

(b) SWD has strengthened its internal guidelines on handling complaints against subvented NGOs concerning abuses of vulnerable persons notably children, elders and people with disabilities by conducting direct investigation upon receipt of such complaints;

(c) SWD has distributed the revised guidelines to headquarters and district offices staff. Responsible staff has been requested to observe this revised set of guidelines and to handle alleged abuse cases with care in future; and

(d) In the light of this case, SWD set up a Working Group on Procedural Guide for Handling Mentally Incapacitated Adult Abuse Cases in September 2008 comprising representatives from NGOs and service users to develop guidelines specifically for handling abuse cases of mentally handicapped persons. SWD expects that the draft guidelines will be ready by the end of 2009 for consultation with relevant stakeholders, such as relevant government departments, NGOs and parents' groups.

Case No. 2007/2665 : Unreasonably refusing retrospective payment of disability allowance to the complainant's deceased mother

Background

245. The complainant's mother ("Ms A") had been certified severely disabled by a medical officer and hence granted Disability Allowance ("DA") by the Social Welfare Department ("SWD"). When her case was due for review after a year, SWD lost contact with her and so could not confirm her continued eligibility. Her DA payment was thus stopped. Subsequently, Ms A passed away.

246. The complainant was dissatisfied that SWD had –

(a) rashly closed Ms A's DA case without first conducting a home visit; and

(b) unreasonably refused the retrospective payment of DA after Ms A's death.

247. In January 2005, based on the doctor's medical assessment report, SWD granted DA to Ms A for 12 months. Towards the end of that year, SWD staff tried to contact Ms A for case review by calling her telephone number in the Department's computer records. However, that number was invalid. SWD staff then followed departmental guidelines and sent her three notification letters, the last one by registered mail. Since those letters had neither been responded to nor returned for non-delivery, SWD decided to stop issuing DA to Ms A.

248. In February 2007, the complainant informed SWD that Ms A had passed away in January 2007 and requested the retrospective payment of DA, to which she considered Ms A to be entitled for the period from January 2006 to January 2007. SWD rejected her request.

The Ombudsman's observations

249. Regarding complaint (a), The Ombudsman found that the staff concerned had complied with SWD guidelines. It was only after three notification letters had been issued to Ms A without any response that her DA case was closed.

250. However, on re-examining Ms A's case file, SWD had discovered that the contact telephone number in her medical assessment report was different from that in the Department's computer records. Moreover, the

report also showed her son's mobile telephone number. Had the staff concerned noticed and tried those numbers, they might have been able to contact Ms A.

251. As to whether a home visit should have been conducted, since home visit was not an essential step in DA review procedures, The Ombudsman would not consider it maladministration on SWD's part for not having conducted a home visit in this case. That said, SWD should certainly have been more sensitive to cases like this one, the client being over 80 and seriously ill, hence possibly having difficulties in reading or responding to SWD's letters. In such circumstance, a home visit should have been conducted.

252. In sum, there was clear negligence on SWD's part. The Ombudsman, therefore, considered complaint (a) partially substantiated.

253. Regarding complaint (b), according to the policy of SWD, to be eligible for DA, one has to be certified severely disabled by a doctor of a public hospital or clinic. As Ms A had not undergone medical review and there was no medical assessment report to certify her severe disability during her final year, SWD could not agree to the retrospective payment of DA as requested.

254. The Ombudsman found SWD bureaucratic. It had missed the very intent of the DA scheme, i.e. to help those severely disabled. Owing to the special circumstances mentioned above, medical review could not have taken place and hence no medical assessment report could have been produced. Nevertheless, according to Ms A's earlier medical assessment report and her final medical records, her dementia had never shown any improvement and she also had a heart problem, thus requiring constant care. It should take only common sense to recognise Ms A as being still "severely disabled" and eligible for DA in her final year.

255. While SWD had followed its policy and guidelines, it showed a lack of flexibility and compassion. The Ombudsman, therefore, considered complaint (b) partially substantiated.

Administration's response

256. SWD has accepted the Ombudsman's recommendations and has taken the following actions –

(a) SWD has been reminding staff concerned to be more careful in referring to the records, and to ensure the accuracy of clients' data in the computer record to facilitate effective communication;

(b) SWD has repeatedly reminded frontline staff to serve their clients, especially the elderly and feeble, with a proactive, warm-hearted, polite and caring attitude at all times, and

(c) This case has been used as an example in staff briefing and training sessions.

Case No. 2007/5721(I) : (a) Failing to inform the complainant immediately that his daughter was admitted to a refuge for women; (b) Unreasonably asking for a written statement from the complainant that he would not contact the Department's headquarters and refusing to provide him with a copy of that statement; and (c) Unreasonably refusing the request by his lawyer for information about his daughter's case

Background

257. The complainant divorced his ex-wife in 2006 and at the time, they consented that the custody of the daughter be vested with the complainant. About half a year later, the ex-wife moved back to live with the complainant. On 8 October 2007, the ex-wife and the daughter approached the Social Welfare Department ("SWD") for assistance alleging that they were battered by the complainant and worried about their personal safety. As such, the social worker arranged for the ex-wife and the daughter to be admitted to a women refuge centre. At that time, the social worker advised the ex-wife to contact the complainant, but she declined saying that she would need to consider the matter further.

258. As child abuse and spouse battering were suspected, the case was transferred to the Family and Child Protective Services Unit ("FCPSU") of SWD on 10 October 2007 for follow-up services. Later, upon the enquiry from the police, SWD informed the police of the condition of the ex-wife and the daughter. On 12 October 2007, social worker of SWD contacted the ex-wife. Still feeling unsettled at the time, the ex-wife could not decide if she would inform the complainant of their condition. The social worker thus decided to have an interview with the ex-wife on 15 October 2007 and then contact the complainant afterwards.

259. On 13 October 2007, SWD received a fax from the complainant requesting to have his daughter back immediately. The social worker arranged for the ex-wife and daughter to meet the complainant at the police station.

260. On 26 October 2007, SWD conducted a Multi-disciplinary Case Conference ("MDCC") for suspected child abuse with members unanimously agreed to establish the case as a physical and psychological child abuse case. The complainant attended the MDCC but did not accept the welfare plan for his daughter as recommended by the MDCC. The Chairperson of the MDCC (i.e. staff of SWD) thus arranged an interview with the complainant on 30 October 2007 to explain in details the welfare plan for the daughter, the procedures for applying for Care or Protection

Order and variation of custody. After the interview, the complainant expressed appreciation for the assistance of the social worker and Headquarters of SWD. The Chairperson suggested that the complainant could express his appreciation in the form of a note and undertook to fax the note to Headquarters for him and put a copy on file. The complainant agreed and wrote a note.

261. The complainant made a data request through his lawyer on 30 October 2007 for copies of statement as well as medical and psychological reports on his ex-wife and daughter.

262. On 4 and 5 November 2007, staff of SWD explained to the complainant the regulations as well as restrictions of the Personal Data (Privacy) Ordinance ("PD(P)O") and the reasons for not being able to provide data relating to the ex-wife. The complainant decided to request only for information relating to his daughter. The staff gave the Application for Access to Information of the Code on Access to Information ("the Code") to the complainant for his data request.

263. On 7 November 2007, SWD informed the complainant's lawyer that SWD had contacted the complainant directly and assisted him to complete his data request. According to the wish of the complainant, SWD would reply the complainant direct and not the lawyer. SWD provided the complainant with a reply on 26 November 2007 regarding his data request.

