THE GOVERNMENT MINUTE

IN RESPONSE TO

THE 24th ANNUAL REPORT OF
THE OMBUDSMAN 2012

Government Secretariat
5 December 2012

Table of Content

	Page
Introduction	1
Part I	
Responses to issues presented in the section *The Ombudsman's Review* of the Annual Report	2
Part II	
Responses to recommendations in full investigation cases	
Agriculture, Fisheries and Conservation Department	3
Buildings Department	10
Buildings Department and Food and Environmental Hygiene Department	16
Buildings Department, Food and Environmental Hygiene Department and Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit)	27
Buildings Department, Food and Environmental Hygiene Department and Lands Department	32
Consumer Council	42
Correctional Services Department	49
Department of Health	52
Employees Retraining Board	54
Environmental Protection Department	56
Food and Environmental Hygiene Department	59
Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit) and Lands Department	73
Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit), Lands Department, Highways Department and Transport Department	78
Government Secretariat – Financial Services and the Treasury Bureau	85
Home Affairs Department	87
Home Affairs Department and Lands Department	89
Hong Kong Housing Society	93
Hospital Authority	97
Hospital Authority and Social Welfare Department	100

Housing Department 104
Immigration Department 107
Lands Department 111
Leisure and Cultural Services Department 123
Official Receiver's Office 127
Planning Department 134
Securities and Futures Commission 138
Social Welfare Department 143
Transport Department 145
Water Supplies Department 152

Part III

Responses to recommendations in direct investigation cases

Government Secretariat – Development Bureau, Government Secretariat – Environment Bureau, Planning Department, Agriculture, Fisheries and Conservation Department, Environmental Protection Department and Lands Department 158
Water Supplies Department 161
Government Secretariat – Education Bureau and Social Welfare Department 165
Social Welfare Department 170
Lands Department 172

Part IV

Responses to recommendations in review cases concluded by full investigation

Government Secretariat – Commerce and Economic Development Bureau 175
Food and Environmental Hygiene Department 186

Annex

Preparation of Development Permission Area Plans for Country Park Enclaves after the Sai Wan Incident 188

THE GOVERNMENT MINUTE IN RESPONSE TO THE 24th ANNUAL REPORT OF THE OMBUDSMAN 2012

Introduction

The Chief Secretary for Administration presented the 24th Annual Report of The Ombudsman (the Annual Report) to the Legislative Council at its sitting on 11 July 2012. 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 four parts – Part I responds generally to issues presented in the section *The Ombudsman's Review* of the Annual Report; Parts II, III and IV respond specifically to those cases with recommendations made through The Ombudsman's full investigation, direct investigation, and reviews concluded by full investigation respectively.

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

The Government has taken note of The Ombudsman's remarks and appreciates The Ombudsman's continuous efforts in raising the quality of service and standard of governance in the public sector. We welcome and have generally accepted the recommendations from The Ombudsman. The Administration will continue to strive for quality public services in a positive, professional and proactive manner.

2. We understand that with social and technological advancement, there is rising expectation on the quality of public services. The Government will closely monitor societal development and endeavour to anticipate new public demands and gear up the provision of public services in a more timely and effective manner. The Government also understands The Ombudsman's concern over issues on inter-departmental co-ordination. The Government shall continue to foster effective collaboration between departments with a view to developing a more joined-up government.

3. For cases specifically mentioned in The Ombudsman's Review, we shall set forth our responses in the corresponding chapters of this Government Minute.

Part II
– Responses to recommendations in full investigation cases

Agriculture, Fisheries and Conservation Department

Case No. 2010/2175 - Failing to discharge its duty to capture stray cats, resulting in serious environmental hygiene nuisance in a certain locality

Background

Details of Complaint

4. In mid-May 2010, the complainant called the 1823 Call Centre (Call Centre) to lodge a complaint with the Agriculture, Fisheries and Conservation Department (AFCD) about stray cats roaming the locality where she lived (the Locality) and causing environmental hygiene nuisance. As the Locality was a zone under the Cat Colony Care Programme (CCCP) run by an animal welfare organisation (the Organisation), AFCD referred the case to the Organisation for follow-up action. AFCD also asserted that its staff had tried to capture stray cats outside the zone.

5. In late May, the complainant called the Call Centre again and requested AFCD to capture the stray cats and provide her with details regarding the time of captures. However, AFCD did not give her a clear reply and only advised her to contact the Organisation directly. She then voiced her dissatisfaction via the Call Centre repeatedly in the following two months, alleging that AFCD had failed to discharge its duties to capture stray cats, shifting the responsibility to the Organisation and passing the work of clearing up cat faeces to the Food and Environmental Hygiene Department (FEHD) and the Leisure and Cultural Services Department (LCSD).

The Cat Colony Care Programme

6. CCCP was launched by the Organisation in various localities in Hong Kong in 2000. Its objective was to improve the life and health of stray cats and eventually stabilise and reduce their population by way of "Trap, Neuter and Return (to where they were captured)" (TNR). Volunteers, known as CCCP carers, are recruited under the Programme. Apart from feeding and taking care of stray cats in their zones of

responsibility, CCCP carers capture and take them to the Organisation for de-sexing. The Organisation claimed that as at January 2011, more than 80 stray cats in the Locality had been de-sexed and there were still about 30 living in the area.

Response from the Agriculture, Fisheries and Conservation Department

The Department's Role

7. AFCD indicated that current legislation has no rules regarding the keeping, feeding, capturing and neutering of cats. Therefore, it can be said that CCCP would not need the approval, permission or monitoring of AFCD. However, the department supported the Programme in principle and played an assisting role. For example, it would return to the Organisation de-sexed and microchipped cats (as identified by a "tipped" ear) that were captured.

8. AFCD and the Organisation had drawn up the "Basic Criteria and Requirements" for CCCP. The document stated that complaints received by AFCD about stray cats within Programme zones would be referred to the Organisation for action. AFCD normally would not follow up on the complaints or enter the zones to capture cats there. The Organisation also had guidelines requiring carers to handle and solve the environmental hygiene problems arising from CCCP within their zones.

9. The Organisation received Government subsidy every year through AFCD for the promotion of animal welfare. Over the previous three financial years, $200,000 of the subsidy was spent on CCCP each year. AFCD noted that it had asked the Organisation to submit information and data for assessing the effectiveness of CCCP, but the data it received were not detailed enough. Meanwhile, AFCD never reviewed the "Basic Criteria and Requirements" since 2005.

Handling of the Complaint

10. AFCD explained that it had referred the complaint of stray cats to the Organisation and the related environmental hygiene problem to FEHD. AFCD itself had deployed staff to conduct site inspections at the Locality at different times of the day. Some stray cats that had been "ear-tipped" were spotted.

11. Nevertheless, AFCD considered that the Organisation had failed to handle the complaint properly. Cats not yet "ear-tipped" were still found in certain parts of the Locality. AFCD, therefore, notified the Organisation at the end of July 2010 that it no longer endorsed the CCCP in those areas. FEHD was also asked to step up its inspections. As at February 2011, AFCD staff had conducted 30 site inspections and captured 17 stray cats in those areas. It continued to request the Organisation to monitor properly the work of its carers, while advising the public against feeding stray cats to avoid causing environmental hygiene nuisance.

Other Relevant Information

12. The Organisation stated that AFCD agreed and indicated its support to CCCP in 2002. Upon receipt of CCCP-related complaints, the Organisation would conduct investigations and its staff would carry out site inspections.

13. The CCCP in the Locality encountered many difficulties. First of all, a number of shops in the neighbourhood kept cats, which were allowed to roam the streets and so easily mistaken for stray cats. Secondly, some people other than CCCP carers also fed stray cats in the Locality. Besides, CCCP carers could not capture cats in those areas under LCSD jurisdiction (such as parks). This rendered captures more difficult. Nonetheless, the Organisation estimated that as at April 2011, the number of stray cats in the Locality had decreased by more than 40%.

14. FEHD had, in response to complaints, conducted several site inspections in the Locality. During the inspection conducted in May 2011, fixed penalty tickets were issued to people found feeding stray cats and fouling public places. The department then stepped up street cleansing there. LCSD also claimed that its staff had inspected the playgrounds in the Locality. They did not see anyone feeding stray cats but leftover cat food, which was immediately cleaned up. Neither FEHD nor LCSD participated in CCCP and they did not consider that AFCD had shifted the responsibility of clearing up cat faeces to them.

The Ombudsman's observations

15. There were cats kept by shops as well as stray cats in the Locality. Meanwhile, cat food left behind by non-carers and cat faeces led to environmental hygiene problems. Consequently, the nuisance caused by cats could not be attributed solely to the CCCP. As it was difficult for ordinary people to distinguish domestic cats from stray cats and CCCP carers from others, the complainant's dissatisfaction with AFCD for allowing the Organisation to run the CCCP in the Locality was understandable.

16. The "Basic Criteria and Requirements" stated clearly that AFCD "cooperates" with the Organisation to promote the Programme. An official document issued by AFCD also stated that it had all along supported the CCCP carried out (in the Locality) by the Organisation. Besides, the Government subsidised the Programme through AFCD every year. AFCD was, therefore, shirking its responsibility when it claimed that it only played an "assisting" role in the CCCP.

17. AFCD had not reviewed or assessed the effectiveness of the CCCP during the past five to six years and had been indifferent to its progress and the problems generated. It had never pointed out specifically to the Organisation the kind of information required to submit for review and assessment of the Programme, nor had it monitored how the Organisation used public funds in running the Programme. This was a dereliction of duty from an administrative point of view.

18. As regards complaint handling, the complaint was lodged with AFCD. AFCD, therefore, had the duty to reply to the complainant direct. However, it only referred the case to the Organisation and asked the complainant to contact the Organisation on her own. It stayed out of the matter and did not bother to find out whether the problem had been properly dealt with. Such indifferent attitude was indeed improper.

19. Overall, the failure of the CCCP in the Locality was attributable to inadequate monitoring by AFCD. The issues involved in this complaint were complicated with other departments also involved including FEHD and LCSD which, however, had not participated in the Programme. In The Ombudsman's view, AFCD must properly monitor the CCCP, work closely with the other relevant departments and the Organisation, and step up publicity and public education in order to completely resolve the problem.

20. Separately, AFCD had, at the earlier stage of The Ombudsman's inquiry in February 2011, indicated its intention to strengthen cooperation with the Organisation regarding CCCP and improve the monitoring mechanism. However, when asked to comment on The Ombudsman's draft investigation report in July, it said that since CCCP was no longer included in the Organisation's application for annual subvention, AFCD would stop subsidising the Programme. Consequently, AFCD no longer had the authority to ask the Organisation to submit any details of CCCP and so a review of the Programme and its effectiveness should not be required. The Ombudsman found this sudden change in AFCD's attitude surprising. In fact, in the Policy Address published in October 2011, the Administration stated its policy towards animal welfare as follows – help (animal welfare organisations) implement TNR trial programmes. AFCD's sudden stoppage of subsidising CCCP, a TNR programme, appeared to be running counter to Government policy. Furthermore, AFCD, pleading its heavy workload such that communication with the Organisation was largely by telephone, was unable to provide The Ombudsman with any documents or records in support of its decision to stop the subsidy. The Ombudsman found this a reflection of AFCD's very poor office administration.

Administration's response

21. AFCD has accepted all four recommendations and taken the following actions –

(a) for the recommendation on reviewing the effectiveness and future direction of the CCCP, a working group comprising representatives of AFCD and the Organisation has been set up to review the effectiveness of CCCP and discuss the future direction of the Programme. AFCD has requested the Organisation to submit a detailed report on the progress of CCCP including updated information on the number and the geographical distribution of CCCP sites, the estimated number of cats within each site, the number of carers actively participating in the Programme, and other relevant information that throws light on the operation, difficulties encountered and effectiveness of the Programme. Based on the information provided by the Organisation, a review on the effectiveness of CCCP is being conducted. In parallel, the Organisation has been requested to update AFCD and the Animal Welfare

Advisory Group (set up to advise AFCD on animal welfare and management issues) on the progress of the CCCP regularly;

(b) as regards the recommendation on reviewing the handling procedures of CCCP-related complaints, AFCD and the Organisation worked out and put in place a new complaint handling procedure for the CCCP in November 2011. Under the new arrangement, AFCD will follow up on all cat nuisance complaints. For cats caught from designated CCCP sites bearing microchips traceable to the Organisation, AFCD will inform the latter to claim back the cats and the Organisation will be required to monitor closely the upkeeping of environmental hygiene and the performance of their carers. If nuisance problem persists (i.e. three or more complaints within two months in the same CCCP site), AFCD will conduct investigations and follow up the matter with the Organisation with a view to addressing the problem. The cat concerned may be disposed of by alternative means instead of being returned back to the CCCP site concerned;

(c) for the recommendation on strengthening communication and cooperation with the Organisation, through the establishment of the working group as mentioned in subsection (a) above, AFCD has strengthened communication and cooperation with the Organisation regarding the management of the CCCP, including monitoring its operation and effectiveness. Specific data and information required for assessing the effectiveness of the Programme have been identified and provided to the Organisation for consideration. In addition, the working group is reviewing the current administration and management of the CCCP with a view to identifying areas for improvement that would help minimise nuisance complaints due to the Programme; and

(d) on the recommendation on stepping up publicity and public education targeting pet owners in the Locality, AFCD has implemented the following –

(i) writing to shop owners keeping cats in the Locality to remind them of the need to keep their cats under proper control and refrain from allowing them to wander on the street; and

(ii) distributing advisory leaflets at housing estates and pet gardens, and organising roving exhibitions in the Locality and its vicinity to promote the message of "Responsible Pet Ownership".

Buildings Department

Case No. 2010/5818 – (1) Delay in handling a water seepage complaint; (2) Failing to inform the complainant of the result of its investigation conducted in a flat which the complainant had suspected to be the source of the seepage in her flat; (3) Failing to respond to the complainant's telephone enquiries; (4) Manipulating the findings of the inspection conducted in the complainant's flat; and (5) Failing to respond to the complainant's complaint letter

Background

22. On 29 December 2010, the complainant complained to The Ombudsman against the Joint Office (JO) of the Food and Environmental Hygiene Department (FEHD) and the Buildings Department (BD) for failing to take due action in its investigation of the seepage problem in her flat and to reply to her enquiries.

23. In the course of inquiry, The Ombudsman received detailed information from the complainant on 30 March 2011 in support of her allegation on "the conduct of staff of JO, particularly the honesty and reliability of those BD officers dealing with this case". The Ombudsman then considered a full investigation necessary and commenced a fresh inquiry regarding the complaint against BD.

24. The complaint against BD contained the following –

(1) there were unreasonable delays in BD's handling of the complainant's report on seepage;

(2) BD had failed to inform the complainant of the result of its investigation conducted in the upper floor, which she suspected to be the source of the seepage in her flat;

(3) BD staff had failed to respond to the complainant's telephone enquires;

(4) BD staff had "manipulated the findings of the inspection" in the complainant's flat on 27 January 2011; and

(5) BD had not responded to the complainant's letter of 14 February 2011 regarding the allegation as stated in Allegation (4).

25. JO had received three complaints about seepage in the complainant's flat on 17 July 2008, 6 February 2009 and 8 March 2010 respectively.

26. With regard to the first complaint, the complainant's representative informed JO on 25 July 2008 that the seepage had ceased. JO thus closed the case.

27. As for the second and third complaints, FEHD could not identify the source of seepage during its investigations with colour water tests (CWTs) conducted on 10 March 2009 and 23 March 2010 respectively. The complaints were thus transferred to BD, on 4 May 2009 and 19 April 2010 respectively, for investigation.

The Ombudsman's observations

Allegation (1)

28. BD acknowledged that there had been delays between April and December 2010 in handling the third complaint due to the loss of the case file, shortage of manpower and the heavy workload of the Department at the time. BD had apologised to the complainant in its letter to her on 15 March 2011.

29. Despite the reasons stated by BD, The Ombudsman considered the lapse of nine months without any follow-up action on the seepage complaint unacceptable by any standard. The case revealed deficiencies in BD's case monitoring mechanism and in the case officer's performance.

30. The Ombudsman considered Allegation (1) substantiated.

Allegation (2)

31. JO had received separate complaints about seepage in the complainant's flat and the flat above and these complaints were investigated separately by the same team of JO staff with cross-referencing.

32. During its investigation into the seepage problem in the flat above the complainant's flat, JO conducted tests at two floors above the

flat, but did not find the source of seepage in the complainant's flat or in the flat immediately above the complainant's flat.

33. For protection of privacy, JO did not inform the complainant of the result of its investigation of the alleged seepage on the upper floor, nor did JO inform the complainant that the scope of investigation on the seepage in her flat had been expanded to cover the flat at two floors above.

34. The Ombudsman noted the BD's concern about privacy but considered it not a valid ground for BD to withhold disclosure of the tests conducted in the flat at two floors above the complainant's flat and their results. The non-disclosure of the investigation results might have led the complainant to feel that her water seepage complaints had not been properly attended to.

35. The Ombudsman considered Allegation (2) substantiated.

Allegation (3)

36. The complainant had called a Building Safety Officer (Staff B) of BD, who had been assigned to deal with the case, three times between July and November 2010, enquiring about the progress of BD's investigation, but Staff B failed to respond promptly.

37. The complainant also alleged that she had called Staff B's supervisor, a Professional Officer (Staff A) of BD, several times between September and November 2010, but her calls and messages were never answered. According to Staff A, however, there was no record of messages from the complainant in his telephone answering machine during that period. Since Staff A's telephone could not display the telephone numbers of incoming calls, he was unable to provide a record of the incoming calls received during that period for verification.

38. The complainant's allegation against Staff B had been corroborated by BD, while there was no independent evidence to support the allegation against Staff A.

39. The Ombudsman therefore considered Allegation (3) partially substantiated.

Allegation (4)

40. After an inspection in the complainant's flat on 27 January 2011, Staff B reported insignificant moisture content at the ceiling of the bathroom. The moisture content measured at 18 checkpoints ranged between 15.4 and 33.

41. Staff B resigned and left BD on 16 May 2011. BD could not reach him thus far for the verification on the contents of his investigation report. Meanwhile, BD had arranged with the complainant to review the seepage condition in her flat.

42. In the absence of corroborative evidence, The Ombudsman was unable to comment on the alleged "manipulation" of the findings.

43. However, The Ombudsman observed in the same report that the result of the Reversible Pressure Test conducted on 11 September 2009 was wrongly recorded as "negative". Moreover, instead of recording the result of the CWT conducted by FEHD on 23 March 2010 (after receiving the complainant's third complaint), the result of CWT conducted on 10 March 2009 (for the second complaint) was erroneously recorded in the report.

44. BD had confirmed the aforementioned errors in the report. The Ombudsman therefore considered Allegation (4) substantiated other than alleged.

Allegation (5)

45. According to the standard procedures, when a complaint letter is received, BD's General Registry staff would automatically issue an acknowledgement to the complainant. A copy of such an acknowledgement, together with the complainant's letter, would then be placed in the complaint case file for follow-up by the case officer.

46. As for this case, upon receiving the complainant's letter of 14 February 2011, the General Registry issued an acknowledgement on 16 February 2011. However, for unknown reasons, both the letter from the complainant and the copy of the acknowledgement had not been placed in the case file for follow-up by the case officer Staff B.

47. The complainant's letter only came to BD's attention in June 2011 when BD received a copy of the letter from The Ombudsman.

That explained why the JO's letter of 15 March 2011 to the complainant did not address her disagreement with the investigation result and hence allegation against Staff B.

48. Since the officer issuing the acknowledgement on 16 February 2011 had resigned and left BD, the BD was unable to further investigate. Nevertheless, the fact remained that BD had not responded to the complainant's letter of 14 February 2011.

49. The Ombudsman therefore considered Allegation (5) substantiated.

Administration's response

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

(a) BD has reviewed its monitoring mechanism in JO, i.e. the use of a master spreadsheet to keep track of the progress of complaint case handling. To ensure effective monitoring, BD has reminded its staff to update the records bi-weekly and respond to complainants' enquiries. To cope with the rapid increase in the number of complaints, FEHD and BD are now jointly exploring the feasibility of developing a computer information system to enable real time updating and tracking of investigation and response to complainants' enquiries;

(b) BD has instructed its staff in JO to monitor the progress of investigation and to keep complainants informed in writing at bi-monthly interval;

(c) all the telephone systems in the office premises of JO are already provided with the function of recording a limited number of voice messages. The telephone system in JO's corresponding district office has been recently upgraded to expand its recording capacity to 68 voice messages and to include a caller display function. JO will continue exploring the feasibility of upgrading the telephone systems in other JO offices. All staff members of JO have also been reminded to check the telephone voice messages regularly and reply the complainants promptly;

(d) BD has reminded its staff in JO to exercise care in preparing/proof-reading investigation reports and to ensure that every investigation report is checked by the respective professional officer before the subject case is concluded; and

(e) further to the inspection with the complainant in her flat on 5 August 2011, JO conducted another inspection on 21 September 2011 and assigned the case to a consultant on 27 September 2011 for further investigation and tests with a view to identifying the source of the seepage. The complainant was also informed of the arrangement in writing on the same day. The consultant carried out an inspection at the complainant's flat on 10 October 2011 and conducted CWTs to all relevant drainage pipes in the bathroom of the flat above on 22 October 2011. Inspection of the complainant's flat on 15 November 2011 revealed negative test results. The consultant carried out colour water ponding test at the bathroom of the flat above the complainant's premises on 19 November 2011 and then re-inspected the complainant's flat on 17 December 2011. The consultant is now compiling the investigation report. JO will continue to keep the complainant informed of the progress of investigation every two months.

Buildings Department and Food and Environmental Hygiene Department

Case No. 2010/5020 (Food and Environmental Hygiene Department) - (1) Delay in handling a water seepage complaint; and (2) Improper decision to stop investigating certain seepage areas in the complainant's flat

Case No. 2011/0913 (Buildings Department) - (1) Improper decision to stop investigating certain seepage areas in the complainant's flat; and (2) Failing to properly handle the structural safety problem in the complainant's flat

Background

51. In 2007, an owner lodged a report regarding water seepage and concrete spalling at the ceiling of his flat to the Joint Office (JO) of the Buildings Department (BD) and the Food and Environmental Hygiene Department (FEHD). On 10 June 2009, JO replied the complainant that it had identified the source of water seepage and would order the concerned owner to carry out repair works to abate the water seepage nuisance. However, JO delayed follow-up action leading to deterioration of the seepage condition. The complainant had to pay more to carry out internal renovation several times. (Allegation (1))

52. Although the water seepage problem had not been resolved, JO notified the complainant on 24 February 2011 that no further investigation would be carried out to identify the source of seepage from the upper floors. (Allegation (2))

53. In view of the presence of exposed reinforcement in part of the ceiling of the flat concerned, JO referred the case to BD on 17 December 2010 to follow up the structural safety issue. However, BD merely urged the complainant to promptly carry out repair works, instead of probing into the problem of water seepage from the flat above, which caused the cracks at the ceiling. (Allegation (3))

The Ombudsman's observations

Allegation (1)

54. As early as October 2008 (instead of 10 June 2009 as alleged), consultant employed by BD had confirmed that defective waterproofing material at Flat A and Flat E on the floor above had caused seepage in the complainant's premise. However, FEHD did not issue Nuisance Notice to the concerned owners. The case was put aside for eight months. On receipt of the complainant's telephone enquiry in June 2009, a FEHD staff went to inspect the flat. Thereafter, the case was put aside again for nearly one and a half years. FEHD did not follow up the case until the complainant made further telephone enquiry in November 2010.

55. The Ombudsman considered it highly improper for FEHD to leave the case unattended for more than two years and for not monitoring the progress in the interim.

56. Given that the flat could accommodate more than a hundred persons, The Ombudsman observed that persistent water seepage would constitute serious environmental hygiene nuisance. The consequence could be serious if the structural safety of the building was impaired.

57. In view of the above, The Ombudsman considered Allegation (1) substantiated.

Allegation (2)

58. Regarding water seepage in the areas below Flat A and Flat B of the floor above, JO had carried out tests on 28 and 29 December 2010 respectively, and re-inspected the flat on 5 and 12 January 2011. The re-inspections did not reveal any colour dye at the seepage areas and the seepage areas were also dry. In the circumstances, The Ombudsman considered it reasonable for JO to stop further investigation. The Ombudsman, therefore, considered Allegation (2) not substantiated.

Allegation (3)

59. Regarding Allegation point (3), BD had the following responses –

(a) in respect of the complaint about dilapidation in the ceiling of the flat concerned, BD had completed the investigation in accordance with the established procedures. BD also recognised the need to tackle the seepage problem simultaneously, and had therefore issued an advisory letter to the owner of Flat B above, requesting the owner to take steps abating the seepage nuisance. BD also informed JO of this arrangement;

(b) upon review, BD considered that there was room for improvement in handling this case. For example, in its advisory letter about the repair of the ceiling to the complainant, BD could also inform the complainant that it would coordinate with JO to take follow-up action. This would give the complainant a better understanding of the position; and

(c) in handling water seepage complaints, there is clear division of responsibility between BD and JO. BD is responsible for investigating structural safety of buildings. BD and JO have been working closely to jointly resolve the problem of structural defects arising from water seepage.

60. According to the investigation conducted by the consultant commissioned by BD, apart from the area below Flat B, concrete spalling and cracks also appeared in other parts of the ceiling where no water seepage was found. The Ombudsman considered it not unreasonable for BD to urge the owner to carry out repairs promptly on account of safety consideration and owners' responsibility.

61. As regards the suspected seepage from Flat B which caused cracks in the ceiling of the flat, BD had issued advisory letter to urge the owners concerned to carry out repairs. It also informed JO of such arrangement. The Ombudsman considered that BD had taken reasonable follow-up action within its responsibilities in handling the problem. The Ombudsman therefore found Allegation (3) not substantiated.

Administration's response

62. FEHD and BD have accepted The Ombudsman's recommendations and taken the following follow-up actions –

(a) in November 2011, FEHD modified the "Progress Monitoring System" (PMS) to strengthen the monitoring of water seepage investigation progress, and instructed the Superintendent in each district to monitor the progress monthly through the system, which should be followed by necessary follow-up actions and reports to the headquarters. On the recommendation from The Ombudsman, supervisory staff of the concerned district office had been reminded to be vigilant on monitoring the progress of cases through PMS and take prompt rectification if any deviation be detected. Besides, staff of JO had been reminded to strictly adhere to the guidelines so as to avoid delays;

(b) JO has reviewed the mechanism for prioritising cases to avoid affecting the progress of case handling. FEHD had also reminded its staff in JO that if building defects in the flat, such as severe spalling concrete or concrete cracks, were detected when handling water seepage complaints, apart from advising the complainants to report to BD, if necessary, refer the situation to the Police or 1823 Call Centre for urgent building safety inspection. FEHD staff in JO should also accord priority in handling the case and notify BD for prompt referral for parallel action;

(c) BD would continue to ensure and enhance the communication and liaison with JO to deal with building structural defects problem caused by water seepage. FEHD had also reminded its staff in JO to closely monitor the situation of such cases proactively. After making referrals to BD, FEHD staff in JO should keep in touch with BD regularly to have a better understanding of the progress for rendering assistance whenever necessary to resolve the seepage problem; and

(d) for cases with serious water seepage or with structural safety concerns, BD and JO will take appropriate follow up actions in line with the prevailing policy.

Case No. 2011/2382 & 2011/2456 (Buildings Department) and Case No. 2011/2284 & 2011/2363 (Food and Environmental Hygiene Department) - Mishandling a complaint about seepage nuisance caused by defective water-proofing layer of a platform's floor slab upstairs

Background

63. In April and May 2007, complainants A and B separately reported to the Joint Office (JO) of water seepage on the ceiling of their shops during rainy days ever since the unauthorised building works on the first floor flat roof of a building were removed.

64. From May to July 2007, inspections conducted at the two complainants' shops by JO confirmed that the ceilings of the cocklofts in the two shops were affected by water seepage. Subsequent investigations by JO revealed that the seepage was originated from the damaged waterproofing material on the floor slab of flat roof of Unit 1G above, as well as from a damaged branch sewer connected to a drain outlet at the flat roof concerned. JO therefore issued two "Nuisance Notices" on 6 December 2007 and 18 September 2008 respectively, requiring the owners of Unit 1G to repair the flat roof and the branch sewer. In January and October 2008, confirmatory tests were conducted at the flat roof of Unit 1G to ascertain whether proper repairs had been made by the owners.

65. In April 2010, complainant A reported to JO through the 1823 Call Centre that water seepage had recurred. On 27 July and 2 September, JO conducted coloured water test and water ponding test to the sewer and the floor slab at Unit 1G. The results revealed defects and leakage in the waterproofing material on the floor slab of flat roof at Unit 1G.

66. On 14 December 2010, FEHD issued a "Nuisance Notice" requiring the owners of Unit 1G to repair the floor slab of the flat roof. On 21 December, the owners of Unit 1G informed JO in writing that they intended to work out a settlement with the shop owners affected by water seepage, including the two complainants.

67. In early January of 2011, on being informed that the owners of Unit 1G had failed to reach a settlement with the shop owners affected, JO required the 1G owners to repair the floor slab of the flat roof within 28 days.

68. On a rainy day on 15 February 2011, an FEHD officer visited Unit 1G and the two complainants' shops for investigations. According to the records of the Hong Kong Observatory, the total rainfall in that district on the day was not high. The investigation revealed that the floor slab at Unit 1G had undergone repairs, and the humidity readings at the areas where water seepage had occurred were lower than 35%.

69. Since it was not certain whether the owners of Unit 1G had properly carried out repairs at the floor slab of the flat roof, FEHD therefore notified BD in JO of the above findings in February 2011, and requested BD to conduct a confirmatory water ponding test at the flat roof of Unit 1G.

70. On 4 March 2011, BD replied to FEHD. It disagreed with carrying out a confirmatory water ponding test on the grounds that according to the procedures of handling seepage complaints, JO would conduct further tests only after seepage in the unit concerned could be identified, i.e. the humidity reading at the seepage areas being higher than 35%. However, the humidity readings at the seepage areas in the two complainants' shops taken by FEHD on a rainy day (15 February) were lower than 35%. BD therefore did not suggest conducting a confirmatory water ponding test at the flat roof of Unit 1G so as to avoid unnecessary disturbance to the residents of Unit 1G, and to accord priority for the use of limited resources to other more significant seepage nuisances.

71. On 7 April 2011, the humidity readings at the seepage areas of the two complainants' shops taken by the FEHD staff were still lower than 35%. On 13 April, JO wrote to the two complainants, advising that based on the findings of the above humidity checks, their cases would not be further pursued.

72. On 24 May 2011, complainant B reported to the JO the recurrence of water seepage. On the same day, FEHD staff conducted humidity checks at the seepage areas on the ceilings of the two complainants' shops and the readings were found higher than 35%. FEHD thus referred the case again to BD for follow-up.

73. On 8 July 2011, BD carried out a water ponding test at Unit 1G. On 19 July, the colouring material used in the testing was found on the ceilings of the two complainants' shops. Based on this finding, JO issued a "Nuisance Notice" to the owners of Unit 1G on 29 July, requiring them to repair the floor slab of the flat roof.

74. Later, JO noted that the premises at Unit 1G were sold in late July 2011. A "Nuisance Notice" was therefore issued to the new owners of Unit 1G on 8 August 2011, requiring them to repair the floor slab of the flat roof. In late October 2011, the owners concerned reported that waterproofing works had already been completed. On10 November 2011, a confirmatory water ponding test was conducted at Unit 1G by a consultant commissioned by BD. The consultant inspected the two complainants' shops on 1 December and found that the seepage areas had already dried up. The consultant would submit an investigation report to JO later on.

The Ombudsman's observations

75. In handling water seepage complaints, JO's key responsibilities are to identify the source of water seepage, to investigate whether there are public safety or health hazards, and to collect evidence for taking actions to abate the seepage nuisance.

76. In accordance with established procedures, JO had to confirm that the complainants' units did suffer from water seepage nuisance and that the humidity readings at the seepage locations reached the threshold criterion (i.e. 35% or more) before further tests would be conducted.

77. The Ombudsman believed that if the locations of suspected leakage were near to areas with running water, such as the bathroom slab or kitchen slab, and that the owners concerned failed to conduct proper repair/maintenance, then water seepage would, naturally, soon appear at the complainants' units. As such, it was not unreasonable for JO to choose to first observe whether there was any seepage at the units before deciding on the need to conduct confirmatory tests.

78. However, the above procedure was considered ineffective in circumstances, such as this case where rain water seeped through the damaged flat roof slab to the lower floor. Even without proper repair/maintenance, as long as there was no heavy rain, seepage might stop temporarily at the complainants' units.

79. In light of the above, The Ombudsman considered that if repair/maintenance of the flat roof (or the roof) concerned could be conducted during the non-rainy season, JO should not passively wait for heavy rains and recurrence of water seepage before follow-up actions would be taken. JO should, as soon as possible, actively investigate and

conduct confirmatory tests to ascertain whether the floor slab of the flat roof or the roof had been properly repaired/maintained with a view to resolving the complainants' water seepage problems.

80. In the circumstances of this case, the test carried out by JO in September 2010 confirmed that water seepage recurred because the floor slab of flat roof of Unit 1G was damaged, and that seepages mainly occurred after heavy rains. The owner concerned had repaired his flat roof during the non-rainy season. FEHD found on 15 February 2011 that the humidity readings at the ceilings of the two complainants' shops were less than 35%, but still requested BD to conduct confirmatory tests to check whether the owner concerned had properly repaired his flat roof as early as possible. Since FEHD had requested BD to take follow-up actions in light of the actual circumstances of the case, The Ombudsman considered such an approach flexible and responsible. The Ombudsman, therefore, considered the complaint against FEHD not substantiated.

81. On FEHD's request for a confirmatory test, BD not only took into account the JO's aforementioned procedures, but also took into account the low humidity readings taken by FEHD on that rainy day. However, BD did not review whether the actual rainfall on that rainy day and the days before would be adequate to confirm if proper repair/maintenance had been conducted for the floor slab of flat roof of Unit 1G. The Ombudsman opined that BD had not exercised thorough consideration and judgment.

82. It was not until four months later that JO took follow-up actions and arranged for a water ponding test at Unit 1G when the seepage nuisance recurred during the rainy season. The test results showed that the owner of Unit 1G did not properly repair the flat roof, which led to the water seepage. In hindsight, if BD had entertained FEHD's request and conducted a confirmatory test at Unit 1G, the seepage problems would have been resolved earlier.