The Ombudsman's observations

264. The Ombudsman considered all three points of the complaint and found them unsubstantiated.

265. The Ombudsman was of the opinion that the ex-wife approached SWD for assistance alleging that she and the daughter had been abused by the complainant. SWD arranged for them to be admitted to the women refuge centre out of concern for their personal safety and did not inform the complainant out of the respect for the ex-wife's wish. The Ombudsman considered that it was a prudent and reasonable arrangement. Although the complainant later found out the whereabouts of his daughter through the police, SWD did not have the intention of not contacting the complainant. Rather, SWD had advised the ex-wife to notify the complainant about the condition of the daughter. As such, the complaint (a) was considered not substantiated. Nevertheless, the Ombudsman considered that SWD should appreciate the concerns of the complainant over the daughter. If it was not appropriate to disclose the daughter's actual address, SWD should ease the mind of the complainant by letting him know that the daughter was under the care of SWD for the time being.

266. With regard to the writing of the note and the refusal to provide a copy of the note to the complainant, the complainant and the staff of SWD gave different accounts of what had happened. By common sense, the staff should have no reason not to let the complainant have a copy of the note or stopping him to contact the Headquarters of SWD. The Ombudsman deduced that it might only be mis-communication between the two parties and concluded that the complaint (b) was unsubstantiated.

267. The Ombudsman believed that the complainant had requested SWD to provide him with data relating to his daughter. SWD had replied to the complainant's lawyer clearly stating that the complainant agreed with SWD replying him direct and not the lawyer. As the complainant had not raised any objection regarding SWD's reply either in person or through his lawyer, it was reasonable for SWD to consider that the written request from the lawyer had concluded and replied the complainant directly regarding the data request. The Ombudsman considered the complaint (c) unsubstantiated.

268. Nevertheless, the complainant was actually raising a request to have access to data relating to his daughter. The staff should have provided him with the PD(P)O Data Access Request Form instead of the Application for Access to Information under the Code. This gave rise to the difference in the handling procedures that followed. At the end, SWD informed the complainant that his request was handled and considered in accordance with the provisions of the PD(P)O. If he wanted to lodge a complaint against SWD for its decision, he could approach the Privacy Commissioner for Personal Data. If he had any enquiry in respect of the procedures of handling his request, he could approach SWD. The Ombudsman considered that whether it was appropriate for SWD to refuse the request of the complainant was a matter of interpretation of the PD(P)O and he was not in a position to comment. Nevertheless, The Ombudsman was of the opinion that SWD had not followed the procedures as stipulated in the Code by referring to the reason(s) set out in Part 2 of the Code for refusing to disclose the information and had not informed the complainant of the channel of internal review as well as the option of lodging a complaint with the Ombudsman if he was not satisfied with SWD's decision.

Administration's response

269. SWD has accepted the Ombudsman's recommendations and taken the following actions –

(a) SWD would remind staff to consider the feelings and needs of all family members when handling similar family dispute cases and adhere to the related procedural guidelines, such as Procedural Guide For Handling Child Abuse Cases, Procedural Guidelines For Handling Battered Spouse Cases, etc. Besides, SWD would step up staff training and clinical supervision, so as to enhance their knowledge and skills when dealing with family dispute cases; and

(b) Regarding training on the Code, SWD organises talks every year for newly recruited staff to ensure that their handling of data requests by the public could meet the requirements of the Code. In 2008-09, a total of seven talks on the subject were organised. In 2009-10, SWD will continue to organise similar training according to the number of newly recruited staff. The duration of the talks will be appropriately adjusted with a view to strengthening the content. Starting from 2009-10, SWD will also provide refresher course for staff to ensure that they adhere to the Code in discharging their duties.

Case No. 2008/2385 : (a) Improperly suspending the old age allowance of an aided person before his application for disability allowance was approved and (b) Mistaking the aided person's hospital admission date to be his date of death and stopping his disability allowance from that date

Background

270. The complainant's father ("Mr A") was a Higher Old Age Allowance ("HOAA") recipient. In October 2007, Mr A was referred by a social worker in a psychiatric clinic for Higher Disability Allowance ("HDA") and was assessed to be unfit for making a statement by a Medical Officer. Therefore, the complainant acted as Mr A's appointee and was responsible for handling the application.

271. Mr A's HOAA was stopped by Social Welfare Department ("SWD") on 27 December 2007. As for Mr A's HDA, it was approved on 29 February 2008 and the back payment was covered since 27 November 2007. The complainant received Mr A's HDA in March 2008.

272. Meanwhile, Mr A was admitted into hospital on 27 February 2008 and then passed away on 7 March 2008. The complainant informed SWD on 10 March 2008 that Mr A had passed away. Several days later, the complainant received a letter from SWD, informing that the HDA of Mr A was stopped from 27 February 2008 due to the death of Mr A.

273. The appointee therefore lodged a complaint against SWD on–

(a) improperly suspending the old age allowance of an aided person before his application for disability allowance was approved; and

(b) mistaking the aided person's hospital admission date to be his date of death and stopping his disability allowance from that date.

Ombudsman's observations

274. Regarding complaint (a), the complainant thought that SWD suspended Mr A's HOAA because Mr A was applying for HDA. In fact, the allowance was stopped by SWD since Mr A was certified by a Medical Officer to be mentally unfit to make a statement. Under the circumstances, appointment of an appointee recognised by SWD would be arranged to ensure Mr A could still receive the allowance though Mr A could no longer handle the allowance by himself. The Ombudsman agreed that SWD's

arrangement was prudent and reasonable. Therefore, The Ombudsman considered complaint (a) not substantiated.

275. However, The Ombudsman noted that the processing of Mr A's application for HDA was quite slow. Although appointment of an appointee took time and the above two types of allowance were not purposely designed for solving financial difficulties, SWD should consider the importance of the allowance for the elderly and should shorten the "time gap" between the change of different types of allowance.

276. The Ombudsman considered that SWD should speed up the appointment of appointee when handling similar cases, and should arrange for the prompt payment of the allowance after the appointment in order not to keep the applicant and his family members waiting. From this point of view, SWD indeed had room for improvement when handling the application.

277. Regarding complaint (b), SWD had not mistaken Mr A's hospital admission date to be his date of death. Actually, SWD stopped Mr A's HDA from 27 February 2008 since payment should be stopped on the first day of the payment month (i.e. the first day of payment month 27 February 2008 to 26 March 2008) of his date of death.

278. Furthermore, the "suspension" did not mean that Mr A would not receive the payable allowance. SWD would not pay allowance to the bank account of Mr A's appointee directly as Mr A was deceased before the pay day of allowance (i.e. 14 March 2008). The relatives of Mr A could claim such allowance from SWD through estate claim procedures.

279. The Ombudsman agreed that the staff concerned had not mistaken nor confused Mr A's date of hospital admission and date of death. Therefore, the Ombudsman considered complaint point (b) not substantiated.

280. However, the Ombudsman considered that the staff concerned had not clearly explained to the complainant the procedures. SWD issued on 10 March 2008 the Notification of Suspension of HDA Payment to the complainant ("the notification"). The notification set out that "Mr A's HDA would be stopped since 27 February 2008" with the reason of "Applicant was deceased". The complainant was understandably dissatisfied. This was also the key reason to lodge complaint (b).

281. The Ombudsman commented that the content of the notification should be simple and easily understood. Otherwise, it could not serve properly as a "notification" letter. Although there is a telephone number

for enquiries in the notification letter, it could only be treated as better than nothing. Moreover, if there was a clear explanation to the applicant, it would eliminate the applicant's anxiety and the need for detailed explanation from SWD staff after receiving complaints. Regarding the above-mentioned notification letter with the problem of unclear message, SWD should consider improvement measures.

282. To conclude, the complainant's two complaint points were both not substantiated. However, SWD had room for improvement in other aspects.

Administration's response

283. SWD has accepted the Ombudsman's recommendations and has taken the following actions –

(a) In November 2008, staff of the concerned Social Security Field Unit ("SSFU") were reminded again at their regular staff meetings that they should handle the appointment of appointees promptly to ensure the timely arrangement of allowance. SWD has also reminded all SSFUs that they should be prudent and timely in handling cases involving the appointment of appointees;

(b) Regarding revision to the computer-generated notification letter used by all SSFUs, SWD has revised the wording as 「申請人經醫生證明狀況不適宜親自提出申請津貼；本辦事處急需聯絡申請人的親友，以便安排代辦申請手續」 in accordance with The Ombudsman's recommendation; and

(c) SWD has reviewed the existing work procedures and made improvement. The allowance would now be suspended only from the month following the applicant's date of death. This could avoid the applicant's allowance being suspended during the period when he was still alive, or any dissatisfaction caused by the suspension of allowance due to other reasons. This has taken effect since April 2009 through adjustments to the computerised system.

Transport Department

Case No. 2007/4056 : Shirking responsibility to take enforcement action against illegal parking of bicycles at a public transport interchange

Background

284. The property management agent ("PMA") of a residential complex had complained to various Government departments about illegal parking of bicycles at the public transport interchange ("PTI") underneath the complex. The problem had persisted for one and a half year. The PMA thus complained to The Ombudsman against the departments for shirking responsibility. The Ombudsman found the Transport Department ("TD") primarily responsible.

285. The PTI was built by the developer of the residential complex and then handed over to the Financial Secretary Incorporated as required by the land lease. Later, TD took over the PTI as the user department.

286. Section 344 of the Accommodation Regulations provides that the user department, after taking over such a property, shall manage it and monitor its operation and utilisation. TD should, therefore, be responsible for managing the PTI in question.

287. However, TD pointed out that the management of the PTI should be the "shared responsibility" of all those departments listed in a Maintenance Schedule ("the Schedule") drawn up by the Highways Department, setting out the duties of various departments in maintenance and repairs of the PTI. The Schedule did not spell out which department should handle illegal parking of bicycles. Furthermore, there was no legislation empowering TD to remove such bicycles or issue clearance notices to their owners. As a result, TD kept referring the complaint to other departments for action.

The Ombudsman's observations

288. The Ombudsman considered that it was ridiculous that TD, the user department and thus manager of the PTI, had been trying to pass to other departments the responsibility for coping with the problem of illegal parking of bicycles at the PTI. Clearly, the Schedule relates to quite a different subject – maintenance and repairs.

289. While assistance from other departments might be necessary, the overall responsibility rested with TD.

290. The Ombudsman, therefore, considered this complaint substantiated.

Administration's response

291. TD has accepted The Ombudsman's recommendations and has taken/will take the following actions –

(a) A comprehensive review has been conducted, in consultation with other relevant departments, on the management responsibility of the covered PTIs that are handed over to TD. TD will take up duties relating to the removal of bicycles illegally parked and causing obstruction at these covered PTIs, with the support of other departments; and

(b) TD has drawn up and circulated the management guidelines and division of duties for the above mentioned PTIs with the relevant departments for comments. TD is also discussing with Department of Justice the legal basis about the authority of Commissioner for Transport for the clearance of illegally parked bicycles at these PTIs.

Case No. 2007/6091 : Installing railing outside the complainant's vehicle repairs shop without prior notice, thus affecting its business

Background

292. On 17 December 2007, a vehicle repairs shop on the ground floor of an industrial building in Tsuen Wan ("the complainant") lodged a complaint with The Ombudsman alleging that the Transport Department ("TD") had installed railings along the pavement outside his newly opened shop without prior notice. Vehicles could not then enter the shop and business would suffer. The complainant filed a complaint with TD on the day when the railing was being installed. Although TD suspended the installation works upon an investigation into the case, the complainant was still worried about any possible changes in TD's decision. Thus, the complainant requested that TD undertake never to install any railing outside his shop. But since TD refused, the complainant accused the Department of mishandling his complaint, and requested an investigation by The Ombudsman.

293. A complaint was received by the Lands Department ("LandsD") in April 2007 about vehicles frequently going in and out of a certain shop on the ground floor of the aforesaid building via Castle Peak Road. Upon investigation, LandsD confirmed that vehicular access to and from the said location via Castle Peak Road was in contravention of the land lease concerned. LandsD therefore issued an advisory letter to the shop in question requesting rectification. At the same time, LandsD also requested TD to consider installing railings on the section of pavement outside that shop so as to prevent unauthorised vehicular access to and from the location concerned. Upon consultation, the relevant works were completed by the end of December of the same year.

294. On 17 December of the same year, TD received a complaint made by the complainant to the Chief Executive. On the same day, the complainant made an inquiry with TD and was given an explanation of the rationale for installing the railings. On the 20th of the same month, an on-site inspection was conducted and the complainant was given the explanation of the land lease condition and TD's stance again.

295. Later, TD furnished the complainant with a written reply at the end of December, stating its decision to suspend the installation works outside the complainant's shop. However, TD also pointed in the reply that it would continue to monitor the situation and review its decision later.

296. LandsD, upon investigation, confirmed that vehicular access to and from the complainant's shop was indeed in contravention of the

relevant land lease. In April 2008, LandsD issued an advisory letter to the complainant requesting the latter to immediately stop allowing vehicular access to and from the shop. At the end of April, the complainant applied to LandsD for a waiver of the land lease restriction, and LandsD consulted TD on that application. TD refused to support the application.

297. In mid-May of the same year, LandsD gave the complainant a written reply stating, on traffic grounds, that the complainant's application for a waiver of the land lease restriction had been rejected.

The Ombudsman's observations

298. For the sake of public safety and smooth traffic flow in addition to the land lease restriction, TD initially considered it necessary to install railings on the pavement outside the aforesaid building. TD had also asked the Home Affairs Department ("HAD") to conduct public consultation before finalising its decision to implement the relevant works. It was a reasonable and most appropriate way of handling the case. The complainant's shop was not yet in existence during the consultation (June to July 2007), and it was naturally impossible for HAD or TD to consult the complainant on the works or even give the complainant "prior notice" then.

299. As regards TD's refusal to undertake never to install any railing outside the complainant's shop, The Ombudsman considered TD's decision absolutely appropriate.

300. According to the land lease condition, all vehicles were indeed prohibited from accessing the aforementioned building via Castle Peak Road. The complainant should have acquired an understanding of the land lease restriction before renting the shop for business. That said, the complainant should never allow vehicles to access his shop regardless of whether any railing was installed on the pavement, otherwise the complainant would be in contravention of the land lease condition and liable to punishment.

301. The Ombudsman had other observations. Initially, TD decided to install railings on the pavement for pedestrian safety. The Ombudsman considered that decision to be in the public interest. Unfortunately, The Ombudsman found it puzzling as to how the events of the case unfolded later on, and TD's grounds for suspending the installation of railings outside the complainant's shop were, in The Ombudsman's view, unfounded.

302. After receiving the complaint made by the complainant to the Chief Executive, TD suspended the installation of railings outside the

complainant's shop for the following reasons: that the location of the complainant's shop was farther away from the bus stops and minibus stop, that no complaint about the complainant's shop had been received from the public, and that TD was not the department responsible for enforcing the land lease condition.

303. The Ombudsman considered it unjustifiable that TD should decide to suspend the installation of railings. Initially, TD installed the railings to lend full support to LandsD's enforcement of the land lease restriction, only to argue later that the issue should be resolved through LandsD's enforcement action first, with the installation of railings by TD as a strategy in reserve or a last resort. On the one hand, TD claimed that it was not sure whether it was possible for the complainant to lodge an appeal against LandsD's decision, and so it would not be advisable for TD to install the railings in a rash manner. On the other hand, TD had not proactively deliberated over the issue together with LandsD to work out how the two departments were to cooperate at the action level. While both are Government departments, departments should endeavour to cooperate with each other and act in concert.