83. Based on the above, The Ombudsman considered the complaints against BD partially substantiated.

Administration's response

84. FEHD and BD have accepted The Ombudsman's recommendations and taken the following follow-up actions –

(a) FEHD has jointly reviewed the procedures and guidelines with BD pertaining to the carrying out of confirmatory tests for cases of water seepage caused by defective flat roof or roof. On 13 April 2012, FEHD instructed all District Offices via email to handle rain water seepage cases in accordance with the revised guidelines; and

(b) as for the water seepage case of the flat roof of Unit 1G, the new owners of the unit completed the necessary waterproofing works in October 2011. Having conducted a confirmation test and inspection, the consultant submitted the Inspection Report to JO in December, confirming the seepage had ceased. JO had completed the investigation of the case and informed the complainants on 11 January 2012 that in light of the cease of water seepage, JO would stop pursuing the case for the time being.

Case No. 2011/2737A & 2011/4096A (Food and Environmental Hygiene Department) and Case No. 2011/2737B & 2011/4096B (Buildings Department) - Failing to follow up a complaint about seepage of rain water through the external wall of a building

Background

85. In July and August 2011, two complainants lodged complaints to The Ombudsman against JO formed by BD and FEHD. Water seepage was noticed in the complainants' flats on rainy days and it was suspected that the water seepage was caused by the defective external walls of the buildings. However, JO did not properly investigate nor alleviate the water seepage nuisance.

The Ombudsman's observations

86. JO would carry out investigation and tests upon receipt of reports on water seepage in buildings. If seepage nuisance had been confirmed, JO could issue a "Nuisance Notice" under the Public Health and Municipal Services Ordinance (PHMSO) (Cap. 132) requiring the owner(s) concerned to carry out repair works to abate the sanitary nuisance.

87. The investigation of seepage cases by the JO are normally carried out in three stages –

Stage I: FEHD staff visits the complainant's premises to ascertain whether there was water seepage.

Stage II: FEHD staff carries out initial investigation to identify the source of the water seepage.

Stage III: If the source of the water seepage could not be identified in the initial investigation, FEHD would refer the case to BD for the latter to arrange a professional investigation.

88. According to FEHD, if the water seepage did not constitute a sanitary nuisance, such as potable water leaking from a defective supply pipe or rain water seepage, JO would not take enforcement action. The Ombudsman had doubts on FEHD's stance. In fact, it is not uncommon for external walls of buildings to have structures attached like planters, signboards, canopies and supporting frames for air-conditioning units. If rainwater seeped into a building through these structures, such seepage might cause a sanitary nuisance. In the present case, The Ombudsman

was also concerned whether JO would stop follow up action simply because the seepage was caused by rain water. The Ombudsman therefore requested JO to clarify.

89. JO explained that water seepages from an insanitary source could be regarded as a sanitary nuisance, for example, the seepage of foul water from a defective drain and seepage of water used to clean the floor of a kitchen or toilet to the unit below through defective waterproofing membranes of the floor. However, rain water seepage would not normally constitute a sanitary nuisance. Therefore, JO would not take enforcement actions against rain water seepage under the PHMSO.

90. However, JO would take into account the actual condition on site in determining whether the rain water seepage constitutes a sanitary nuisance. If the water seepage constituted a sanitary nuisance, JO would take enforcement action.

91. Following the receipt of the reports on water seepage, staff of JO inspected the complainants' flats and monitored the moisture content of the seepage areas on rainy and non-rainy days. After initial investigation, the JO confirmed that the water seepage occurred on rainy days and suspected that it was caused by the defective external walls of the buildings concerned. However, as from the observation of the site environment, no sanitary nuisance was caused by the rain water seepage, it was not necessary for JO to conduct further investigation or take further enforcement action. Nevertheless, JO had issued letters to advise the owners' corporations concerned to inspect and repair the external walls.

92. The Ombudsman considered JO's stance acceptable.

93. As for the subject complainants, JO arranged staff to inspect the complainants' flats and investigate the cases. Since the rain water seepage did not constitute sanitary nuisance, JO did not take follow-up action. The Ombudsman also considered this reasonable.

Administration's response

94. JO has completed the review and revision of the related workflow and guidelines regarding water seepage complaints. Staff of all district offices were instructed on 13 April 2012 to strictly observe the revised guidelines in handling rain water seepage.

Buildings Department, Food and Environmental Hygiene Department and Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit)

Case No. 2011/0870 (Buildings Department) and Case No. 2011/1398 (Food and Environmental Hygiene Department) – (1) Delay in handling a water seepage complaint; and (2) Delay in responding to the complainant's enquiries about the progress of investigation into his water seepage complaint

Case No. 2011/1399 (Efficiency Unit) - Delay in responding to the complainant's enquiries about the progress of investigation into his water seepage complaint

Background

95. The complainant complained against the Joint Office (JO) set up by the Food and Environmental Hygiene Department (FEHD) and the Buildings Department (BD), and the 1823 Call Centre of the Efficiency Unit (EU). The complainant was dissatisfied that JO had delayed in following up the water seepage problem of his premises (Allegation (1)) and that the Administration had delayed in giving him a reply (Allegation (2)).

96. Since November 2010, the complainant has complained to JO about water seepage in his premises. On 3 November, JO received a complaint from the complainant. On 19 November, staff of FEHD inspected the complainant's premises and found water seepage at the bathroom ceiling. On 29 November, FEHD staff carried out colour water test on the drains of the flat immediately above. However, inspection by FEHD staff on 13 December did not reveal any colour stains on the ceiling of complainant's flat. On 20 December, FEHD issued a letter in the name of JO to the complainant, stating that the source of seepage could not be confirmed. The case was then passed to BD for follow-up.

97. On 23 December 2010, BD received the relevant case file. Given the large number of cases in hand, it was necessary for BD to prioritise the cases on the basis of their urgency. On 24 December, the complainant called Staff A of BD and enquired about the progress of the water seepage investigation. Staff A explained that in light of the large number of seepage cases in hand, the cases had to be prioritised for handling. It was expected that follow up actions for the complainant's case would be taken after the Chinese New Year (i.e. by early

February 2011) and that BD would notify the complainant of the relevant arrangement in due course.

98. Between December 2010 and February 2011, the complainant called and left voice messages to Staff A of BD many times. BD explained that as the staff had to frequently work outside the office, he might not be able to pick up the calls. BD further checked the records and could not find any messages left by the complainant.

99. On 18 and 23 February 2011, the complainant complained to the Call Centre twice about the slow progress of BD in investigating the seepage case, and that the department had not replied to him. The complainant requested the Administration to handle the case urgently, and urged for a reply from the supervisor of Staff A. On both occasions, the Call Centre referred the requests to FEHD on the same day.

100. Since the complainant's call involved a complaint against Staff A, apart from referring the case to FEHD, the Call Centre opened another case and referred it to BD Headquarters for follow-up actions. BD Headquarters clarified that the staff complaint should be handled by BD staff of JO, and the Call Centre referred the case to FEHD, which is the contact point of JO, on 1 March.

101. After receiving the referral from the Call Centre for several times, FEHD referred the complainant's request to BD staff of JO on 10 March. The staff of BD called back the complainant on the same day.

102. As the complainant's case was classified as normal, BD had assigned the case to a consultant on 2 March 2011 for follow-up actions accordingly. On 12 March, the consultant carried out tests in the bathroom of the flat immediately above, which included ponding test and spraying test to the peripheral walls. On 8 April, the consultant's staff inspected the complainant's flat, and found on the bathroom ceiling of the complainant's premises stains of colour water used for the tests at the flat immediately above, indicating defects in the bathroom floor slab of the flat above.

103. On 24 June 2011, the consultant submitted the investigation report to BD. On 28 July 2011, BD finished vetting the investigation report. In light of the findings, FEHD contacted the owner of the flat immediately above requesting him to conduct the necessary repairs. In early August 2011, JO requested inspection of the complainant's premises to ascertain the latest seepage condition, but the complainant advised that

the flat had been sold. On 26 August 2011, the staff of The Ombudsman's Office also approached the complainant, but was advised that the premises concerned had been handed over to the new owner in mid-August. Hence, further inspection by JO could not be arranged.

The Ombudsman's observations

Allegation (1)

104. Upon receipt of the complainant's water seepage complaint, FEHD had promptly carried out the initial investigation and referred the case to BD for follow-up. There was no delay on the FEHD's part.

105. Upon receipt of the complainant's case on 23 December 2010, Staff A of BD informed the complainant on 24 December 2010 that his case would be handled and a reply in writing from BD would be available after the Chinese New Year (early February 2011). However, BD did not assign a consultant to carry out investigation until 2 March 2011. Although BD requested the consultant to expedite the processing, there was a delay in the case handling. The Ombudsman considered that BD should not take heavy workload as an excuse.

106. As far as Allegation (1) is concerned, The Ombudsman considered the complaint against FEHD not substantiated while the complaint against BD was partially substantiated.

Allegation (2)

107. With no supporting evidence, The Ombudsman could not verify the complainant's allegation that BD did not respond to him despite he had called the department and left messages many times. Irrespective, Staff A of BD did inform the complainant that he would follow up with a reply in February 2011, but failed to honour that commitment.

108. As regards the two subsequent telephone calls made to the Call Centre by the complainant, The Ombudsman took the following views –

(a) investigation of seepage complaints is undertaken by both FEHD and BD. The Call Centre might not be able to tell which department was following up a case when it received an enquiry or a complaint. The Ombudsman considered it not

unreasonable for the Call Centre to generally refer the enquiry to FEHD, which is responsible for initial investigation; and

(b) however, the complainant had stated clearly on the two occasions that the case was being followed up by BD, and requested BD to urgently handle the case and give him a reply. The Call Centre should directly inform BD's staff in JO as soon as possible. However, the Call Centre referred the enquiries to FEHD. As such, BD's staff in JO did not have early knowledge of the situation and could not take early action. The Call Centre was too rigid in handling the enquiries and failed to meet the urgent needs of the complainant in an efficient manner.

109. FEHD received the first enquiry of the complainant referred by the Call Centre on 18 February and received his further enquiries and complaints subsequently. However, FEHD did not refer them to BD's staff in JO until 10 March. The Ombudsman considered that FEHD was partly responsible for the delay.

110. As regards Allegation (2), The Ombudsman considered the complaint against EU, FEHD and BD partially substantiated.

Administration's response

111. BD, FEHD and EU have accepted The Ombudsman's recommendations and implemented the following follow-up actions –

(a) JO staff had repeatedly contacted the new owner of the affected premises. During the visit on 1 November 2011, it was found that the ceiling had dried out, indicating the cessation of water seepages. The new owner indicated that JO did not have to further pursue the case. JO staff suggested that the new owner approach JO for assistance if water seepage was found again.On 15 November, JO wrote to the new owner about such arrangement; and

(b) BD, FEHD and EU have jointly reviewed the arrangement for referral of enquiries or complaints about water seepage cases, and agreed to rationalise the referral procedures. If the Call Centre receives calls from members of the public claiming that a seepage complaint is being handled by a BD officer in JO and demanding follow-up actions and a reply from them, the Call Centre will inform BD's staff in JO in addition to referring the case to relevant JO contact point (i.e. FEHD District Office) with a view to ensuring that requests raised by members of the public can be addressed as soon as possible. The revised referral arrangement was put in place on 1 April 2012.

Buildings Department, Food and Environmental Hygiene Department and Lands Department

Case No. 2010/4759 (Buildings Department) - (1) Improper handling of a seepage problem in the complainant's flat; and (2) Failing to follow up the complainant's request to remove an unauthorised roof structure

Case No. 2010/4760 (Food and Environmental Hygiene Department) - Improper handling of a seepage problem in the complainant's flat

Case No. 2010/5819 (Lands Department) - Failing to remove an unauthorised roof structure and repair the roof of a building on behalf of the Financial Secretary Incorporated

Background

112. In June 2006, the complainant lodged a report on water seepage at the ceiling of her premises located on the top floor of a building to the Joint Office (JO) of the Buildings Department (BD) and the Food and Environmental Hygiene Department (FEHD). However, JO failed to take due action in its investigation and the water seepage problem remained unresolved (Allegation (1)).

113. The complainant requested BD to take enforcement action against the unauthorised building works (UBW) on the roof of the building. However, BD did not take follow-up action (Allegation (2)).

114. The roof of the building was originally owned by a private owner. Meanwhile, the Government Lease for the land on which building was situated had expired on 21 December 1992. Pending the completion of the legal process for regranting the roof to the private owners, the title to the roof was held by the "Financial Secretary Incorporated" (FSI). When BD discovered that the roof was owned by FSI, it referred the case to LandsD, the agent of FSI, for follow-up action. However, LandsD did not take appropriate action on the unauthorised structure or carry out the necessary repairs (Allegation (3)).

115. Due to the special circumstances of the original owner, the Government had not been able to complete the legal process for the regrant of the roof to the owners of the building.

The Ombudsman's observations

Allegation (1)

116. JO of FEHD and BD is responsible for handling water seepage reports and conducts non-destructive tests to identify the source of water seepage. In addition, BD is responsible for handling reports related to building safety and defective drainage pipes.

117. The complainant suspected that the water seepage was caused by UBW on the roof. However, the problem persisted despite BD's investigations in response to her several complaints and the repairs made to the damaged ceiling by the complainant.

118. The Ombudsman considered it important to first identify the source of leakage in order to resolve the problem. Hence, BD should have worked closely with JO. However, BD did not refer every complaint to JO for follow-up.

119. JO took follow-up actions on the complainant's reports made during June 2006 to February 2010. Subsequently, because the water seepage had ceased, the complainant withdrew her complaint and refused further tests by JO. JO therefore terminated the investigations. The Ombudsman considered it proper for JO to cease the investigation work.

120. The Ombudsman found the following shortcomings in JO's handling of this water seepage report –

(a) although JO had conducted preliminary investigation within one month after the receipt of the report in end-June 2010, it failed to take timely follow-up until the complainant's enquiry on progress two months later, and only found that the case file had been lost. JO therefore had delayed processing the case and there was negligence in JO's handling of files;

(b) the circumstances as described also reflected the JO's lack of effective monitoring on the progress of water seepage investigations; and

(c) in view of the Lands Department's (LandsD) tardiness in making remedy to the roof, JO decided to further investigate the case. However, the dispute between FEHD and BD staff in JO over the responsibility for carrying out the tests had

caused further delay in the progress of investigation work and prolonged anxiety for the complainant. There was therefore a need to improve mutual understanding and cooperation between FEHD and BD.

121. The Ombudsman therefore considered Allegation (1) partially substantiated.

Allegation (2)

122. In line with its enforcement policy, BD did not take enforcement action against UBW during the early stage when there was no imminent structural danger and building safety was not threatened. The Ombudsman considered this acceptable.

123. In March 2010, however, BD's inspection revealed that the structural conditions of UBW had deteriorated and would pose a danger to the public. BD strongly advised LandsD, agent of FSI, to remove UBW immediately. BD also continued to follow up with LandsD on progress. However, no statutory actions on UBW could be taken by BD because the roof was owned by the Government and thus exempted from the control of the Buildings Ordinance (Cap. 123).

124. Noting that BD had done the best they could to tackle UBW on the roof within the authority vested in them and in accordance with BD's policy, The Ombudsman considered Allegation (2) not substantiated.

Allegation (3)

125. The concerned roof was previously private property. Upon the expiry of the land lease for the site of the building at the end of 1992, the Government started to make necessary arrangements with all the owners of the building to renew the lease. While the legal formalities regarding the regrant of the lease were in progress, the properties involved were temporarily vested in FSI, with LandsD handling those formalities on behalf of FSI. Meanwhile, the previous owner of the roof passed away and the legal personal representative did not complete the regrant formalities. As a result, the Government could not assign the title of the roof back to that representative.

126. In February and March 2010, the complainant complained to BD that water seepage from the roof had caused concrete spalling and corrosion of the steel reinforcement at the beams of her flat. After

investigation, BD also found noticeable cracks on the walls of the unauthorised structure on the roof. Its condition had deteriorated, rendering it potentially dangerous. In mid-March, BD wrote to LandsD and urged the latter to remove the unauthorised structure as soon as possible. Despite BD's subsequent reminders, LandsD took no action. In early August, LandsD replied to BD, refusing to remove the unauthorised structure on the grounds that FSI was not the permanent owner of the roof.

127. In mid-October, BD issued another reminder to LandsD. It was not until then that LandsD conducted a site inspection and sought legal advice.

Response from the Lands Department

128. LandsD explained that as FSI would eventually have to assign the title of the roof back to the legal personal representative of the previous owner, FSI never took possession of or used the roof. Hence, it should not be liable for any matters related to the roof. Moreover, as some people related to the previous owner (i.e. the occupants of the unauthorised structure) were still using the roof, the Government would not enter the unauthorised structure without the consent of the owner's legal personal representative or the occupants. Besides, the case involved complicated policy and legal issues. To find a feasible solution, LandsD had to seek legal advice on the removal of the unauthorised structure and the handling of the water seepage problem.

129. Subsequently, on receipt of the legal advice, LandsD took action against the legal personal representative of the previous owner and other relevant parties in April 2011. It ordered them to remove the unauthorised structure and to carry out the necessary repairs within a specified timeframe.

Conclusion

130. The Ombudsman was aware of the complicated legal issues involved. Nevertheless, as the agent of the current owner of the roof (i.e. FSI), LandsD had an obligation to resolve the problems as quickly as possible. It should not have let the complainant and other residents suffer from prolonged nuisance caused by the water seepage and face the hazards posed by the unauthorised structure.

131. In this incident, LandsD initially made no attempt to clarify the condition of the unauthorised structure or the responsibility of FSI. It also procrastinated in responding to BD's advice and reminders. LandsD argued that it had not taken any action because the Government was not the permanent owner of the roof. The Ombudsman considered this argument untenable. LandsD could have resolved the critical problems expeditiously with public funds and claim the expenses from the parties concerned afterwards. In any event, LandsD should protect public interest and ensure building safety rather than shying away from the problems.

132. In this light, The Ombudsman considered Allegation (3) partially substantiated.

Administration's response

133. FEHD and BD have accepted The Ombudsman's recommendations and taken the following follow-up actions –

(a) in March and August 2009, JO issued guidelines specifying that seepage cases should proceed to Stage III investigation without going through Stage II tests under two scenarios. As this case did not fit into the two scenarios, FEHD and BD had different opinions on whether to proceed to Stage III investigation without going through Stage II tests when handling this case. After reviewing the case, JO was of the view that it was appropriate to proceed to Stage III directly. In June 2011, FEHD reminded its staff that consent from the respective professional officer of BD should be sought prior to referral for stage III investigation in case of any deviations from the conditions prescribed in the above guidelines;

(b) in November 2011, FEHD modified the "Progress Monitoring System" to strengthen the monitoring of water seepage investigation progress, and instructed the Superintendent in each district to monitor the progress monthly through the system, which should be followed by necessary follow-up actions and reports to the headquarters. In light of The Ombudsman's recommendations, FEHD reminded the supervisory staff in the concerned district to be vigilant in monitoring the progress of investigation through the system and to take timely corrective actions. Staff of FEHD had

also been reminded to adhere strictly to JO's guidelines and timeframe in conducting seepage investigations;

(c) JO has located the relevant case file. JO has also studied and reviewed the file handling procedures of FEHD. The study revealed that the misplacement of the case file was due to the failure to record the file movement in the transfer of the case file from one officer to another. To avoid the loss or misplacement of case files, FEHD has reminded its staff to ensure proper transfer of files with proper record when there is a change in the case officer;

(d) LandsD clarified the FSI's position in this case and the procedures for recovery of the unauthorised structure with the Department of Justice and in-house solicitors. Two rounds of notices were served to require the related party of the ex-owner/occupant to remove the unauthorised structure, carry out repair works for the water seepage problem and vacate from it;

(e) through successive persuasions, the occupants agreed to hand over possession of the unauthorised structure to FSI;

(f) LandsD removed the unauthorised structure and, upon obtaining consent from the Incorporated Owners of the building concerned, carried out repair works with public funds to the roof and the part of the waterproofing layer which is commonly owned; and

(g) LandsD will seek to recover the costs involved when the legal representative of the ex-owner applies for assignment of the title of the roof from FSI.

Case 2011/3155A (Buildings Department) and 2011/3155C (Lands Department) - Shirking responsibility in clearing the platform and unauthorised building works of a stall

Case 2011/3155B (Food and Environmental Hygiene Department) - Failing to control the unauthorised extension of business area by a stall

Background

Details of Complaint

134. Since 2009, the complainant had repeatedly complained to the Food and Environmental Hygiene Department (FEHD), Lands Department (LandsD) and Buildings Department (BD) about the unauthorised extension of business area by a fixed-pitch stall (Stall A) erected against the external wall of a building. Stall A had a fixed-pitch hawker licence issued by FEHD. The extended portion of Stall A, comprising unauthorised building works (UBW) that encroached on the pavement, was occupied by an unlicenced hawker stall (Stall B).

The complainant alleged that –

(a) FEHD had failed to control the unauthorised extension of business area; and

(b) LandsD and BD had disagreed on the authority for clearing the platform and UBW of Stall B and shirked their responsibility, thus allowing the problem to persist.

Departments' Responses

Food and Environmental Hygiene Department

135. Under the Public Health and Municipal Services Ordinance (Cap. 132), no one shall hawk on the street except with a valid licence issued by FEHD.

136. FEHD considered that it was only responsible for overseeing the operation of Stall A. Hence, its enforcement actions had focused all along on obstruction of the street by the goods of Stall A. Stall B was operated within the UBW and did not constitute hawking on the street. FEHD, therefore, considered Stall B beyond its purview.

Lands Department

137. Under the Land (Miscellaneous Provisions) Ordinance (Cap. 28), LandsD is responsible for controlling any unlawful occupation of unleased land (i.e. Government land). LandsD admitted that it could act on its own and deal with Stall B's platform and display racks which were erected on the pavement. In July 2010, the department posted a notice to order the operator of Stall B to cease the occupation of Government land. Subsequently, the stall operator voluntarily removed a portion of the platform. Nevertheless, LandsD considered BD to be responsible for clearing the overhanging structure affixed to the external wall of the building in accordance with the Buildings Ordinance (BO) (Cap. 123).

138. LandsD explained that since all UBW were connected structurally, they could only be removed safely one by one from top to bottom. If LandsD acted on its own to remove the platform and display racks at the lower part of the stall, UBW installed above would be subject to the risk of collapse for lack of support. LandsD, therefore, needed to carry out a joint operation with BD to clear all UBW in a single operation.

Buildings Department

139. BD is empowered by BO to deal with UBW in private buildings.

140. BD noted that the overhanging structure belonged to the operator of Stall B, not the owners of the building. Together with the other parts of Stall B, they formed an integral structure erected entirely on the pavement. Under BO, unleased land and streets vested with the Government are exempt from its provisions. BD simply could not serve a removal order to the land owner (i.e. the Government) regarding UBW. BD, therefore, did not consider that it had the authority to take enforcement action.

The Ombudsman's observations

141. FEHD's initial refusal to take enforcement action against the unlicenced hawking on the street by the operator of Stall B was a total disregard of the obvious fact that the pavement was being occupied for unlicenced hawking. Subsequently, FEHD sought legal advice from the Department of Justice (DoJ). DoJ considered that FEHD could institute prosecutions against the operator of Stall B for unlicenced hawking after gathering sufficient evidence. This showed that FEHD's arguments for

not taking enforcement actions in the past were totally unjustifiable.

142. The Ombudsman, therefore, considered Allegation (1) against FEHD substantiated.

143. According to BD's analysis, all UBW of Stall B could be considered as one large object that occupied Government land. In such case, LandsD could have taken enforcement actions on its own and removed all UBW. Then there should not have been a need to worry about the technical difficulties involved in clearance by stages. At the same time, it was not outside BD's jurisdiction to deal UBW projecting from the external wall of a building. Based on the usual division of work between BD and LandsD in handling such kind of UBW, BD could have served a removal order on the title owners of the building's external wall. Any dispute between the owners and the stall operator should be resolved by themselves.

144. Evidently, both LandsD and BD had powers to take enforcement actions. If there were any doubts or concerns, they should have addressed the problems jointly in a proactive manner, rather than shifting the responsibility to each other. The Ombudsman, therefore, considered Allegation (2) against BD and LandsD substantiated.

145. The illegal activities revealed in this case were serious. The stall had expanded illegally to such an extent that it looked like a typical shop. Nevertheless, all the three departments involved were clouded by a compartmental mentality and they attempted to evade responsibility with such excuses as Government policy, limitation of powers and technical difficulties. Their performance was disappointing.

Administration's response

146. BD, FEHD and LandsD have accepted The Ombudsman's recommendations and implemented the following follow-up actions –

(a) FEHD would step up enforcement actions against the illegal extension of business and unlicenced hawking activities of Stall A. A total of seven prosecutions were initiated against the licensee of Stall A from October 2011 to March 2012. The illegal hawking activities in Stall B have ceased since early April 2012 with all hawking paraphernalia removed;

(b) in response to the comments in The Ombudsman's investigation report, BD has conducted a review to assess whether it is legally and administratively viable to invoke BO to deal with Stall B. BD had previously sought legal advice on a similar wall stall case from DoJ who was of the view that on-street wall stalls were exempt from the control of BO by virtue of section 41(1) as the area occupied by the wall stall structures was wholly on unleased Government land. BD therefore does not have power to take enforcement action in this case. The Ombudsman has indicated that BD could have served a removal order on the title owners of the building's external wall. BD considers that, even if the above legal consideration is disregarded, it would still be administratively difficult to take enforcement action under BO in this case. It is because if Stall A and Stall B were regarded as UBW on the exterior of the subject building under BO, they would be actionable items under the prevailing enforcement policy on UBW. It follows that, apart from Stall B, enforcement action should also cover Stall A which was covered by a valid licence issued by FEHD;

(c) nevertheless, BD agreed that it should work closely with LandsD to tackle the issue of UBW. For the present case, BD and LandsD had come to a consensus that LandsD would take clearance action against the unauthorised structures on public pavement whilst BD would provide expertise advice on the demolition work;

(d) the District Lands Office (DLO) concerned of LandsD posted a notice under section 6(1) of the Land (Miscellaneous Provisions) Ordinance on the unauthorised structures in March 2012, demanding the occupant to cease occupation of the government land; and

(e) DLO's site inspection in June 2012 revealed that all the unauthorised structures concerned on government land had been demolished and the clearance work had also been completed.

Consumer Council

Case No. 2010/3421 - (a) Referring a complaint to another organisation despite its statutory role to handle consumer complaints; and (b) Failing to properly follow up the complaint and being bureaucratic

Background

Details of Complaint

147. The complainant booked a package tour and paid a deposit. Later, staff of the travel agent informed him that the tour was cancelled due to low enrolment and recommended a more expensive package tour with the same departure date. He considered it unfair and complained to the Consumer Council (CC) and the Travel Industry Council of Hong Kong (TIC) against the travel agency.

148. CC replied the complainant that as his complaint was outside the purview of CC according to the mutual referral mechanism established between CC and TIC, CC would refer the case to TIC for handling. Subsequently, the complainant received from CC a copy of TIC's reply which he considered as merely repeating the travel agent's words. He was dissatisfied that CC had referred his complaint to another organisation and failed to follow it up properly.

Travellers' Complaints and Referral Mechanism

149. CC considered TIC to be able to handle complaints about travel agents more effectively and monitor the industry more closely because anyone who wants to operate as a travel agent in Hong Kong must first register as a member of TIC before applying for a licence.

150. Following several incidents of Mainland visitors being forced to make purchases at designated shops in Hong Kong in 2007, CC and TIC set up a working group with the Tourism Board, the Customs and Excise Department and the Police. The working group aimed to review relevant legislation to strengthen the legal grounds for protection of consumer rights as well as to establish a reporting mechanism of travellers' complaints. Since the new mechanism came into force, travellers' complaints are referred to the appropriate department or organisation according to their nature. CC and TIC are responsible for receiving and handling complaints from inbound travellers and resolving disputes

between travel agents and related businesses and the consumers.

151. According to the agreement between CC and TIC in 2007, if complaints lodged by inbound or outbound travellers are within the purview of TIC, CC will suggest to the complainants that they should approach TIC if they have not yet done so. In case the travellers request CC to refer their cases to TIC for follow-up actions, CC will first obtain their consent and then make the referral. The findings and proposed resolution will then be submitted to the complainants via CC.

Response from the Consumer Council

Allegation (1)

152. According to CC, its staff had followed the aforesaid referral mechanism and the internal guidelines set out in "Complaints outside the purview of CC" in handling this complaint. Besides, the case was referred to TIC with the complainant's consent. Therefore, CC considered referring the complaint to TIC not only appropriate, but also more efficient and direct. After referring the case, CC continued to check on the progress of the complaint handling. Unfortunately, the outcome was not what the complainant had expected.

153. The mode and referral arrangements adopted by CC and TIC for handling travellers' complaints have been effective in achieving the objective to protect consumer rights. CC has also reminded travellers on its website and in the recorded messages on its hotline that they could lodge a complaint with TIC if they received any unfair treatment by their travel agents.

Allegation (2)

154. After receiving the complaint, CC staff had stayed in touch with TIC to resolve the issue and tried their best to assist the complainant. CC, therefore, had not failed to properly follow up the complaint, nor had it been bureaucratic.

155. The complainant suggested that CC should convey its views to problematic travel agents or publish articles to expose how they exploited consumers in its monthly publication Choice as a deterrent. CC explained that it had from time to time been reminding consumers what they should pay attention to when making travel plans and had already published articles on this subject in "Choice".

The Ombudsman's observations

156. Under the referral mechanism established between CC and TIC, the latter is responsible for handling complaints against licenced local travel agents. The Ombudsman, therefore, found no evidence of impropriety in CC's referral of this complaint to TIC for handling. Besides, TIC could penalise its member agents for confirmed violation of rules. In terms of effective utilisation of resources, it was not unreasonable for CC to refer the complaint to TIC.

157. In fact, upon receiving the complaint, CC immediately referred the case to TIC for follow up. There was no maladministration on its part. On the other hand, the travel agent also tried to resolve the dispute by offering a concession to the complainant, only that the complainant did not accept it. The Ombudsman considered CC to have performed its statutory function in handling the complaint. As regards TIC, it was not within The Ombudsman's jurisdiction and so The Ombudsman would not comment on how TIC handled the complaint.

Administration's response

158. The recommendations from The Ombudsman aim to enhance the dissemination of information on how complaints made by travellers are handled by CC. CC accepted both recommendations and has implemented the following measures –

(a) the guidelines set out in "Complaints outside the purview of CC" have been revised to provide clearer guidance for staff in their handling of cases which may not fall within CC's purview; and

(b) CC's website has also been updated to show information on the referral mechanism between CC and TIC.

Case No. 2011/1339 - Delay in handling a complaint about compensation for real estate development

Background

Details of Complaint

159. The complainant previously lived in a building to be redeveloped by a real estate developer. She was dissatisfied with the compensation package offered and considered that the developer had not properly replied to her enquiries. In early 2010, she lodged a complaint with CC. Despite her subsequent provision of supplementary information and emails urging CC to take action, there had been no progress and CC had not told her what follow-up action would be taken on her case. She alleged that CC had delayed handling her complaint.

Response from the Consumer Council

160. The complainant sent emails to CC to enquire about the unsatisfactory compensation package offered by the developer. She also asked about application for the Consumer Legal Action Fund (CLA Fund). Her case was classified by CC as an "enquiry". As the complainant had not been able to provide the necessary information and documents requested by CC, her case had never been treated as a "complaint" and no mediation arrangements had been made.

161. The case officer concerned had taken long leave from June 2010 to April 2011 and later resigned. While he was on leave, CC had assigned its Screening Unit to keep watch on any correspondence and emails that might be sent by the complainant but none had been received. CC thought that the case officer had already replied to the complainant before taking leave and thus completed the handling of her "enquiry".

162. CC explained that the complainant did send two emails while the case officer was on leave. However, it was not aware that the case officer had mistakenly used his personal staff email address instead of the council's email address to communicate with the complainant. As a result, the emails had gone unnoticed. The officers who subsequently took over the case had also failed to check the status of the case before closing it. According to CC, it would check the personal staff mailbox of ex-serving officers or those away from their positions for a long period so that work-related messages would not be missed or left unattended causing undue delay. The officer who handled the complainant's case had

extended his vacation leave several times and his supervisor was not sure how many leave days he would need to take. To protect the officer's privacy, CC had not activated the mechanism to check his mailbox.

163. CC admitted that the case had not been handled satisfactorily. It had reminded supervisors to check staff members' personal staff mailboxes for work-related messages from the effective dates of their departures so that outstanding cases could be reassigned to other officers. Staff members taking any leave for more than five days should also ask their colleagues to help check whether there are work-related messages in their mailboxes and attend to urgent cases where necessary. In September 2011, CC issued a circular to staff members reminding them to advise enquirers to send emails to the CC's official email address.

164. CC added that the complainant had also submitted an application for CLA Fund in July 2010 and its Legal Affairs Division processing the application had been handling the complainant's relevant enquiries. On the whole, CC considered that the complainant's case had been properly attended to and followed up.

The Ombudsman's observations

165. CC could not confirm whether the complainant's case was within its ambit after working on the case for several months (from early 2010 to June 2010). It also failed to give the complainant a specific reply. Although there might not be actual delay during this period in replying to the complainant, the situation was far from satisfactory. In addition, the two emails sent by the complainant while the case officer was on leave were missed out.

166. In fact, had the case officer's personal staff mailbox been checked properly, CC would have known that the complainant's case did not fall under its definition of "consumer". It should then be able to reply to the complainant immediately, advising her to seek independent legal advice and then close this "enquiry" case. However, CC had not taken the initiative to check the officer's personal staff mailbox on the grounds that it could not confirm for how long the officer was taking his leave and that his privacy had to be protected. His supervisor apparently lacked vigilance. Moreover, CC failed to monitor or give instructions to staff members regarding leave or exit arrangements as well as the proper use of email addresses.

167. The Ombudsman could not accept that CC attributed the delay in handling the "enquiry" to the complainant's failure of providing the necessary information. In fact, the complainant's provision of specific information, if any, could only have a bearing on when CC would turn her "enquiry" into a "complaint" or to decide to close the case. It had no bearing on whether CC had handled the complainant's "enquiry" in a proper and timely manner.

168. While CC claimed that it had guidelines and performance pledges for handling "enquiries" and that it had responded the complainant's enquiry, it also stated that this "enquiry" case was, in fact, the one left behind by the case officer concerned pending follow-up action. This showed that CC had still not come to a conclusion as to whether the case was closed.

169. The Ombudsman considered there to be a number of slips on the part of CC in handling the complainant's case and The Ombudsman also discovered systemic problems. For example, the complainant's two emails had gone unnoticed because the work of the departing case officer had not been followed up. Obviously, it was a systemic management problem but CC attributed it to the errors of individual staff members and inadequate information provided by the complainant. This reflected CC's reluctance to acknowledge the problem and accept its responsibility.