304. Later, the complainant applied to LandsD for a waiver of the land lease restriction. TD advised LandsD of its refusal to support the complainant's application.

305. There was an inconsistency between what TD said and how it acted. On the one hand, TD objected to the complainant's application for a waiver of the land lease restriction. On the other hand, the department suspended the installation of railings on the pavement.

306. For the reasons above, The Ombudsman considered this complaint substantiated other than alleged.

Administration's response

307. TD accepts The Ombudsman's recommendations and has already deliberated on the issues together with LandsD. As the latter's efforts to strictly enforce the land lease restriction had made little progress, it suggested that TD proceed with the installation of railings to prevent unauthorised access to and from the shop concerned. Hence, TD made a request to the Highways Department in early December 2008 for the installation of railings on the relevant section of pavement on Castle Peak Road. The installation works were completed on 5 February 2009.

Case No. 2008/0226 : Rashly removing the newly installed bollards on a pavement and disregarding the safety of pedestrians

Background

308. On 22 January 2008, the owners' corporation of an industrial building in Tsuen Wan ("the complainant") lodged a complaint with The Ombudsman against the Transport Department ("TD") which, due to the objection raised by a tractors Concern Group ("the Concern Group"), removed the bollards that had just been installed on 10 December 2007 on the pavement outside the vehicular access entrance of the industrial building for the purpose of keeping vehicles, which turn left from Tsuen Yip Street into Lung Tak Street, from driving onto that section of pavement. The complainant thought that TD acted in a rash manner, disregarded pedestrians' safety, and removed the bollards without a good reason.

309. That section of Tsuen Yip Street is an emergency vehicular access with crash gates installed at both ends and "all vehicles prohibited" signs erected. TD, in re-installing the western crash gate that had been removed, discovered that the original location of the crash gate had trespassed on private land. Hence it arranged to have the crash gate relocated to the kerb at the junction of Tsuen Yip Street and Lung Tak Street, but some goods vehicles leaving Tsuen Yip Street took the opportunity to turn left into Lung Tak Street via the pavement next to the crash gate. As such, the complainant lodged a complaint with TD and requested TD to rectify the situation.

310. In September 2007, the Traffic and Transport Committee of the Tsuen Wan District Council agreed with TD's proposal on the installation of bollards on the pavement next to the said vehicular access to prevent goods vehicles leaving Tsuen Yip Street from passing through the pavement. TD then implemented the scheme on a trial basis and the works were completed in December of the same year.

311. In early January 2008, the Concern Group complained to TD and demanded for the dismantlement of the bollard or it would stage protest action by holding up traffic. The Department thus decided to remove the bollards first to check such protest that might cause traffic jam, pending further discussion with the District Council and relevant departments. In mid-March of the same year, TD and the representatives of the District Council concerned and various relevant departments, after making a site inspection, agreed that it was desirable to remove the crash gates at both

ends of Tsuen Yip Street. The works were completed in May of the same year.

The Ombudsman's observations

312. The Ombudsman disagrees with TD's allegation that emergency vehicular access falls beyond the jurisdiction of the Department. Despite the fact that cases involving illegal entry to emergency vehicular access should be dealt with by the police, it does not necessarily mean that TD has no "management" responsibilities over the road concerned. In this case, TD had all along exercised overall "management" of the emergency vehicular access of Tsuen Yip Street, including the provision and the removal of the crash gates as well as the erection of "all vehicles prohibited" traffic signs. The Ombudsman concludes that it is more proper to say that TD, apart from taking enforcement action, has the "management" responsibilities of all emergency vehicular access (including the section of Tsuen Yip Street in this case).

313. In this case, TD first accepted the complainant's view and arranged for the installation of bollards and then consented to the dismantlement of the same upon receiving a complaint lodged by the Concern Group. However, in consideration of the further complaint made by the complainant, TD decided to remove the crash gates, but with the "all vehicles prohibited" signs remaining, so that vehicles leaving Tsuen Yip Street did not need to make use of the pavement outside the vehicular access of the industrial building concerned. At present, although all crash gates have been dismantled, Tsuen Yip Street is still an emergency vehicular access to which vehicles are denied entry.

314. The aforementioned facts reflect that TD had not given careful consideration to the issue and the effectiveness of the scheme.

315. If TD had given serious thought to the matter, carefully evaluated various factors and struck a balance among justifications before arriving at any decision, the aforesaid installation and dismantlement of bollards and the time and public resources so spent could be spared.

316. Meanwhile, Tsuen Yip Street has for many years been used for loading and unloading purposes, and the crash gates installed by the relevant authorities have often been vandalised. The problem surrounding the illegal use of the emergency vehicular access has been in existence for a long time.

317. TD, knowing that the crash gates had been vandalised for the sake of driving vehicles into Tsuen Yip Street rather than complying with traffic

regulations, simply relied on the Highways Department for the re-installation of the crash gates that had been destroyed rather than taking early action to solve the problem. Such passive manner of handling the matter spelt unfairness to the Highways Department as well.

318. The Ombudsman hence concludes that the case is substantiated.

Administration's response

319. TD has accepted The Ombudsman's recommendations and has taken/will take the following actions:

(a) TD, after the completion of an overall review, is now implementing improvement scheme to Tsuen Yip Street so that the emergency vehicular access in question would be open to all vehicles;

(b) TD will give comprehensive consideration before making any decision on proceeding with similar work in future; and

(c) TD will continue to keep in close liaison with the Police to curb illegal parking and obstruction of the emergency vehicular access.

Water Supplies Department

Case No. 2007/4684 : Failing to give adequate notice to the public about the cancellation of an enquiry number

Background

320. In September 2005, the complainant started using a telephone number but soon received numerous enquiry calls regarding plumbers' licences. She complained repeatedly to Water Supplies Department ("WSD") and demanded action. But she continued to receive nuisance calls over two years and eventually complained to The Ombudsman.

321. The telephone number was formerly that of WSD's Licensed Plumbers Registry. Its use had officially ceased with effective from 1 April 2005. Despite the complaint, some WSD staff when answering enquiries on plumbers' licences still wrongly gave that number to the public as the number to call for further enquiries. Moreover, the WSD website continued to list that number as one of its enquiry numbers.

322. Meanwhile, a WSD staff member who taught part-time at an Vocational Training Council institute thought the number to be still valid for WSD enquiries and released it to his students.

The Ombudsman's observations

323. WSD indicated that before use of the telephone number ceased, it had notified various parties through its external announcement and internal notification arrangements. However, The Ombudsman considered that the parties concerned had not been fully informed.

324. In internal communication, although matters concerning plumbers' licences had been taken over by the Customer Telephone Enquiry Centre, some staff members (including some at the Enquiry Centre) were found repeatedly advising enquirers to call that number. Some other Enquiry Centre staff were apparently not aware of their duty to answer such enquiries.

325. As regards external communication, WSD explained that since the number was not for use by other departments, they were not notified individually when its use ceased. The Ombudsman considered this unsound as District Offices often had to answer different public enquiries, including those on WSD services.

326. The Ombudsman considered that WSD had failed to examine thoroughly the crux of the problem when it followed up the complaint. It had left it to individual staff members to handle the problem on their own and make different decisions each time the complainant raised a new issue. As the handling lacked coordination, thorough discussion and examination, only a partial solution was offered each time a complaint was received. That some staff members continued to give the public the ceased telephone number actually prolonged the complainant's telephone nuisance.