Administration's response

170. CC has accepted all three recommendations from The Ombudsman. CC's Operation Manual on Handling of Complaints and Enquiries has been revised, setting out in detailed arrangements for handling complaint cases and tracking of case progress while subject staff are on leave or have resigned. A general mail box has also been set up such that email correspondences with enquirers can be retrieved more easily for better tracking and record. Staff are required to use the general mail box for sending and receiving emails with necessary details for identification of cases. In addition, the target response time to written enquiries and the target lead time for issuing replies have also been highlighted in the Manual. Furthermore, extra manpower has been allocated to the screening team under the Complaints & Advice Division, which is responsible for the handling of all written enquiry cases. The team supervisor holds weekly meetings with team members to discuss and closely monitor case progress, which can also be checked in the computerised case management system. CC is planning to enhance the

case management system by issuing alerts on outstanding enquiry cases in order to better ensure that performance pledges are met.

Correctional Services Department

Case No. 2011/2957 - Unreasonably prohibiting an inmate from making telephone calls to his family aboard

Background

Details of Complaint

171. The complainant, an expatriate inmate, alleged that the management of the institution had unreasonably prohibited him from making telephone calls to his family in Europe. He was required to produce a letter from his wife for the management's consideration or to make his request via his Consulate.

Response from the Correctional Services Department

Convention and Rules

172. Neither the "Standard Minimum Rules for the Treatment of Prisoners" (Minimum Rules) adopted by the United Nations nor the Prison Rules (Cap. 234A) contain any provision governing inmates' requests to make telephone calls. CSD Standing Orders state that such requests are to be considered on their own merits, with reference to whether the inmate has a "genuine need for timely communication with his friends and relatives".

173. CSD stressed that expatriate inmates' geographical distance from their families is only one of the various factors for consideration. The department cited two Court of Appeal cases to support its stance that expatriate inmates should not be given "preferential treatment" of being allowed more frequent telephone communication with their family members and friends as compared with local inmates.

The Event

174. CSD records show that between late February and early June 2011, the complainant had been allowed to make telephone calls to his wife (four calls), his lawyer and the Consulate for seven times. When he made a further request in mid-July, the officer concerned noted that he had received more than 30 letters and 10 social visits since his admission in January. As he could not provide additional information to justify his latest request, the officer declined the further request.

175. The officer denied having asked the complainant to produce letters from his wife or to make his request via his Consulate. He only advised him to provide supporting documents such as incoming letters to facilitate the management's consideration of his request.

The Ombudsman's observations

176. The management had indeed exercised discretion in allowing the complainant to make telephone calls between February and June 2011. Furthermore, his request in July was not rejected outright; he was asked to provide additional information as justification when the officer apparently had doubts whether that was a bona fide request. The officer's action was in accordance with CSD Standing Orders.

177. In this light, The Ombudsman considered the complaint unsubstantiated.

Other observations

178. Nevertheless, it was widely recognised that allowing inmates' regular contact with their families helped preventing alienation and assisted rehabilitation. Most expatriate inmates were in fact in a disadvantaged position compared with local inmates that their chance of having regular visits by family members was much lower because of geographical distances. Consequently, they had to rely more on telephone as a means of contact with their families.

179. The two court cases cited by CSD only illustrated that expatriate inmates should not be given preferential treatment regarding their sentences of imprisonment. It should not be confused with the issue of equal opportunity for a disadvantaged group of inmates to have contact with their families and friends.

180. CSD should aspire to higher standards instead of just meeting the Minimum Rules, which was drawn up back in 1955. Besides, it was practically difficult for expatriate inmates to provide supporting documents such as letters from family members, especially in case of emergency, not to mention that it was difficult to verify the authenticity of such documents and that their contents might not be always comprehensible if written in a foreign language. Therefore, there is a high degree of arbitrariness in the current system of relying on individual officers' discretion in handling inmates' requests to make telephone calls.

Administration’s response

181. CSD has accepted The Ombudsman’s recommendation and formed a task group to review its system of handling inmates’ requests for telephone communication with their family members and friends.

Department of Health

Case No. 2010/4919: Allowing the Hospital Authority to conduct clinical trials of a medicine without a clinical trial certificate

Background

182. In early 2010, the Drug Safety Consortium (DSC) lodged a complaint to the Department of Health (DH) about the clinical trials by hospitals under the Hospital Authority (HA) without a clinical trial certificate on "Avastin" for the treatment of Wet age-related macular degeneration. DSC stated that "Avastin" is a registered drug for the treatment of colon cancer. If it is used for other diseases, there should be proper regulations. Furthermore, DSC considered that as "Avastin" needs to be split into several doses for the treatment of Wet age-related macular degeneration, there is a risk of contamination if the drugs are not properly stored.

183. DH responded to DSC that DH was aware some institutions did not have clinical trial certificates and had already issued letters to remind them. DSC, however, was not satisfied that DH had not taken substantive actions to rectify the problem, and therefore lodged a complaint with The Ombudsman.

The Ombudsman's observations

184. The Ombudsman considered that "Avastin" had already been registered by the Pharmacy and Poisons Board (the Board) for the treatment of colon cancer. Prescription of "Avastin" by doctors for the treatment of Wet age-related macular lesion (which is considered as "off-label use") is not an offence in Hong Kong. Prior approval from regulatory authority is not required. However, doctors must ensure that the prescribed drugs are safe and appropriate for patients, and must provide clear explanation to the patients before use. The professional conduct of doctors, including prescription of drugs, is regulated by the Medical Council of Hong Kong.

185. Regulation 36 of the Pharmacy and Poisons Regulations (the Regulations) (Cap. 138A) under the Pharmacy and Poisons Ordinance (the Ordinance) (Cap. 138) stipulates that all pharmaceutical products intended for sale in Hong Kong must be registered by the Board to ensure its safety and efficacy.

186. Regulation 36B stipulates that for the purpose of conducting clinical trials on human beings or medicinal tests on animals, written application shall be made to the "Pharmacy and Poisons (Registration of Pharmaceutical Products and Substances) - Certification of Clinical Trials/Medicinal Test) Committee" (the Committee) under the Board. If eligible, the Committee will issue a clinical trial certificate or medicinal test certificate (the Certificate). DH is the administrative arm of the Committee.

187. Regulation 40 stipulates that contravening certain specified provisions of the Regulation is an offence and liable on conviction to specified penalties. However, the provisions in Regulation 40 do not cover Regulation 36B.

Administration's response

188. DH is working on the relevant legislative amendments to the Pharmacy and Poisons Ordinance to implement the recommendations from the Review Committee on Regulation of Pharmaceutical Products in Hong Kong. A Regulatory Impact Assessment on the proposed amendments is being conducted by the consultant to assess the technical feasibility of the proposed amendments and its impact on the community and stakeholders.

189. In parallel, DH has requested the consultant to engage and seek views from stakeholders regarding the addition of penal provisions to Regulation 36(B)(1) of the Pharmacy and Poisons Regulations, with a view to obtaining more comprehensive opinion on the issue.

190. DH has submitted progress reports to The Ombudsman in January, May and August 2012.

Employees Retraining Board

Case No. 2011/1759 - Mishandling a complaint against the poor staff attitude of an organisation under its purview, and unreasonably refusing to provide relevant information

Background

191. In March 2011, the complainant complained to the Employees Retraining Board (ERB) about the provision of incorrect information on training courses by the staff of Training Body A and the poor attitude of Training Centre Manager B of Training Body A in handling the matter. In May, ERB stated that upon investigation, there was no evidence to substantiate the complaint against the poor attitude of Manager B. Such reply is copied to Training Body A.

192. The complainant was of the view that ERB's investigation result did not reflect the actual situation and that her complaint had not been properly handled. The complainant also considered that ERB had been unfair to her by copying the reply to her to Training Body A without obtaining her prior consent. Besides, the complainant requested ERB to provide her copies of the correspondences between ERB and Training Body A. ERB refused on the ground that the information was internal investigation documents. The complainant considered the explanation unreasonable.

193. After studying the preliminary information provided by ERB, The Ombudsman decided in August 2011 to conduct a full investigation into the case.

The Ombudsman's observations

194. On the complainant's allegations against Training Body A, ERB had conducted investigation and sought responses from Training Body A and its concerned staff. After the investigation, ERB had replied to the complainant, setting out its findings and observations. ERB had also followed up on and responded to the dissenting views of the complainant. The Ombudsman considered that ERB had properly followed up the complaint. The Ombudsman also accepted ERB's explanations for copying the reply letter to Training Body A in order to keep the latter informed of the investigation result, and that it was not improper for ERB to do so.

195. On the complainant's request for copies of the correspondences between ERB and Training Body A on the case, acceding to the request would not be in line with the established understanding between ERB and its appointed training bodies. Considering that disclosing information to the complainant would prejudice its efficient operations, ERB refused the complainant's request in accordance with Section 8.6(c) of the ERB's Code on Access to Information (the Code) which has a provision relating to "information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of the ERB". The Ombudsman was satisfied that it was not improper for ERB to do so.

196. ERB also took into account Section 8.11(a) of the Code which provides that "information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed." in refusing the complainant's request. The Ombudsman considered that the section was only applicable to the information provided by Training Body A to ERB, but not to the information provided by ERB to Training Body A.

197. It was unsatisfactory for ERB failing to explain to the complainant in detail the justifications for refusing to disclose information and the arrangements for reviewing her requests in the first instance. On this, ERB had apologised to the complainant.

198. It was slightly insufficient for ERB to just quote the relevant sections of the Code in its reply in September to the complainant when it refused the complainant's request without explaining in detail how the disclosure of the requested information would prejudice the efficient operation of ERB.

Administration's response

199. ERB has accepted The Ombudsman's recommendation. In September 2011, ERB conducted a briefing session on the Code for its staff to ensure that related requests would be processed in accordance with the Code and relevant internal guidelines. ERB would also conduct training and circulate the relevant guidelines regularly to remind its staff of the need to adhere to the Code when processing information access requests.

Environmental Protection Department

Case No. 2011/1723 - Rejecting the complainant's applications for the Quality Powered Mechanical Equipment labels in respect of some second-hand generators on the basis of unpublished assessment criteria

Background

Details of Complaint

200. The complainant was a plant and machinery leasing company. In 2008, it applied to the Environmental Protection Department (EPD) for the Quality Powered Mechanical Equipment (QPME) labels in respect of some Japanese-made second-hand generators it had purchased. Some of the applications were turned down because the manufacture dates of those generators were earlier than the date of the certification letter issued by the Japanese authorities to generators of the same type. The complainant alleged that EPD had failed to state clearly on the application form the requirement regarding the manufacture date of the equipment.

201. In early 2011, the complainant applied for the QPME labels in respect of another batch of Japanese-made second-hand generators. However, 18 of the applications were denied because, according to EPD, they were relatively aged. The complainant alleged that EPD had never published any new requirements regarding the age of equipment.

Response from the Environmental Protection Department

QPME Label Scheme

202. Powered machines awarded QPME labels are those that have been issued a Declaration of Conformity by any European Community member country or a certification letter by the Japanese authorities certifying them as low noise models under the revised quality standards. Such machines are quieter when in operation, more environmentally friendly and have better mechanical performance.

203. The QPME Label Scheme was launched by EPD in 2005. Applications should be accompanied by relevant conformity documents and a noise emission test certificate or report on that particular type of equipment. To prevent abuse of QPME labels, EPD was considering measures to optimise and improve the Scheme, for example, to require that

maintenance records or a noise emission report be submitted as well for applications regarding equipment more than five years old. Consultation with the industry on this would be conducted as soon as possible.

The Complainant's Application

204. In 2008, the complainant applied for QPME labels in respect of a batch of Japanese-made second-hand generators. Six of the generators were manufactured before the date of the certification letter issued by the Japanese authorities to that particular type of generators and so did not get the Japanese certification. Consequently, EPD refused to award QPME labels to them as it was not sure that they conformed to the revised Japanese quality standard.

205. In 2011, the complainant applied for QPME labels in respect of another batch of second-hand generators which, though certified by the Japanese authorities, had been in use for many years. EPD considered that aged machines would be noisier and lower in environmental efficiency, hence without the "quality" element. In fact, with regard to the service life of powered mechanical equipment, the Japanese authorities had recommended five years as an indicator; while other countries suggested six years as the maximum life with reference to their relevant guidelines on cost-effectiveness. Besides, equipment designated as QPME could only enjoy tax concessions for five years under the Inland Revenue Ordinance (IRO) (Cap. 112). EPD, therefore, refused to award the QPME labels to 18 of the generators which had been in use for over five years.

The Ombudsman's observations

206. EPD had explained in 2008 that the six generators were not awarded QPME labels because they failed to obtain the Japanese certification. Although this might be related to their manufacture dates, it was not EPD's cited reason for rejecting the applications. There was, therefore, no impropriety in the department not listing the manufacture date as an assessment criterion on the application form.

207. The Ombudsman considered the complainant's allegation unsubstantiated in this regard.

208. As for the 2011 applications, it was inappropriate for EPD to have used the age restriction, which was still awaiting consultation and yet

implemented, as the reason for not issuing QPME labels to those 18 generators. Furthermore, as the authority to assess the quality of powered machines, EPD should not have used the tax concession that such equipment could enjoy under IRO as a factor in deciding whether to award QPME labels. Such reliance amounted to putting the cart before the horse.

209. The Ombudsman, therefore, considered this part of allegation substantiated.

Administration's response

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

(a) EPD completed the consultation with the trades in mid-2012, and would consider fine-tuning the proposed refinement on the criteria for QPME labels in response to comments received from the trades. EPD would finalise the refinement in 2012 for implementation in 2013;

(b) EPD updated the relevant information concerning the applications of aged or second-hand equipment on the QPME webpage, the application form and the "Checklist in Sending Application for QPME Label" for the applicant's reference; and

(c) EPD stated explicitly in its QPME webpage that satisfying all the relevant requirements including the sound level limits of the European Union and the Ministry of Land, Infrastructure, Transport and Tourism of Japan were the basic requirements for considering a piece of equipment as a QPME. The public may access such information via the "hyperlinks" available from the EPD's QPME webpage.

Food and Environmental Hygiene Department

Case No. 2011/0657 - (1) Failing to revoke the licence of a restaurant which illegally extended its business area; and (2) Allowing the restaurant to set up an outside seating accommodation area despite its serious violation of restrictions

Background

Details of Complaint

211. Restaurant A had often illegally extended its business area to the pavement at night, causing serious obstruction and other problems. The complainant reported the problems to the Food and Environmental Hygiene Department (FEHD) many times, but the situation never improved. He was dissatisfied that the Department not only failed to revoke the restaurant's licence (Allegation (1)), but also allowed the restaurant to set up an alfresco dining area to operate from 11 am to 11 pm every day (Allegation (2)). The restaurant continued to conduct business both within and outside the specified area well after the time limit at night. The complainant considered that FEHD was lax in its control over the restaurant.

Illegal Extension of Business Area

212. Restaurant A, operating in a locality where restaurants often illegally extended their business areas at night, had been identified by FEHD as a black spot. For such black spots, FEHD conducted surprise inspections from time to time. In addition to prosecutions, FEHD would penalise those restaurants convicted by the Court and having accumulated a certain number of points under the department's Demerit Points System. The penalties include temporary suspension or even revocation of licence.

213. Between February 2009 and August 2011, FEHD had conducted 32 surprise inspections on Restaurant A and instituted seven prosecutions. The operator had been tried by the Court on one offence and convicted. FEHD indicated that under its Demerit Points System, the restaurant might lose its licence if it was also convicted of the other six offences.

Approval of Alfresco Dining Area

214. Under established procedures, when a restaurant applies for setting up an alfresco dining area, FEHD will consult the relevant

Government departments and the public. The application may be approved if no objection has been received and if the restaurant meets the licensing requirements. Any records of offence will not affect its application.

215. Since July 2010, Restaurant A had been granted approval to set up an alfresco dining area, bounded by a "yellow box" outside its premises. When assessing the restaurant's application for setting up an alfresco dining area, FEHD had not taken into account the fact that the restaurant had already been identified as a black spot.

The Ombudsman's observations

216. FEHD had indeed taken enforcement actions against Restaurant A. However, FEHD's regular inspections were conducted largely at non-peak hours of the restaurant, while its surprise inspections were taken only once a month on average and mostly before 11 pm. Such actions simply could not curb the restaurant's illegal extension of business area. As a result, the effectiveness of the Demerit Points System would be compromised.

217. The Ombudsman, therefore, considered Allegation (1) partially substantiated.

218. FEHD, in considering Restaurant A's application for setting up an alfresco dining area, should not have ignored the fact that it had already been identified as a black spot for blitz operation against illegal extension of business area, and that before obtaining FEHD's approval, Restaurant A had been prosecuted twice for illegal extension of business area after 11 pm. After the application was approved, Restaurant A continued to ignore the restrictions regarding business hours and area, which showed that FEHD's approval of the restaurant's application only encouraged further offence and aggravated the situation.

219. The Ombudsman, therefore, considered Allegation (2) substantiated.

Administration's response

220. FEHD has accepted the four recommendations from The Ombudsman and implemented the following follow-up actions –

(a) FEHD has been tackling the problem of street obstruction caused by illegal extension of business area by food premises during night time proactively. With a view to tackling the problem more effectively, FEHD identifies the localities where illegal extension of business area by food premises are more serious as black spots, and conducts blitz enforcement operations from time to time, in particular during peak hours of business;

(b) apart from providing past conviction records, FEHD will also provide photos showing the ground situation of the illegal extensions of business area by the food premises being prosecuted to appeal to the Court for a heavier fine;

(c) upon receiving an application for outside seating accommodation (OSA) from a licenced restaurant, FEHD will refer it to the concerned Government departments for comment and conduct public consultations. If the departments and the local community have no objection and the applicant has complied with all licensing requirements, FEHD will approve the application. If the restaurant illegally extends its business area persistently, leading to objection from the concerned district council members, area committee members or local residents, FEHD will consider the restaurant's records of illegal extension of business area and reasons of objection from the community to decide whether to reject the OSA application. The objective of granting approval for alfresco dining outside restaurant premises is to put the OSA under regulatory control. Once an approval is granted, the licensee is required to observe the relevant licensing conditions. Furthermore, if the licensee breaches the relevant provisions on the extension of food businesses, FEHD will institute prosecution against him, and will suspend or even cancel his licence under the Demerit Points System in case of repeated offences. In this regard, FEHD issued a new guideline in May 2012 which stipulates the following – in case a licenced food premises is located in a black spot of illegal OSA and has a poor track record of repeated offences of illegal OSA, when an application for licence is received after cancellation of the licence in the same premises, FEHD will impose an additional requirement to prohibit encroachment on any government land or common passageway outside the premises. If illegal extension of

business area is detected subsequently, the additional requirement will be considered breached. Apart from taking enforcement actions, FEHD will consider suspending the licence until the irregularity has been rectified for a period of time; and

(d) FEHD will closely monitor the operation of restaurants granted with OSA approval and take appropriate enforcement actions to ensure full compliance with the relevant licensing conditions.

Case No. 2011/0898 - Failing to remove a roadside stall erected against a flank wall of the complainant's ground-level shop and asking the complainant to apply to the Court for a removal order himself

Background

221. The complainant intended to carry out building works to add an entrance and ramp at a flank wall of his ground-level shop against a wall stall (the Wall Stall). The complainant claimed that he had requested FEHD to remove the Wall Stall since May 2008 but FEHD asked the complainant to apply to the Court for a removal order by himself to force the relocation of the Wall Stall. The complainant alleged that FEHD had mishandled his case and unreasonably asked him to apply to the Court for a removal order on the relocation of the Wall Stall.

The Ombudsman's observations

222. In 1970s, the then Urban Council (UC) conducted a one-off exercise of licensing of wall stalls so that licenced stalls could operate on specified Government land. Nevertheless, if objection is raised by the owner of the concerned building before the issuance of the licence, the authority would not issue the licence.

223. In 1976, UC agreed that the following provision be included in the licence of a wall stall – "Any disputes over the use of any part of the stall between the licensee and a private land owner have to be resolved between the parties and UC disclaims any responsibility or liability in such a dispute." UC discussed the request for relocation raised by a building owner after a wall stall had been licenced in 1983, and agreed that in order to protect the interest of licenced wall stall operators, building owners should obtain Court Orders by themselves for the removal of objected wall stalls. In 2000, FEHD was established replacing the then Urban Services Department (USD). FEHD had followed the same policy from UC.

224. In 2004, the High Court ruled in a case concerning a licenced wall stall against the external wall of a private building that the building owner concerned enjoyed the right of possession of a vacant external wall (i.e. to use the external wall without any hindrance), and that the wall stall hawker was required to remove his wall stall from the external wall of the building or to move the stall substantially away from the wall.

225. FEHD in 2005 decided not to renew the wall stall licence of a hawker involved in another similar dispute case, and requested the hawker to identify another location for operation. The hawker later lodged an appeal with the Municipal Services Appeals Board (the Board) against the FEHD's decision. The Board overturned FEHD's decision on the basis that the concerned ground floor building owner might not possess the absolute sole ownership to the external walls of the building. Furthermore, FEHD already had the policy that building owners should obtain Court Orders for the removal of wall stalls. Such a policy enabled FEHD to avoid having to make judgment without sufficient evidence provided by the parties concerned on the ownership of external walls of a building. FEHD thereby continued to pursue the policy of requiring building owners to apply for Court order by themselves.

226. For the present case, USD received an application for issue of a wall stall licence in respect of the Wall Stall in October 1976. Since no objection by the owner of the building was received and specific licensing conditions had been fulfilled, USD issued the licence to the applicant. FEHD has no record showing the complainant's objection to the Wall Stall in 1982 as purported by the complainant. The complainant was also unable to submit a copy of such objection letter. FEHD followed the policy that if the complainant raised objection to the Wall Stall, the complainant should obtain a Court Order for the relocation of the Wall Stall.

227. The Ombudsman agreed with FEHD's prudent practice that unless there was sufficient evidence proving that the owner of the building enjoyed absolute sole ownership to the external walls of the building, the Department should not make a judgment on the ownership issue. Hence, FEHD can in no way hastily relocate the Wall Stall just because there is a request by the complainant.

228. For the present case, the complainant could not prove that he enjoyed absolute sole ownership to the external wall of the building nor can he provide a copy of the objection letter. Due to the uncertainty of the ownership of the external wall and with reference to the deliberation of the Board for the case in 2005 aforementioned, there were practical needs and reasonable grounds for FEHD to follow UC's policy that the complainant was required to apply to the Court for a Removal Order by himself.

229. Although it was not unreasonable for FEHD to advise building owners to obtain a Court Order for the removal of a wall stall by themselves, going through judicial procedures would incur time and cost, and that some owners may not be able to do so. The Ombudsman suggested that FEHD should handle each case with flexibility according to individual merits. For instance, if a building owner has sufficient evidence proving that he possesses sole ownership to the external wall of the building and the case was not involved in pecuniary argument on rental matters, FEHD would not have to rigidly require the building owner to obtain a Court Order for the removal of the wall stall. DoJ's advice could also be sought if necessary.

230. Besides, The Ombudsman noted that in FEHD's replies to the complainant, it repeatedly disclaimed any responsibility or liability concerning the dispute between the licensee and the building owner. The Ombudsman considered that such expression in the letters would make the complainant feel that FEHD kept itself aloof from the matter. Given that the hawker cannot operate at the Wall Stall without securing a licence from the FEHD, it would be difficult for FEHD saying that it has nothing to do with the matter. The Ombudsman considered that FEHD should clearly explain to the complainant the reason why he was required to apply to the Court for a removal order by himself as well as the importance of providing evidence on ownership of the building wall in question.

Administration's response

231. FEHD has taken the following actions on the two recommendations –

(a) FEHD is seeking legal advice on the recommendation on trying to verify the ownership status of the wall in question; and

(b) FEHD has accepted the recommendation on further explaining to the owners on the need to apply for court orders themselves, and has reminded its staff to be active and positive when answering enquiries in accordance with the prevailing policies.

Case No. 2011/3097 - Failing to properly follow up a complaint about illegal dumping of refuse in front of shops and on pavement at midnight

Background

232. The complainant lodged a complaint with The Ombudsman on 7 August 2011 against FEHD, alleging that shop operators often dumped refuse in front of the shops and on the pavement in the vicinity of certain parts of a certain district (the subject location) at midnight, leading to rodent and pest problems.

233. The complainant had lodged a complaint with FEHD through the 1823 Call Centre but there was no improvement.

The Ombudsman's observations

234. In response to the complaint lodged by the complainant on 8 June 2011, FEHD did follow up the case in various ways in the subsequent period between June and August 2011, including conducting inspections, taking out prosecutions, performing cleansing works, conducting pest control measures and health education. However, FEHD staff still found abandoned refuse each time when carrying out inspections at midnight around the time mentioned by the complainant. Apparently, the then situation did not have remarkable improvement. There was only one Fixed Penalty Notice issued by FEHD staff against illegal dumping of refuse by a shop operator, the law enforcement was insufficient and illegal dumping of refuse on roadside by shop operators persisted. FEHD strengthened the actions after the complainant lodged a complaint with The Ombudsman on 7 August 2011, including increasing the frequency of collection of refuse from the subject location by refuse collection vehicles from once to twice a night, issuing advisory letters to shop operators at the subject location, and meeting and advising shop operators to refrain from illegal dumping of refuse which were subject to prosecution. The situation had since been much improved.

235. In view of the above, The Ombudsman considered the case partially substantiated.

236. Under the current practice, shops have to dispose of the refuse by themselves but the location and the operation time of the nearby refuse collection points could not cope with the needs of the shops at the subject

location whose business operated till midnight. Some inconsiderate shop operators might dump the refuse on roadside for convenience. The Ombudsman opined that FEHD should step up inspection so as to gather sufficient evidence for prosecutions in order to curb the malpractices.

Administration's response

237. FEHD has accepted The Ombudsman's recommendations and taken the following actions –

(a) FEHD has stepped up midnight inspections and enforcement actions at the subject location; and

(b) FEHD has continued to regularly advise the shop operators at the subject location to refrain from illegal dumping of refuse which is subject to prosecution.

Case No. 2011/4017 - (1) Delay in handling a case of dripping air-conditioner; and (2) Failing to respond to the complainant's telephone messages in a timely manner

Background

238. The complainant lodged a complaint to FEHD concerning water dripping from air-conditioners of upper floors, which caused noise nuisance and affecting her sleep. However, FEHD staff (Staff A) delayed the investigation, and hence the dripping problem persisted.

239. The complainant tried to call Staff A on several occasions but no one answered the phone. Despite leaving telephone messages, the complainant had not received any return call.

The Ombudsman's observations

240. FEHD has formulated clear procedural guidelines on how to follow up complaints against dripping from air-conditioners and set out a reasonable timeframe for issuing "Notice of Appointment" and "Notice of Intended Entry". However, Staff A failed to follow the procedural guidelines and conducted only a few visits. Staff A also failed to keep a copy of the "Notice of Appointment" according to the procedural guidelines.

241. During investigation, Staff A had once left a "Notice of Appointment" at the premises under complaint for making an appointment of visit. However, the occupier did not accede to the request. According to the departmental guidelines, Staff A should have issued the more stringent "Notice of Intended Entry" which indicated the preparedness to escalate the investigation. However, Staff A still issued the "Notice of Appointment" again, instead of the "Notice of Intended Entry", even after not being able to inspect the premises in the fourth visit, thus resulting in a delay in the investigation.

242. Investigation on dripping from air-conditioner is under FEHD's jurisdiction. It is fair and reasonable to seek assistance from the management office concerned. However, the information so obtained may not be as important as the evidence collected by an investigation officer. In this case, it was imprudent for Staff A relying on the information from the Management Office instead of conducting personal inspection in the premises under complaint to collect evidence on her own.

243. Dripping from air-conditioners often only occurs in summer. Upon receiving a complaint, FEHD staff should carry out prompt investigation to identify the source of nuisance, collect sufficient evidence and take enforcement action against the offender so as to abate the nuisance before the end of summer. However, in this case, the slack and perfunctory working attitude of Staff A would lead to an impression that the delay of the investigation was done intentionally.

244. Staff A had contacted the complainant from time to time. However, it is inappropriate for any public officer not calling back complainant after receiving telephone message. An interim reply should be given even though there is no significant case progress.

245. The Ombudsman, therefore, considered the two allegations substantiated.

Administration's response

246. FEHD has accepted The Ombudsman's recommendation and taken the following actions –

(a) FEHD has instructed the subject officer to handle complaints proactively and to conduct personal inspection to enhance the effectiveness of investigation; and

(b) FEHD has contacted the complainant and taken appropriate action to follow up on the complaint case based on the information provided.

Case No. 2011/5091 - Failing to effectively control a shop with illegal extension of business, thus causing persistent pavement obstruction

Background

247. According to the complainant, a dispensary (Shop A) at a particular area had been persistently placing goods outside the shop for sale and illegally occupying the pavement, thus causing obstruction. As the frontage of the shop was an area where pedestrians waited to cross the road, the illegal extension had forced some pedestrians stepping out onto the road. Upon lodging a complaint with FEHD, FEHD staff stated that the shop owner had been warned and summoned, but the illegal extension still persisted. The complainant considered that FEHD failed to solve the problem.

248. In addition, the complainant questioned why FEHD did not confiscate the goods that the shop had placed on the street for sale, which they did when prosecuting unlicenced hawkers.

The Ombudsman's observations

249. FEHD certainly had taken enforcement actions against Shop A. Recent inspection by staff of The Ombudsman, however, found that Shop A still illegally occupied the pavement in front of the shop by placing goods for sale thereat. This showed that the shop was a habitual offender.

250. FEHD's current enforcement actions were obviously not strong enough to serve as a deterrent to the shop. Moreover, Shop A was situated at a location where pedestrians would wait for crossing the road. The shop's illegal occupation of the pavement undoubtedly posed a danger to pedestrians. The Department should therefore take stringent enforcement actions against Shop A's illegal extension so as to keep the pavement free from obstruction and protect the safety of the pedestrians.

251. In view of the above, The Ombudsman found the complaint partially substantiated.

252. Regarding the complainant's questions, The Ombudsman noted the following relevant provisions in the Public Health and Municipal Services Ordinance (Cap. 132) (PHMSO) –

- Section 2(1)(a)(i) "hawker" includes "any person who trades in any public place … by exposing for sale (any goods, wares or merchandise)".

- Section 83B(1) "No person shall hawk in any street except in accordance with a licence …".

- Section 86(1): Authorised staff of FEHD "may seize any equipment or commodity in respect of which he has reason to believe that a hawker offence has been committed …".

253. According to The Ombudsman's understanding of the above provisions, exposure of goods for sale by a person constituted as a "hawker". Whether the person involved had solicited for sale or whether there had been transactions was not crucial. The placing of goods by Shop A at the shop front was obviously for the purpose of exposing the goods for sale and not simply for storage or display, and this act constituted as a "hawker".

254. Whether the act of a "hawker" was equivalent to "hawking" as stated in Section 83B(1) depended on the interpretation of PHMSO. FEHD indicated that according to its observation, Shop A just placed goods outside the shop to attract customers without soliciting for sale or hawking the goods. The Department, therefore, did not have sufficient evidence to prosecute the person-in-charge of the shop for hawking without a licence and seize his/her goods by invoking section 86(1). The Ombudsman doubted FEHD's views and considered that FEHD should seek legal advice to clarify its enforcement powers.

Administration's response

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

(a) since April this year, FEHD staff have stepped up inspections and enforcement actions. As at present, the person-in-charge of Shop A was prosecuted on 24 April for causing obstruction in public place. After FEHD seriously warned Shop A and kept it under close monitoring, FEHD had not found Shop A hawking without a licence at shop front or causing obstruction to the passageway; and

(b) FEHD considered that before instituting any prosecutions, its staff should gather sufficient evidence to prove that the persons concerned had violated the relevant legislation. In tackling unlicenced hawking activities, enforcement staff should gather evidence testifying that there had been acts of selling and buying of goods before instituting prosecutions against the persons concerned and seizing their commodities under sections 83B and 86(1) of PHMSO respectively. FEHD had sought legal advice, which reaffirmed the Department's stance. FEHD had reminded its enforcement staff to continue keeping Shop A under close surveillance, and to undertake immediate enforcement action in accordance PHMSO whenever unlicenced hawking activity is detected for Shop A.

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

Case No. 2010/1203 (Efficiency Unit) – Failing to follow up the complainant's request to prune some roadside trees

Case No. 2010/2142 (Lands Department) – Failing to take action to prune some roadside trees, thus blocking the view of passengers waiting at the adjacent bus stop

Background

Details of Complaint

256. The complainant called the 1823 Call Centre (Call Centre) under the Efficiency Unit (EU) to complain about obstruction of vision caused by some tree branches to passengers waiting at a bus stop. A few months later, she was told that the government departments concerned would follow up the matter. When the problem remained unresolved, however, she made a number of calls to the Call Centre to urge for prompt Government action, but to no avail.

The Ombudsman's Findings

Mechanism for Handling Tree Management Complaints

257. In 2009, the Development Bureau set up an inter-departmental task force to centralise the handling of tree-related complaints to ensure public safety. The task force was formed by EU and other relevant departments (including the Lands Department (LandsD)) with the Call Centre as the central contact point to receive complaints from the public. The Call Centre would maintain contacts with all the departments concerned and monitor the progress of cases. Where there were delays, the Call Centre would escalate the cases to the management of the departments concerned and issue a "Monthly Outstanding and Overdue Case Reports" (monthly case reports) for follow-up action by the departments.

Responsibility for Tree Management

258. The Highways Department (HyD) did not have any responsibility in this case as it had neither received the complaint nor contacted the complainant.

259. In the absence of any responsible department, LandsD will handle natural vegetation on unleased or unallocated Government land. In general, however, LandsD will instruct the relevant District Lands Office (DLO) to conduct on-site assessment and arrange for necessary removal or pruning only when complaints or referrals are received. As the subject tree was on unallocated Government land, it should be the responsibility of LandsD.

Response from the Efficiency Unit

260. On receipt of the complaint, the Call Centre referred it to LandsD on the same day. The complainant subsequently made a number of calls to the Call Centre urging for prompt Government action and the Call Centre immediately notified LandsD on each occasion. The Call Centre also issued reminders to LandsD and directly contacted the DLO concerned. Moreover, on learning that tree pruning had been arranged, it also notified the complainant on the same day.

261. The Call Centre had issued monthly case reports to the coordinator of LandsD to remind the department of the pending and overdue cases. Apart from that, it had sought assistance from a LandsD officer who was at that time the coordinator of a project on a proposed transfer of the department's complaint hotline to the Call Centre.