327. Against this background, The Ombudsman considered the complaint substantiated.

Administration's response

328. WSD has accepted The Ombudsman's recommendations and taken the following actions –

(a) WSD has reviewed its complaint handling mechanism and procedures and issued instructions requiring the relevant staff to pay more attention to those complaints that are repetitive and have not been resolved after a long time, and to notify their supervisors where necessary and at an appropriate time for follow-up and handling;

(b) As recommended by The Ombudsman, when granting approval to staff for outside works, WSD will remind the staff in its approval letter to provide outsiders accurate and updated information in connection with WSD;

(c) WSD has reviewed its internal notification mechanism and issued instruction requiring all relevant staff in the Customer Services Branch to implement appropriate measures to enhance and strengthen the internal notification mechanism with particular emphasis on situations where –

(i) the content of notification involves updating of official correspondence addresses and telephones; and

(ii) ensuring the notification is effective if the information is likely to be accessible to the public; and

(d) It is one of WSD's mission to adopt a customer-oriented approach in its delivery of services. WSD will keep on reminding its staff of this value in providing their services in their daily works. Also,

WSD will continue to provide training to its front-line staff in a bid to enhance service quality and manner in dealing with customers. For example, during the period between September 2007 and January 2008, WSD conducted the Customer Services Workshop for more than 700 frontline staff, advocating its customer-oriented values as well as teaching them the skills of dealing with customers. In June and July 2008, WSD provided a series of training on staff counselling to supervisors who were in the middle management levels of the Customer Telephone Enquiry Centre and to enhance their skills in customer service delivery to enable them to handle customers' complaints more effectively and to provide appropriate guidance and assistance to their subordinates.

Part III
– Responses to recommendations in direct investigation cases

Efficiency Unit

Case No. DI/161 : Effectiveness of the Integrated Call Centre in Handling Complaints

Background

329. Since The Ombudsman's direct investigation in 2003 into the overall operation of the Integrated Call Centre (ICC) to examine its effectiveness in handling complaints against Government departments, The Ombudsman had continued to receive complaints about its complaint handling. Concerned that this might suggest new or continuing systemic deficiencies in ICC's arrangements, The Ombudsman decided to conduct a follow-up investigation on the subject.

Administration's response

330. The Efficiency Unit ("EU") has accepted The Ombudsman's recommendations. and has taken / is taking the following actions –

(a) At a more strategic level, a review is being undertaken to establish whether the role of 1823 Call Centre (1823) should be expanded and how this can be done on an institutional basis that will address the various concerns raised in The Ombudsman's report;

(b) EU has reviewed the modus operandi of 1823. 1823 has amended its mission statement to make it clear that it will provide a caring and one-stop service for the public to make enquiries and lodge complaints about its participating departments. 1823 has dropped the English term "Government Hotline" and the Chinese term "政府熱線" in its Interactive Voice Response System (IVRS) greeting script. Besides, Customer Services Officers of 1823 no longer greet citizens using the English term "1823 Citizen Easy Link" or the Chinese term "1823 政府熱線", instead, they use "1823 Call Centre" and "1823 電話中心" in their greeting message. The English name "Integrated Call Centre" and Chinese name "綜合電話查詢中心" have been standardised to "1823 Call

Centre" and "1823電話中心" respectively. Meanwhile, 1823 has been playing an increasingly important role in handling complaints that cross the boundaries of different departments. One recent example is the complaint handling mechanism on tree management. Under this mechanism, 1823 functions as the central point to receive public complaints on tree management. 1823 will ensure timely assignment of complaints to the responsible departments, monitor case progress, and keep complainants updated in the process. 1823 will continue to strive for better coordination and cooperation in providing a quality service to the public;

(c) EU has been making substantial efforts in engaging bureaux and departments in clarifying grey areas related to cross-departmental complaints. When 1823 notices unclear areas in the roles and responsibilities between different departments, 1823 will proactively engineer inter-departmental discussions to develop more clear-cut case referral guidelines. If required, 1823 would also take the lead to work with bureaux and departments to resolve the complaint. In 2009, 1823 has played an active role in developing clearer roles and responsibilities of departments concerned for assigning complaint cases on tree management. 1823 will continue with the practice;

(d) 1823 has implemented a mechanism for monitoring case progress on the 12th day and 14th day after receipt. Once a complaint case reveals unclear demarcation of responsibility among departments, 1823 will alert and discuss the cases with the concerned departments according to the escalation mechanism. From December 2008 to May 2009, 1823 had alerted departments on 814 cases where the demarcation of responsibilities was unclear. Through the joint efforts of 1823 and the departments concerned, these complaints had been resolved subsequently. 1823 has provided value-added coordination throughout the chain;

(e) EU has organised a complaints handling seminar for all bureaux and departments in August 2008. During the seminar, the central repository service of 1823 was explained. The central repository service was also covered at a directorate seminar on complaints handling held by EU in December 2008. On both occasions, attendees were informed that EU would help set up the service if they were interested;

(f) 1823 has stepped up monitoring of case progress to ensure prompt escalation action is taken;

(g) 1823 has obtained funding from the Administrative Computer Project Committee to engage contractor to modify its existing agent-computer interface to make it simple and readily comprehensible. The new agent-computer interface, which is designed according to the requirements of 1823's Customer Services Officers, was launched in end of June 2009. With the implementation of this new agent-computer interface, cases are monitored more effectively in the system;

(h) All 1823 liaison officers have conducted reviews on the definition of urgent cases for all subject matters under their purview. The guidelines and handling procedures for urgent cases were also reviewed to ensure smooth operation for the Customer Services Officers;

(i) 1823 has strengthen induction training for new recruits and refresher training for serving staff to enhance their awareness and knowledge in handling urgent complaints;

(j) 1823 has openly recognised participating departments with good adherence record in a complaints handling seminar held in August 2008. An appreciation letter was also sent to one of the participating departments to recognise their effort;

(k) 1823 has reviewed the format and content of the monthly reports to departments with a view to providing more intelligence. 1823 has included complaint analysis and the number of overdue complaints in the monthly reports to facilitate department's case monitoring. Departments have conveyed positive feedback on the monthly reports. 1823 will continue to review the content and format for improvement;

(l) 1823 has engaged an external consultant to carry out regular surveys on citizens' satisfaction on 1823's complaints handling service. Four quarterly surveys of 2008/09 had been completed. The overall satisfaction rating was improved from 7.3 to 7.7 out of a 10-point scale. 1823 will continue to conduct regular surveys to identify areas for improvement;

(m) 1823 has been maintaining close working relationship with departments. Apart from liaison meetings, 1823's staff has regular and frequent contacts with subject officers of departments to discuss and exchange views on 1823 operation. Besides, EU has conducted a service-wide survey on departments' demand for

public enquiry services. One part of the survey also covers the client departments' satisfaction level on 1823 service. The result shows that 80% of the client departments rated 1823 service as good or above and that no client department was dissatisfied with 1823 service;

(n) 1823 has critically reviewed its website and publicity materials to spell out its role and services, procedures and timeframes in complaint handling. It has informed client departments of the revamped website and requested them to make necessary amendments or clarifications in their websites and other publicity materials;

(o) 1823 has requested client departments to make direct contact with complainants and fellow departments where complex or multiple issues are concerned; and

(p) 1823 has requested client departments to provide the name and contact number of subject officers in both interim and final replies to improve accountability and transparency.

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

Case No. DI/163 : Street Management and District Administration

Background

331. Over the years, The Ombudsman has been processing complaints of illegal occupation of streets and ineffective enforcement by Government. In more recent times, our cityscape has been marred even more markedly by such activities. The Ombudsman views this a matter of overall "street management".

332. In November 2007, The Ombudsman declared direct investigation into three aspects of street management, namely indiscriminate placing of skips at roadside, illegal parking of bicycles and obstruction and nuisance caused by on-street promotional activities.