262. EU considered that since different government departments had their own concerns when handling complaints, the only thing the Call Centre could do was to strive to monitor the progress and advise the departments so that complaints could be resolved as soon as possible.

Response from the Lands Department

263. LandsD explained that the DLO concerned had conducted a site inspection and found the tree under complaint had no imminent danger of collapse. While overgrowing tree branches might cause inconvenience, it would not be an issue of road safety. At the time when the complaint was lodged, the DLO concerned needed to handle around 500 similar cases and had to prioritise these cases. In response to the reminders from the Call Centre, DLO had contacted the complainant and conducted a site inspection again to make sure that the situation has not deteriorated.

264. Nevertheless, LandsD agreed that the DLO concerned had followed up the case unsatisfactorily, as it did not follow the internal guidelines to give the complainant a timely reply and notify her of the

progress. LandsD had reminded its staff to follow departmental instructions in replying to complainants. Also, it had directed all DLOs to deploy manpower and resources appropriately, monitor the case progress and adhere to the internal guidelines and procedures when handling complaints.

265. LandsD pointed out that in general, referrals from the Call Centre were handled and responded to by the relevant DLO directly and hence it had not made reference to those monthly case reports from the Call Centre. From June 2010 onwards, LandsD has been forwarding the monthly case reports from the Call Centre to the relevant DLOs/Sections, urging for their prompt follow-up action and reply.

The Ombudsman's observations

266. Considering the large number of complaints LandsD had to handle, it was not unreasonable for the department to prioritise the cases before handling. However, it should have contacted the complainant direct or via the Call Centre to let her know how and the tentative time her case would be handled. During the 11 months from July 2009, when the complainant first lodged her complaint, to the time of LandsD's arrangement for tree pruning, the complainant had made 13 calls to the Call Centre urging for follow up actions, while the Call Centre had issued monthly case reports to the management of LandsD. Nevertheless, LandsD still failed to follow up actively the case and sometimes even made no response.

267. The Ombudsman considered LandsD has failed to follow its internal guidelines and complaint handling mechanism, conduct site inspections or reply to the Call Centre in a timely way. Moreover, despite repeated reminders from the Call Centre, it had failed to attend to the matter. There was a large discrepancy between the department's work attitude and efficiency on the one hand and its performance pledge and public expectation on the other. The Ombudsman found this unacceptable.

268. While the Call Centre had indeed promptly referred the case, it failed to alert the senior level or take further follow-up actions when its multiple reminders were not heeded. The Ombudsman considered the Call Centre's efforts in monitoring the relevant departments' complaint handling process clearly weak and ineffective.

Administration's response

269. EU has accepted The Ombudsman's recommendation and enhanced its follow-up action. On top of the existing mechanism for issuing reminders to departmental subject officers and monthly case reports to Departmental Coordinators, for cases that remain overdue for three months or above, the Call Centre will escalate the cases to the relevant Departmental Complaint Officers at directorate level even if no refusal to take responsibility is involved. In addition, the Call Centre has implemented other improvement measures including the provision of additional analysis in the monthly reports to Departmental Coordinators to facilitate their monitoring of overdue cases.

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

(a) LandsD has reviewed the timeframe and duties of frontline staff in dealing with complaints relating to tree management (including issuing a reply to the complainant and the Call Centre), as well as the duties of their supervisors. Memoranda have been issued to all DLOs and section heads to ensure effective implementation of tree management work and proper follow-up of related complaints;

(b) starting from June 2010, cases listed in the Call Centre's monthly case report are categorised by the Departmental Coordinator of LandsD according to the responsible districts/sections, and are forwarded to officers responsible for coordinating complaint cases at relevant DLOs/sections for action according to the departmental guidelines. To strengthen the monitoring of the progress of overdue cases, a Complaints Liaison Officer (CLO) was appointed in each of the four functional offices of LandsD in June 2010. At present, the Departmental Coordinator would forward the categorised monthly case report, together with relevant data analysis, to the DLOs/section heads concerned, with a copy to the CLOs and the relevant Assistant Directors and Deputy Directors. All DLOs/section heads would inspect and monitor the progress of overdue cases under their purview. If assistance from the Headquarters is required, DLOs/section heads would discuss with the respective CLO at head office level and submit the overdue cases to the Assistant Director or Deputy Director

concerned to ensure proper and prompt follow-up of these cases; and

(c) regarding the backlog and the large number of incoming tree management cases, LandsD would contract out part of the tree management enquiry and investigation work. Since June 2011, nine DLOs have contracted out the work concerned.

Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit), Lands Department, Highways Department and Transport Department

Case No. 2010/2027 (Efficiency Unit), Case No. 2010/2028 (Lands Department), Case No. 2010/5147 (Highways Department), and Case No. 2010/5148 (Transport Department) - Undue delay in handling a complaint about water leakage problem from below the podium next to a West Rail Station

Background

Details of Complaint

271. The complainant lodged several complaints with the 1823 Call Centre (the Call Centre) under the Efficiency Unit (EU) since late January 2010 about water leaking from a pipe near a West Rail station (the Station), making the ground slippery for pedestrians. As the leakage worsened, he complained to The Ombudsman in early June against EU and Lands Department (LandsD) for undue delay in resolving the problem.

The Ombudsman later found the Highways Department (HyD) and Transport Department (TD) were involved as well and therefore, included them in this investigation.

Background

272. The Kowloon Canton Railway Corporation (KCRC) was the project contractor of the Station. Maintenance responsibilities for the essential public infrastructure works (EPIWs) around the station area were shared between KCRC (the Mass Transit Railway Corporation Limited (MTRCL) after 2007) and the relevant Government departments. This complaint was about water leakage from the podium at a public transport interchange (PTI), an EPIW, next to the Station.

Course of Events

273. The Call Centre received the complaint on 23 January 2010 and referred it to TD, which was supposedly the first contact point for complaints concerning MTRCL. When informed by TD that the location of leakage was not within the jurisdiction of the MTRCL, the Call Centre then referred the case to LandsD on 12 February.

274. LandsD conducted a site inspection and a land status records search and found a letter dated 22 March 2004 (the March letter) from KCRC to HyD, TD and LandsD, setting out the arrangements regarding the management and maintenance of PTI. It stated that KCRC (now MTRCL) and HyD had shared maintenance responsibilities for PTI. However, HyD sent an internal memo to LandsD in early April 2010, indicating that it had no records of having taken over such responsibilities. To facilitate prompt action, LandsD wrote to the recipient departments of the March letter on 21 April to formally record the handover of maintenance responsibilities for the facilities. LandsD further wrote to HyD on 22 April, pointing out its maintenance responsibility. Nevertheless, HyD asked LandsD to rectify the water leakage problem first and LandsD rejected, quoting its lack of maintenance expertise.

275. On 30 April 2010, LandsD, HyD and MTRCL conducted a joint site inspection and agreed on the likely source of water leakage. On 10 May, HyD found another letter dated 4 October 2004 (the October letter) from KCRC to HyD and TD. The letter confirmed that handover of maintenance responsibilities for PTIs had been completed, but LandsD was not a recipient of that letter. On 14 May, HyD wrote to MTRCL requesting it to conduct desilting works by 20 May 2010.

276. On 19 June 2010, the Call Centre informed the complainant that MTRCL had completed the repair works, as advised by LandsD the day before.

277. However, the complainant called the Call Centre again on 24 June, alleging that the pipe was still leaking. The Call Centre referred this repeated complaint first to TD, then to LandsD. Nonetheless, while LandsD later told the Call Centre that MTRCL was investigating the case, TD replied that MTRCL found no water dripping within the area under its responsibility. Such conflicting information prompted the Call Centre to escalate the case to the departmental coordinators of TD, LandsD and HyD at the end of August, requesting them to come to a solution and report progress by 3 September.

278. In early September 2010, the complainant said the situation had improved but there was still water dripping during heavy rain. MTRCL agreed to follow up. The case was finally resolved in early October.

Comments from Departments

The Efficiency Unit

279. EU stated that the Call Centre had done its best to ensure speedy handling of the complaint. Despite an oversight by its agent in June 2010 in referring the case to TD again, its referral of the case to the other relevant parties was prompt and in accordance with established procedures. Besides, it issued several reminders and brought the case to the attention of the coordinator of LandsD five times between March and August 2010. It also communicated with the complainant nine times to keep him abreast of case progress.

280. As soon as it noticed the conflicting information from TD and LandsD, the Call Centre immediately escalated the case to the departmental coordinator level. This helped to bring about resolution of the complaint.

The Lands Department

281. LandsD indicated that although it took over the Station and its EPIWs on behalf of Government in November 2003, it had no expertise or maintenance responsibilities over them. KCRC, in consultation with HyD and other parties concerned, should work out the apportionment and handover of these responsibilities and inform LandsD of such.

282. LandsD also took upon itself to coordinate and record the handover of the PTI in April 2010. Such coordination by LandsD enabled the relevant parties, such as HyD and MTRCL, to take early action to resolve the case.

The Highways Department

283. HyD's electronic map showed that maintenance responsibilities for the PTI structures should rest with MTRCL and it informed the Call Centre of this in January 2010. HyD saw no need to search for handover records as LandsD's April letter had confirmed the handover of maintenance responsibilities to parties concerned. It subsequently provided information on the location of the leakage and reminded MTRCL of its maintenance responsibility. Actually, throughout the whole period, HyD had assisted in convincing MTRCL to take up the responsibility and urging it to conduct repairs quickly.

284. HyD deemed that LandsD should be responsible for ensuring MTRCL performs its maintenance functions, as it has a duty to ensure facilities on Government land are properly managed and maintained by relevant parties.

The Transport Department

285. TD twice relayed MTRCL's response to the Call Centre in January and June 2010 that the leakage did not fall within the Corporation's jurisdiction. When it learned that LandsD and HyD were liaising with MTRCL for repair works in early August, it helped chasing for updates.

286. TD was on the circulation list of the March and October letters only because it was responsible for the management of some other facilities listed in the maintenance schedule. It is not a maintenance agent and has no maintenance responsibility over PTI.

The Ombudsman's observations

General Observations

287. As the leading department handling this case, LandsD did not have all the key documents that could identify the responsible party, while the departments that held such documents failed to make reference to them and EU did not bring the case to the attention of all parties involved. These factors, plus the tricky nature of leakage problems, led to a delay of eight months in resolving the matter.

288. The case also exposed the possible problems arising from shared maintenance responsibilities between Government and an outside party. The Call Centre and TD agreed that complaints concerning MTRCL's service or facilities should be referred to TD first. Therefore, TD seems to be the appropriate party taking up the coordination role in the future.

The Efficiency Unit

289. Of the nine communications between EU and the complainant, a number were actually initiated by the latter when he called the Call Centre for updates. EU's numerous correspondences with LandsD did not bring much progress to the case. Escalation to departmental coordinator's level took place only in August 2010, i.e. five months after the case had become

overdue. This casted doubts on EU's ability to bring about prompt resolutions to complaints.

290. The complaint against EU was, therefore, partially substantiated.

The Lands Department

291. LandsD had tried its best to solicit prompt action from the responsible parties. It was not clear why it was not given the October letter, which could have helped identify the responsible parties and clarify maintenance responsibilities for early resolution of the water leakage problem. Nonetheless, as LandsD had taken over the Station and its EPIWs and was a recipient of the March letter, its staff should have been more alert at the time. Overall, had LandsD received a little more help from concerned departments, this case could have been resolved earlier.

292. The complaint against LandsD was therefore unsubstantiated.

The Highways Department

293. HyD was the coordinator and Government's representative in the West Rail Project. While it was well aware of its own responsibilities over PTI and had the maintenance schedule in hand, The Ombudsman's investigation revealed that it had not been helpful in resolving the matter. It did not lend support to LandsD conscientiously such that the latter had to spend months identifying the responsible party for the repairs. HyD also relied too much on its electronic map and refused to search its file records. Consequently, it was unable to refute MTRCL's denial of responsibility and clarify matters earlier.

294. The complaint against HyD was, therefore, substantiated.

The Transport Department

295. As the first contact point of the Call Centre for matters relating to MTRCL, TD had a duty to verify information provided by the Corporation (that the location of leakage was outside its jurisdiction) before passing the matter onto others for action. Besides, holding records of the maintenance schedule, it should have assisted in ascertaining the maintenance parties. However, it contented itself with the role of a post box.

296. The complaint against TD was, therefore, substantiated.

Administration's response

297. EU, LandsD, HyD and TD have accepted The Ombudsman's recommendations and taken the following follow-up actions –

(a) the Call Centre has strengthened staff training and stressed again in internal briefings the need to review case history before referral. If staff have doubt about the case assignment, they should consult their supervisors or the departments concerned;

(b) the Call Centre has enhanced the depth of analysis on overdue cases in the monthly reports to Departmental Coordinators and stepped up the escalation mechanism to send cases that are overdue for three months or more to relevant Departmental Complaint Officers at directorate level;

(c) the Railway Development Office (RDO) of HyD had reviewed their records on the apportionment of maintenance responsibilities and re-circulated in December 2011 a complete set of the West Rail demarcation plans together with the maintenance schedules showing the apportionment of maintenance responsibilities of the West Rail infrastructure works to all relevant departments for proper record. Also, a workflow chart and a set of guidelines have been developed for the Call Centre and all parties concerned to follow in handling complaints against infrastructure items along the West Rail Line. HyD will issue reminders to all relevant parties of their maintenance responsibilities on a regular basis;

(d) the West Rail stations concerned are in the boundaries of four District Lands Offices (DLOs) of LandsD. The aforementioned information re-circulated by RDO has been distributed to the DLOs concerned and the Railway Development Section of LandsD;

(e) HyD has uploaded the maintenance records of the West Rail infrastructure works into their in-house electronic record system, and instructed all respective district maintenance staff to make reference to such records while carrying out maintenance works. HyD will also conduct regular experience-sharing sessions for maintenance staff to share their first-hand maintenance experience, including the approaches adopted for handling various issues;

(f) TD held an inter-departmental meeting with HyD, LandsD and EU in January 2012 to work out a mechanism for better coordinating the departments' efforts in liaison with MTRCL over disputes or complaints concerning the shared maintenance responsibilities for infrastructure items at railway stations along the West Rail Line; and

(g) the meeting also agreed on the workflow and procedures which all concerned parties should follow in handling complaints against infrastructure items along the West Rail Line. MTRCL has also been and will be regularly reminded of the maintenance responsibilities for facilities under its care.

Government Secretariat –
Financial Services and the Treasury Bureau

Case No. 2011/1396 - Rejecting the complainant's application for fee waiver in respect of a fire service certificate for a festive event organised by his church

Background

298. The Complainant filed a complaint to The Ombudsman on behalf of his organisation (Organisation A) against the Financial Services and the Treasury Bureau (FSTB) on 15 April 2011. The complaint was in connection with the Christmas Carnival organised by Organisation A in December 2010 for the residents in the district. Prior to the Carnival, Organisation A applied to the Fire Services Department (FSD) for fee waiver in respect of a fire service certificate for the event. Later, Organisation A learnt that the application was rejected by FSTB on the ground of the "user pays" principle. The Complainant considered the decision of FSTB unreasonable.

The Ombudsman's observations

299. FSD charged Organisation A a fire service certificate fee for the Christmas Carnival on the basis of the "user pays" principle laid down by FSTB, which, having considered the nature of the event and the reasons for waiver put up by Organisation A, decided not to grant a "special" approval for the waiver pursuant to section 39A of the Public Finance Ordinance (the Ordinance) (Cap. 2). The Ombudsman was of the view that the decision of FSTB was not unreasonable. After going through the seven applications received by FSTB for fee waiver in respect of fire service certificates in the past two years, The Ombudsman concluded that all the applications were handled by FSTB in a fair and unbiased manner. The complaint against FSTB was not substantiated.

300. As to the complainant's query about why Organisation A's application was rejected by FSD merely on the ground of the "user pays" principle, it should be noted that FSD acted on the advice of FSTB. FSTB did not consider that the application of Organisation A should be warranted treatment on "special ground" as stipulated in the Ordinance, and therefore advised FSD to reject the application on the ground as in general cases (i.e. the "user pays" principle). There was nothing wrong with it. The Ombudsman however, considered it clearer if the reply to

the complainant could explain that FSTB was unable to approve the application of Organisation A as the event in question was no more than an ordinary Christmas festive activity, which did not meet the requirements stipulated in the Ordinance. After all, the applicant takes the "user pays" principle as just a general fee-charging principle rather than a reason for rejection.

Administration's response

301. FSTB has accepted The Ombudsman's recommendation and included the practice of "making reference to precedent cases" in the guidelines for relevant officers' inspection and compliance when processing applications for waiver of fire service certificate fee.

Home Affairs Department

Case No. 2011/3111 – (1) Refusing to view the content of a video record; (2) Failing to take action against illegal operations of guest houses; and (3) Failing to inform the complainant of the progress or result of investigation

Background

302. According to the complainant, he reported to the Office of the Licensing Authority (OLA) under the Home Affairs Department (HAD) in March 2011 that there was suspected unlicenced guesthouse operation in the building where he lived. He offered to provide OLA's enforcement staff with a video record taken outside his flat to serve as evidence. However, OLA staff refused to view the video record. Moreover, OLA did not take any enforcement action and did not reply him. In summary, the complainant alleged OLA–

(1) had unreasonably refused to view the content of his video record;

(2) was lax in taking action against his case; and

(3) had failed to inform him of the progress or result of the investigation.