Administration's response

333. Food and Environmental Hygiene Department ("FEHD"), Home Affairs Department ("HAD") and Lands Department ("LandsD") have generally accepted the Ombudsman's recommendations and have taken the following actions –

Roadside Skips

(a) The Steering Committee on District Administration[2] ("SCDA") met on 25 February 2009 to consider the proposal for a permit system for regulation of roadside skips in Hong Kong. SCDA noted that the existing legislation does not provide the necessary or adequate legislative backing for a skip permit system. On the other hand, under the existing legislative framework, skips causing imminent danger or serious obstruction to road users can be effectively handled under section 4A of the Summary Offences Ordinance (Cap. 228). Specifically, the Police, upon receipt of complaints, will arrive at the scene and arrange for removal of such skips as soon as practicable pursuant to section 4A of Cap. 228. As for other complaints against skips involving unauthorised

[2] The Steering Committee on District Administration (SCDA), chaired by the Permanent Secretary for Home Affairs (PSHA), provides s platform for top management in various departments to formulate strategies to resolve difficult inter-departmental district management issues and provide a steer to District Officers and District Management Committees (DMCs) on enhancing district work.

occupation of Government land, LandsD will deal with them pursuant to section 6 of the Land (Miscellaneous Provisions) Ordinance (Cap. 28).

Considering that skips serve the practical need of the construction and fitting-out trades, the Administration takes the view that complaints against skips not causing imminent danger or serious obstruction should be handled with proportionality. The Administration will work within the existing statutory powers to tighten enforcement against skips.

Skips causing imminent danger or serious obstruction to road users will continue to be handled by the Police under section 4A of Cap. 228. LandsD has also put in place arrangements to shorten the timeframe of enforcement for other complaints against skips involving unauthorised occupation of Government land.

(b) LandsD has reported to SCDA its findings on the existing permit system of the United Kingdom.

(c) LandsD has issued a set of new internal guidelines tightening the timeframe for inspection and re-inspection, removal and confiscation of skips constituting unauthorised occupation of Government land.

(d) LandsD has identified a number of black spots and enlisted the assistance of relevant District Councils ("DCs") and District Offices ("DOs") in monitoring the black spots as appropriate.

(e) LandsD will recover the removal costs at the court if there are convicted cases.

(f) The LandsD Headquarters has instructed all District Lands Offices to publicise the stepping up of action against unauthorised placing of skips in public places and public car parks by reporting the successful clearance operations in their districts to relevant DCs and DOs for information and through press release for public information.

Illegal Parking of Bicycles

(g) After discussions at the SCDA meeting convened in 2007, departments concerned have agreed to adopt a three-pronged approach to tackle the problem –

(i) stepping up clearance operations at blackspots;

(ii) increasing bicycle parking spaces; and

(iii) publicity and public education.

On clearance of illegally parked bicycles, about 60 joint clearance operations were conducted between January and May 2009 under DOs' coordination, with over 3 200 bicycles cleared.

Transport Department ("TD") has continued to identify suitable sites to provide bicycle parking spaces in conjunction with departments concerned. Between January and May 2009, 362 new bicycle parking spaces were provided in the New Territories.

Highways Department ("HyD"), in consultation with TD, has commissioned a consultancy study on innovative parking rack designs with the aim to boosting parking capacity. The consultancy study will soon be completed. Depending on positive findings from the consultancy study, locations for trial of the innovative designs found suitable for Hong Kong would be identified in conjunction with TD.

As regards publicity and public education, HAD has continued to broadcast Announcements in the Public Interest ("APIs") on television and radio to advise against illegal bicycle parking. About 150 banners have also been put on display in early 2009 at illegal bicycle parking blackspots to step up the publicity. HAD also published a supplement in the newspaper am730 in May 2009 to encourage bicycle users to park their bicycles at proper parking spaces and to advise against prolonged occupation of the parking spaces by bicycles or other articles.

(h) The HAD Headquarters has formulated general guidelines for clearance of illegally parked bicycles in consultation with departments concerned. Guidelines on arrangements for bicycle clearance at Public Transport Interchanges ("PTIs") will be added to the general guidelines once they are worked out (see (k) below).

(i) LandsD may consider carrying out small-scale clearance operations in conjunction with relevant departments such as FEHD and the Police, as appropriate, on a need basis. FEHD will continue to mount clearance operations on their own to remove abandoned bicycles in an unserviceable state in public places by

drawing on the power of section 9 of the Waste Disposal Ordinance (Cap. 354).

(j) HAD has obtained the Department of Justice's advice that section 4A of the Summary Offences Ordinance (Cap. 228) could provide the legal basis for immediate removal of illegally parked bicycles. In practice, however, HAD consider it necessary to give notice to forewarn the bicycle users/owners concerned of scheduled bicycle clearance operations, taking into account proportionality and public expectation.

(k) At the SCDA meeting held in February 2009, departments concerned discussed the enforcement responsibility and framework for clearing illegally parked bicycles at PTIs. A further meeting between the Permanent Secretary for Home Affairs and the relevant bureaux and departments was held in April 2009. Following these meetings, TD has agreed to take up duties relating to the removal of bicycles illegally parked and causing obstruction at PTIs, with support from the relevant departments in such operations. TD has already drawn up and circulated the guidelines and division of duties. It is seeking Secretary for Justice's authorisation for delegated authority under section 4A of the Summary Offences Ordinance (Cap. 228) (or will adopt other legislation if necessary) for the clearance of illegally parked bicycles at covered PTIs taken over by TD.

(l) The departments concerned have studied the issue carefully and believe that it is neither effective nor practicable to introduce a deposit scheme at bicycle parking sites. For a deposit scheme to be effective in discouraging prolonged parking at the parking spaces, a penalty had to be imposed on non-complying bicycle owners. However, it would be difficult to set a suitable level of deposit that could deter prolonged parking but without imposing a disincentive on bicycle owners to use the proper parking sites. There is currently no legislative backing for confiscating bicycles that have been parked for a certain prolonged period. The inconvenience of having to make and retrieve a deposit would also discourage bicycle users from using the proper parking facilities.

Instead of a deposit scheme, the Administration would raise public awareness on proper utilisation of bicycle parking spaces through publicity and public education. TD, as the authority for designating bicycle parking spaces, would consider displaying appropriate notices at bicycle parking sites where prolonged parking is a constant problem. In addition, HAD and DOs would

assist in publicity, through its networks with local communities and other channels. For example, HAD has published a supplement in the newspaper am730 to encourage bicycle users to park their bicycles at proper parking spaces and to advise against prolonged occupation of the parking spaces by bicycles or other articles.

The Administration will also continue to conduct joint operations on a need basis to clear abandoned bicycles or other articles occupying bicycle parking spaces.

On-street Promotional Activities

(m) The Administration would take suitable and proportionate measures to control on-street promotional activities to ensure smooth pedestrian flow and prevent public obstruction, taking into account the views of the respective DCs.

Since October 2008, FEHD has launched enforcement operations against easy-mount frames in districts upon request of the respective DCs. Details are provided in (n) below.

(n) In October 2008, FEHD launched a pilot scheme in Wanchai and Yau Tsim Mong districts to seize easy-mount frames displayed in public places without permission as evidence of the offence of unauthorised display of bills and posters. In December 2008, the department had presented a paper proposing territory-wide application of the enforcement strategy to the LegCo Panel on Food Safety and Environmental Hygiene, but Panel Members held different views. In light of the above, FEHD has decided to extend the pilot scheme upon the request of District Councils having regard to the actual circumstances in different districts. As of end of July 09, eight districts, namely Wanchai, Central and Western, Southern, Yau Tsim Mong, Kowloon City, Kwun Tong, Tsuen Wan and Yuen Long have launched the scheme.

(o) Street management is an issue that often involves different departments. Taking into account the extent and seriousness of the street obstruction as well as the nuisances caused, departments concerned would discuss appropriate control measures at the District Management Committees ("DMCs") and, where necessary, conduct joint operations through the coordination of DMCs. Nonetheless, where the statutory powers to be invoked and the enforcement agent that could take action are not in doubt,

the departments vested with the statutory powers would take enforcement action on their own.

(p) FEHD is already adopting the approach as recommended by The Ombudsman in respect of enforcement against unauthorised display of bills and posters using easy-mount frames. FEHD will continue to work closely with the DCs and DOs in monitoring the blackspots and taking enforcement actions, including extension of the pilot scheme upon DC's request. DOs have also assisted FEHD in identifying blackspots and in gauging DC's views on the issue. From January to June 2009, a total of 24 blackspots were identified and referred by DOs and DCs (or its sub-committees). The blackspots referred by them were justified and generally reflected the seriousness of the problem in their districts. A number of DOs and/or DCs also supported the extension of the pilot scheme to their districts. Their requests have already been acceded to by FEHD.

(q) Before launching the pilot scheme as mentioned in (n) above, FEHD had sent letters to the common "beneficiary companies", urging them to refrain from using easy mount frames for unauthorised commercial promotion and reminding them of the possible consequences of doing so. Before taking out enforcement, FEHD also joined hands with the respective DO and DC members and distributed advisory letters to on-street promoters.

Thus far, the fines imposed by the Court to offenders range from $70 to $700. To achieve a greater deterrent effect on recalcitrant offenders, FEHD will provide the necessary information to the Court so that it can consider imposing a heavier fine on them.

334. However, FEHD has grave reservation on the recommendation to review the Public Health and Municipal Services Ordinance (Cap. 132) ("PHMSO") for powers to take enforcement action on "hawking" of services. The dictionary meaning of "hawking" refers to the selling of goods in the street. This is also how the term is commonly used by the public. The definition of "hawking" in PHMSO, i.e. the selling or exposing for sale of any goods, wares or merchandise, is largely modelled on the same. Re-defining the term "hawking" to also cover on-street promotion of services would appear artificial and rather far-fetched. Indeed, abusive and illegal occupation of Government land for profit-making purposes, including setting up promotional booths, call for a more fundamental review of land use and related enforcement work. This goes beyond the

ambit of FEHD and it is questionable whether the problem could or should be addressed by amending PHMSO.

335. Although FEHD considers that it would not be appropriate to amend the PHMSO to take enforcement action against on-street ranting by the services trades, they will take enforcement against general obstruction caused by on-street promotional activities on the grounds of maintaining public cleanliness and environmental hygiene by drawing on powers under section 4A of the Summary Offences Ordinance (Cap. 228) where possible, both on FEHD's own and in joint operations with the Police.

Government Secretariat - Education Bureau

Case No. DI/180 : Support Services for Students with Specific Learning Difficulties

Background

336. This was the third of a series of direct investigations on support for students with Specific Learning Difficulties ("SpLD"). It focused on Education Bureau's ("EDB") measures for schools in the public sector to provide support services to SpLD students.

Administration's response

337. EDB has accepted The Ombudsman's recommendations and has taken/is taking the following actions –

(a) Effective from the 2009/10 school year, schools have to report their Integrated Education policy, the resources they have received and their support measures for students with special educational needs ("SEN") in their Annual School Report. Schools should also spell out more clearly their policy and their support for students with SpLD and other SEN in the school webpage and/or the school profile. A sample of reporting on support for students with SEN for schools' reference will be incorporated in the Integrated Education Operation Guide for Schools by late 2009. EDB officers will continue to monitor and advise schools of the importance and means to enhance openness and transparency in this regard during regular school visits and annual evaluation as appropriate;

(b) EDB is taking forward various measures to help schools enhance parental involvement. EDB will advise and facilitate schools to set up a mechanism to enhance communication with parents including identification of students' SEN, discussion of appropriate support services to be rendered, progress reporting and evaluation of the effectiveness of the support services through various channels such as notices, handbook, meetings and parents' day etc. Recommendations and guidelines on setting up the mechanism will be added to the Integrated Education Operation Guide for Schools following consultation with schools and parents. Moreover, EDB officers are stepping up their advice to

the Student Support Team of schools during advisory school visits, reminding them to involve parents regularly in the planning and review of support measures for students with SEN. Educational psychologists have formulated plans to conduct district-based and school-based training to enhance the skills of school personnel in drawing up a support plan for students with SEN and to actively involve parents in the process;

(c) EDB will continue to publicise the availability of the mediation service through parent leaflets, parent seminars and EDB Webpage. For example, EDB publicised the availability of mediation service at the seminars organised for parents of pre-school children with SEN in June 2009. Information on SEN, including that of the mediation service, is included in EDB's bi-monthly e-newsletter on special education named "融情";

(d) EDB will continue to identify schools with recurrent or systemic problems through various channels, including regular contacts with schools by frontline officers in Regional Education Offices ("REOs"), school visits, periodic review of the record of complaints, school inspections and the monitoring mechanism under the School Development and Accountability Framework. Should any schools of concern be identified, REO officers will, in consultation with relevant bureaux or departments or divisions, render targeted support or appropriate intervention;

(e) EDB is considering the possibility of introducing scholarships for professional training in educational psychology. EDB has been liaising with overseas tertiary institutes offering Education Psychologist training programme on accepting scholarship holders from Hong Kong. EDB is also exploring the possible source of funding for setting up the scholarship;

(f) During EDB's regular meeting with the teacher education institutions on 8 June 2009, among other things, EDB has appealed to their support for making the training on SEN a core or basic module in pre-service teacher training programmes. EDB will approach the teacher education institutions by the end of this year for the progress in this regard; and

(g) The mid-term review of the five-year teacher professional development framework on integrated education will be conducted by July 2010. A review plan is being formulated.

Lands Department

Case No. DI/177 : Control of Roadside Banners

Background

338. Lands Department ("LandsD") manages a scheme for the Display of Roadside Non-Commercial Publicity Materials ("the Scheme"). Government departments, Legislative Council ("LegCo") Members, District Councils ("DCs"), DC Members and certain non-profit making organisations may put up roadside banners at designated spots for display for specified periods.

339. Under the Scheme, LandsD approves applications from organisations for displaying banners case by case, each for about two months. In contrast, LegCo and DC Members are allocated spots for the entire tenure of their office and their banners are not subject to prior vetting by LandsD. The number of designated spots totals 21 821. LandsD has published Guidelines for the Scheme, which govern, *inter alia*, the approved contents of banners.

Administration's response

340. LandsD has generally accepted The Ombudsman's recommendations. It has reviewed the Scheme and sought the legal advice of the Department of Justice ("DoJ") regarding legal issues arising from the recommendations. At present, LandsD is considering the matter further in the light of the advice received from DoJ. LandsD will then circulate the findings to the relevant bureaux or departments.

Leisure and Cultural Services Department

Case No. DI/186 : Free Admission Scheme for Leisure Facilities from July to September 2008

Background

341. The Scheme was announced by the Chief Executive in his 2007-08 Policy Address to highlight the 2008 Beijing Olympic Games as a main theme in promoting national education and encouraging community sports. It had over 3 million sessions available for free use at 150 venues and attracted some 12.8 million attendances. These included over 7.62 million to swimming pools and more than 5 million to land-based facilities. Almost all facilities registered increase in usage compared to the same period in 2007.

342. Since the launch of the Scheme, LCSD received complaints which were related to difficulty in booking, lack of safeguard against abuse and wastage from no-show and congestion in on-line booking. The Ombudsman received 33 complaints on similar issues and received 23 public submissions for the direct investigation. Most of them offered views similar to those expressed in complaints but seven were in praise of the Scheme for taking care of the needs of the less well-off in the community and encouraging people to exercise more. LCSD received 20 submissions in praise of the Scheme from different channels.

Administrations' response

343. LCSD has accepted all of the Ombudsman's recommendations. LCSD has reviewed the Free Admission Scheme, examining the views and suggestions raised by different parties in the community and considering ways to improve their arrangements. When planning for similar initiatives in future, LCSD will –

(a) carefully balance the interests of both regular users of LCSD facilities and free admission beneficiaries;

(b) enhance flexibility in both planning and execution of publicity arrangement for timely and effective announcement of changes, interim measures and special arrangements;

(c) continue to build in effective and proactive mechanism for close monitoring of implementation right from the outset;

(d) continue the provision of a standard application form for cancellation of bookings during normal operation and free admission schemes, and this form can be downloaded from the LCSD website;

(e) take necessary measures to appeal to the public for responsible use of public facilities;

(f) consider instituting safeguards for detecting, deterring and preventing abuse in conducting the feasibility study for the enhancement of Leisure Link System. The feasibility study is being conducted and is expected to be completed by end of 2009;

(g) continue to keep a watching brief on the commercial booking services at a charge;

(h) continue to analyse the data on usage of facilities and booking channels and consider devising further incentives to enhance the use of under-utilised facilities; and

(i) continue to examine ways to maximize the use of recreation facilities. LCSD has already introduced the "Free Use Scheme" which allows schools, National Sports Associations, District Sports Associations and subvented non-government organisations to apply for free use of some lower-usage recreation facilities from opening time up to 5 p.m. from Monday to Friday (except public holidays) throughout the year apart from the months of July and August. LCSD will continue with their efforts on this front.

Social Welfare Department

Case No. DI/175 : Prevention of Abuse of Special Grants under the Comprehensive Social Security Assistance ("CSSA") Scheme

Background

344. The Comprehensive Social Security Assistance ("CSSA") Scheme is meant to be a safety net for people in genuine hardship. On top of standard rates to cover basic needs, special grants are issued for specific needs.

345. Standard special grants cover five categories of expenses: housing and related grants, family grants, medical and rehabilitation grants, child care grants and school grants. Discretionary special grants enable recipients to avoid such exceptional hardship as homelessness, family breakdown and lives at risk.

346. Cases examined by The Ombudsman indicated Social Welfare Department's ("SWD") haphazard processing of applications for special grants, which would unfairly drain resources meant to help those in genuine hardship.

Administration's response

347. SWD generally welcomes the recommendations of The Ombudsman.

348. As pointed out by The Ombudsman, SWD has put in place mechanisms in respect of procedures for processing applications for special grants, eligibility criteria for approving these applications and prevention of abuse. These aspects are considered satisfactory in general. SWD is happy to accept the recommendations of The Ombudsman to strengthen the processing and approval of special grants.

349. SWD agrees that its staff should be cautious and prudent in conducting verifications and approving special grants. Some cases studied by The Ombudsman reflect that there is room for further improvement. SWD has taken the follow-up actions as follows –

(a) To further strengthen the message to the applicants in respect of their obligation to provide full and truthful information and report any changes in circumstances, as well as the legal consequences of

failing to do so, the existing wording of the reminder in the "Notification of Successful Application" and "Notification of Revision of Assistance", which are issued to the applicant after assessment and re-assessment of assistance respectively, has been revised to read as follows:

"Reminder

The information provided by the applicant or his/her guardian/appointee must be true, correct and complete. You are reminded that it is an offence for any person to obtain property/pecuniary advantage/benefits by deception, with a view to gaining for himself/herself or another or with intent to cause loss to another to procure deposit entry to a bank account by deception. An applicant or his/her guardian/appointee who knowingly or wilfully provides false statement or withholds any information in order to obtain assistance by deception or intentionally fails to report changes in information previously provided which may cause a reduction of the amount of assistance payable or disqualification for CSSA may be liable to prosecution for an offence under the Theft Ordinance. Furthermore, any overpaid assistance must be refunded to the Department."

(b) SWD's present arrangements have provided for officers of appropriate ranks to approve standard and discretionary special grants.

(c) While SWD's social security field unit staff are all along required to verify the authenticity of all documents produced by the applicant, make clarifications with the supplier in case of doubt and conduct further investigation by home visit where necessary, SWD has further reminded their frontline staff to carefully conduct verification of the supporting documents and conduct home visit where there is doubt.

(d) As a revised arrangement, the special grant to cover the cost of spectacles should normally be approved by the Authorizing Officer to cover the cost of only one pair of spectacles within 24 months.

(e) In exceptional circumstances where more than one pair of spectacles is required within 24 months with acceptable justifications (e.g. visual problems as certified by eye doctors or optometrists), the case should be put up with full justifications to the Senior Social Security Officers (District) for consideration.

(f) As a revised arrangement, a maximum amount for the special grant to cover the cost of spectacles has been set at $500.

(g) In exceptional circumstances where a higher amount of the special grant is required, the case should be submitted with full justifications to the Senior Social Security Officers (District) for consideration.

(h) A time frame of three months from the date of approval has been set for their social security field unit staff to conduct verification of the actual expenses incurred for cases where advance payment of the dental grant has been arranged.

(i) If it is found that a recipient fails to attend dental treatment, the overpaid dental grant should be recovered in full, and

    (i) no further applications for dental grant should be approved if the recipient cannot provide satisfactory explanation, regardless of whether or not the overpaid dental grant has been fully recovered; and

    (ii) further applications for dental grant can be approved if the recipient can provide satisfactory explanation (e.g. postpone to receive dental treatment due to poor health condition), subject to agreement on repayment plan for the outstanding grant.

(j) Social security field unit staff have been advised to arrange direct cheque payment to the service provider in doubtful cases (e.g. having past record of failing to attend dental treatment after receiving dental grant).

(k) While there are already clear guidelines on the approval of discretionary special grants, SWD has reminded the approving officers to exercise their discretionary power sensibly, prudently and sparingly.

(l) SWD's current practices of reminding the recipients that they are responsible for the safe custody of their own money and considering the offer of assistance-in-kind for cases involving repeated loss of cash are in line with The Ombudsman's recommendations.

350. SWD has reservation on The Ombudsman's recommendation regarding the suggestion of recovering repeated claims of loss of cash by deduction from future CSSA payments. In principle, CSSA aims to help the recipients to meet their "basic" needs. The Ombudsman's recommendation would invite complaints and criticism that the resulting CSSA payments would not be adequate to address basic needs. In practice, the proposed loan arrangement may also be subject to abuses for justifying the claims of cash loss or legitimising negligence in the loss of cash. Instead, SWD has tightened the approval of special grant to recipients who claim to have lost cash, as follows –

Eligibility requirements

(a) The loss has been reported to the police;

(b) Other sources of support (e.g. recipient's own savings) have been exhausted; and

(c) Free meals provided by NGOs and assistance-in-kind are not available or considered inappropriate.

Number of claims and amount of the special grant

(d) Normally, a special grant can only be approved to make good the loss of cash once within 24 months;

(e) Only the amount necessary to cover the basic needs (i.e. standard rates) for the period from the date of loss of cash to the end of the payment month plus the monthly expenses (e.g. rent, school fee, etc.) not yet paid by the recipient, or the amount of cash lost, whichever is the less, should be approved; and

(f) For cases where the recipient reports loss of cash for more than once within 24 months, if the recipient has genuine hardship, the case should be brought up to the District Social Welfare Officer for consideration of enlisting assistance of appropriate service unit(s) for issuing trust funds, arranging social services or mobilising community resources to meet the recipient's needs.