The Ombudsman's observations

303. OLA's enforcement staff had exercised professional judgment in determining not to view the video record because according to the complainant's description, the video only filmed people entering/leaving the premises, which could not be regarded as sufficient evidence for instigating prosecution against unlicenced guesthouse operation. The Ombudsman opined that the decision was not unreasonable. Allegation (1) was therefore unsubstantiated.

304. OLA had actively followed up on the complainant's report. The reason of not instituting prosecution against the suspected premises was due to insufficient evidence instead of OLA's lax in taking enforcement actions. Allegation (2) was unsubstantiated.

305. OLA had informed the complainant of the investigation progress several times in April 2011. Since OLA was still following up on the case when the complainant lodged a complaint to The Ombudsman (8 August 2011), OLA was unable to inform the complainant of the final investigation findings. Moreover, The Ombudsman understood that during an investigation of a criminal offence, the enforcement department needs to observe confidentiality in handling sensitive issues. It was inevitable that the enforcement department might not be able to disclose the investigation details to the complainant. Allegation (3) was, therefore unsubstantiated.

Administration's response

306. HAD has accepted The Ombudsman's recommendations and implemented the following follow-up actions –

(a) OLA had reminded its enforcement staff that when handling similar cases in future, they should receive video records/information offered by the complainants and, if necessary, examine the video records/information; and

(b) OLA had sought Department of Justice's advice on whether taking of video in public area had contravened the Personal Data (Privacy) Ordinance (Cap. 486).

Home Affairs Department and Lands Department

Case No. 2011/2050 (Home Affairs Department) and Case No. 2011/2051 (Lands Department) - Unreasonably taking possession of the complainant's bicycle in a joint clearance operation

Background

307. The complainant claimed that at 2 p.m. on 31 March 2011, he parked his bicycle on the pavement outside the ground level of a shopping mall in a particular district (the location concerned). At 7 a.m. on the following day, he found that his bicycle was "stolen" and reported to the Police. Later, he learned that there was a joint operation to clear illegally parked bicycles (the joint clearance operation) by the corresponding District Office (DO) of the Home Affairs Department (HAD), the corresponding District Lands Office (DLO) of the Lands Department (LandsD) and the Food and Environmental Hygiene Department (FEHD) at the location concerned on 31 March.

308. The complaints lodged by the complainant are summed up as follows –

(a) DLO claimed that its staff posted a notice on the complainant's bicycle and took photographs for record purpose on 24 March. The complainant, however, said that his bicycle had all along been parked outside an industrial city in that district instead of at the location concerned, before 24 March to two or three days towards the end of the month. He alleged that the photograph taken by the LandsD as record was a "fabrication of evidence";

(b) DO claimed that prior to the joint clearance operation, the owners' corporations (OCs) of the housing estates in the vicinity, including OC of the housing estate where the complainant resided, had been informed. Yet the complainant was told by OC that no such notice had been received. He alleged that DO had not informed OC;

(c) the complainant's bicycle was seized by the departments without notice and proper reasons. The departments have refused to listen to his case for recovering the bicycle. This was unfair to him; and

(d) the prior notice of the joint clearance operation given by the department concerned to bicycle owners not only enabled the owners to remove the bicycles beforehand but also park them at the same place after the operation. This would render the joint clearance operation ineffective, wasting public money and was unnecessary.

309. The Ombudsman's investigation found that the 1823 Call Centre and DLO received complaints from members of the public in early 2011 that there were many illegally parked bicycles at the location concerned in that district, which not only affected the cityscape but also obstructing pedestrian traffic. Following a discussion among DO, DLO, FEHD and the Police, it was decided that the location concerned would be included in the list of locations for regular clearance of illegally parked bicycles and a joint clearance operation would be conducted on 31 March.

310. On 18 March, DO issued a letter to the parties concerned, such as District Council Members of the corresponding district, mutual aid committees, OCs (including the OC of the housing estate where the complainant resided) and owners' committees, informing them of the details of the joint clearance operation, including the date of operation and the target area, etc.

311. On 24 March, DLO posted legal notices on bicycles found parking illegally in a number of target sites (including the location concerned), requiring the occupiers to stop occupying the location concerned by 31 March. The staff also took photographs on that day for record and posted advisory notices at prominent places of the target sites to announce the commencement of the operation.

312. On 31 March (i.e. the day of the joint clearance operation), staff of DLO first checked the record photographs to confirm that the illegally parked bicycles had been posted with the "legal notice" and took possession of them. The bicycles were moved to pounds designated by DLO by staff of FEHD as instructed. When the operation completed, DLO took photographs for record.

313. On 5 April, the complainant wrote to DO expressing dissatisfaction with the inadequate number of designated bicycle parking spaces available in the vicinity of the location concerned and complained about the removal of his bicycle in the joint clearance operation. DO gave the complainant a written reply on 14 April explaining the background and details of the joint clearance operation.

314. On 4 May, DLO staff and the Police went together with the complainant to the designated pound of DLO. The complainant identified one of the bicycles seized during the operation as his.

The Ombudsman's observations

315. Regarding Allegation (1) (the alleged fabrication of evidence by DLO), The Ombudsman considered that the complainant and DLO gave different versions on whether the complainant's bicycle was parked at the location concerned or somewhere else in the particular district on 24 March. After investigation, The Ombudsman confirmed the following –

- the location concerned was defined as an area of serious illegal parking of bicycles;

- the photographs showed that DLO had posted legal notices on bicycles parking illegally at the location concerned on 24 March and one of the bicycles looked similar to the bicycle owned by the complainant; and

- on the day of the joint clearance operation, the complainant's bicycle was indeed parked at the location concerned.

316. The complainant claimed that DLO had fabricated evidence. This was a serious allegation which required strong supporting evidence. However, the complainant was unable to provide any concrete evidence showing that his bicycle had not been parked at the location concerned on 24 March, nor was there other evidence supporting his allegation that DLO had fabricated evidence.

317. Regarding Allegation (2) (DO's failure to give prior notice to the OC of the housing estate), The Ombudsman considered that according to DO's facsimile record, DO did in fact issue a letter to the office of OC of the complainant's estate on 21 March. The Ombudsman could not ascertain the reason why OC claimed that such notice was not received.

318. Regarding Allegation (3) (the departments had seized the complainant's bicycle without notice and proper reasons, and refused to listen to his case for recovering the bicycle, which was unfair to him), The Ombudsman stated that DLO was provided with authority under the

Land (Miscellaneous Provisions) Ordinance (Cap. 28) to remove and take possession of bicycles parked illegally on government land. It has acted according to the law. When the bicycles have been seized, they became property of the Government. It is right and proper for DLO not returning them to their original owners.

319. Regarding Allegation (4) (the joint clearance operation was ineffective and a waste of public money), The Ombudsman pointed out that illegally parked bicycles affected the cityscape and caused obstruction to pedestrians. The Ombudsman opined that, while the Administration should seek to make available more designated areas for bicycle users to park their bicycles legally, it should also conduct joint clearance operations frequently in areas where illegal parking of bicycles was serious in order to crack down such illegal acts. It is evident that when warnings go unheeded, the seizure of illegally parked bicycles does have certain deterrence.

Administration's response

320. HAD and LandsD have accepted the recommendation from The Ombudsman, and agreed to shorten the notice period to three days in the district concerned as a trial run (i.e. the joint clearance operation is conducted after the third day when the legal notice has been posted).

321. Since December 2011, the legal notice period of the clearance operation in the corresponding District has been shortened. Joint clearance operation will be conducted by the departments concerned after the third day when the legal notice has been posted.

322. As the trial run was satisfactory, the three-day notice period has been adopted by the departments concerned in all districts for clearance of illegally parked bicycles on the street. Departments will review the arrangements of joint clearance operations from time to time and refine the relevant mechanism having regard to the specific circumstances of individual districts.

Hong Kong Housing Society

Case No. 2010/5752-5753 - Failing to disclose in a timely manner the actual income-expenditure situation and the details of subsidy regarding the management fee of a housing estate under the Senior Citizen Residences Scheme

Background

Details of Complaint

323. The complainants were tenants and committee members of the Residents' Association of a housing estate (the estate) under the Senior Citizen Residences Scheme of Hong Kong Housing Society (HKHS). Allegedly, there had been management fee budget deficits and operating losses for the estate over the past five years. In mid-2010, HKHS decided to increase the management fee by 5% with effect from January 2011.

324. HKHS explained that it had been providing subsidies to fully cover the operating losses. The increase in fees was to improve the financial situation and not an attempt to ask the tenants to cover the shortfall. However, the complainants claimed ignorance of the gap between the management fee received and the actual expenditure of the estate. HKHS seemed to be withholding essential information from the tenants and failed to explain its policy and review mechanism with regard to the subsidy. They were worried about their financial future should HKHS decide to cancel or change the mode of such subsidy.

Response from the Hong Kong Housing Society

325. Senior citizens intending to take up tenancy in the estate, which can last for life, have to pay in advance an "entry contribution fee" upon moving in and then a monthly management fee. Application documents state that the management fee will be subject to adjustments depending on the prevailing economic conditions and operational needs. Since the estate is designed for senior citizens, there are more nursing care and service facilities, resulting in higher management and repair costs. To attract senior citizens, the management fee was set at $2.2 per square foot, in spite of an estimated cost of $4 at the time of intake in 2004.

326. HKHS argued that the level of management fee charged was a commercial decision and that the expenditure exceeding the income for the estate was within its expectation. HKHS was willing to subsidise the shortfall. Nevertheless, HKHS had not formulated any long-term subsidy policy or review mechanism. On the other hand, it had no plans to change the current subsidy mode to avoid creating financial pressure on the tenants. Operating losses would not be shifted to them either. In fact, measures had already been introduced to increase revenue and control expenditure without compromising service standards.

327. Furthermore, the management fee for the estate had remained unchanged for six years since intake. Management and repair costs had, however, soared due to inflation and higher staff costs. Between May and December 2010, HKHS representatives attended seven meetings of the Residents' Association to explain the rationale behind the increase in management fee and other related arrangements. It had, in response to tenants' requests, lowered the rate of increase and deferred the effective date of the new management fee.

328. HKHS added that the social welfare agency responsible for providing management services in the estate would prepare the annual budget and the quarterly income and expenditure statement which, upon HKHS's approval, would be made available to the Residents' Association. The quarterly income and expenditure report as well as the annual audit report would be displayed in common areas for tenants' reference. In fact, HKHS had arranged a site visit of the estate for potential tenants at the time of application so that they could understand better its mode of operation. HKHS never intended to withhold any information about the situation of the management fee.

The Ombudsman's observations

329. With the soaring prices in recent years, an increase in management fee by HKHS to meet the operational needs of the estate was understandable.

330. Despite its efforts to be more open and transparent in handling the financial reports of the estate, HKHS had failed to disclose to the tenants in advance that the management fee charged was not enough to over the estimated expenditure. Although it claimed at various meetings that the increase in management fee had nothing to do with operating

losses, the amount of management fee paid by the tenants and the subsidy provided by HKHS were actually closely related to the management expenditure of the estate and the losses incurred. The adjustment in management fee was in fact meant to cover the additional expenses resulting from a rise in related costs.

331. The Schedule to the residential lease of the estate stipulates that HKHS may levy an "additional management charge" should the management fee received fail to meet expenses. At various meetings with the complainants and the tenants, HKHS had, however, failed to answer their queries on matters relating to the management fee. Nor had it clearly explained the specifics about its subsidy system and long-term policy. The complainants could not tell how much subsidy HKHS was able to absorb and for how long such subsidy could last. Surely the complainants would feel anxious.

332. Overall, The Ombudsman considered the complaint substantiated.

Administration's response

333. HKHS has generally accepted The Ombudsman's recommendations and implemented the following follow-up actions –

(a) HKHS expressly indicated that they would undertake the operational surplus or deficit of the estate and the matter should not be a concern among the tenants. In this connection, a supplementary note was added under the Key Points of the Tenancy Agreement contained in the application form of the Senior Citizen Residences Scheme for Cheerful Court and Jolly Place. The note states that the monthly management fee is subject to adjustments depending on the prevailing economic conditions and operational needs, and that the HKHS would be responsible for the operational accounts of the estate. Accordingly, such a statement has also been made in paragraph 5.6, i.e. "Ways to Determine Management Fees and Service Charges" under "Operational Arrangements" on page 12 of the Application Guide;

(b) In fact, the rationale behind the adjustment to management fee had been clearly stated by HKHS when it gave its response in respect of the case for the first time on 7 March 2011. The

staff of HKHS had on various occasions explained that the adjustment was attributable to aggregate inflation and rising operating costs. Moreover, the relevant income data and operational details had been provided for information by the committee members of the Residents' Association. Most of the committee members indicated that they appreciated the situation and accepted the explanation. In response to their requests, HKHS had reduced the increase in management fee from the proposed 8% to 5% and put off the effective date from August 2010 to January 2011; and

(c) HKHS had all along been taking proactive action to maintain close communication with its tenants, with the relevant income and expenditure accounts disclosed for their information. In future, HKHS would further enhance communication with the tenants by inviting them to attend briefing sessions before considering any adjustments to the management. In the briefing sessions, HKHS would elaborate the rationale behind the adjustment, provide the relevant information, and answer questions raised by the tenants to avoid unnecessary misunderstandings.

Hospital Authority

Case No. 2011/0021 - Refusing the complainant's request to read his own medical records

Background

334. The complainant attended an eye clinic of a public hospital under the Hospital Authority (HA) on 25 March 2009. After an ophthalmic examination, he was asked to bring his own medical record to another consultation point in the clinic to a nurse for receiving eye care training. While waiting for the nurse, he browsed through the medical record and transcribed the clinical information therein but was stopped by a nurse. He then complained to the hospital concerned and was informed that patients are not allowed to read their medical records. If patients need to read the content of their medical records, they should apply for a copy of the medical record and pay the corresponding fee according to HA's established procedures.

The Ombudsman's observations

335. The Ombudsman noted that medical records of patients contain information about the patients' diagnosis, investigation results, treatment given and progress, etc. Patients who wish to access their own medical records should submit applications to the relevant hospital in accordance with the Personal Data (Privacy) Ordinance (Cap. 486) and pay the corresponding fee.

336. In normal circumstances, patients who wish to access their medical records should apply for the record through HA's established procedures. As the administrative procedures involved in processing the application, which include locating, retrieving, reviewing and photocopying of records, would consume the public resources, The Ombudsman considered it reasonable for HA to charge for the service.

337. Prior to the release of a copy of medical records, HA is required to review and sanitise the records in view of the possibility that the record may include personal data of third parties, or information that may cause serious harm to the patients' physical or mental health. The Ombudsman therefore considered HA's refusal of the patient's browsing of his own medical records not unreasonable. As for HA's concerns about the possible damages to the records by the patient, and the patient's possible

misunderstanding of medical terminology and jargons which might in turn resulting in misunderstanding of the medical staff's treatment method and procedures, The Ombudsman considered them not fully justified, though HA could remind the patient of such concerns. The Ombudsman understood HA's view that the preferred way is for patients who wish to read their medical records to apply for a complete copy of medical records.

338. It is the general perception of patients that they have a right to know the content of their own medical records. It follows that they should be allowed to read at will or transcribe their medical records when they are given such records by medical staff. While the original intention to shorten the waiting time by allowing ophthalmic patients to transfer their own medical records from one consultation point to another was understandable, The Ombudsman considered that there was room for improvement, as there was no effective way to prevent patients from reading their own medical records on hand and there lacked easily understandable explanations to the aggrieved patients when they were forbidden to read their medical records. The Ombudsman therefore considered the allegation against HA partially substantiated.

Administration's response

339. HA has accepted The Ombudsman's recommendations. With reference to this case, the eye clinic concerned has piloted alternative operation models and required medical staff to read electronic medical records. For those cases where reference to traditional medical records is needed, delivery of the records will be carried out by hospital staff as soon as possible.

340. The Coordinating Committee (Ophthalmology) has reviewed the workflow of the patients' consultation process in the eye clinics and explored the feasibility of various measures to prevent patients from browsing their medical records without prior agreement of medical and nursing staff.

341. As implementation of the proposed improvement measures needs additional resources in various aspects, HA, having reviewed the situation, has arranged implementation of the improvement measures in all the eye clinics in the Hong Kong East Cluster, Hong Kong West Cluster, Kowloon East Cluster, New Territories East Cluster, and in some eyes clinics in the Kowloon Central Cluster and New Territories West Cluster. After the implementation, patients will not be required to deliver their own medical records during the consultation process. HA would regularly review the effectiveness of the new measures and revise them as necessary.

Hospital Authority and Social Welfare Department

Case No. 2011/3946A (Hospital Authority) and Case No. 2011/3946B (Social Welfare Department) - Shifting responsibility and ignoring the needs of the complainant's disabled daughter in refusing to arrange placement for her in a residential care home

Background

Details of Complaint

342. The complainant's daughter (Miss A) suffered from congenital muscular dystrophy and was totally dependent on the care of her family members in her daily life. Her cognitive development was normal and she was studying at a special school.

343. In September 2010, Miss A reached the age of 15 and was eligible for the Social Welfare Department (SWD)'s residential services for the mentally or physically handicapped. The school social worker conducted an initial assessment of her condition in October that year and in April 2011 applied to the Hospital Authority (HA) on her behalf for the Mental Handicap Infirmary and Rehabilitation (MHIR) Service. However, HA rejected her application on the grounds that she was not severely mentally handicapped. Later on, the social worker helped her apply for HA's General Infirmary (GI) Service. However, the application was again rejected because Miss A had to depend on a mechanical ventilator all the time and GI units did not have such equipment.

344. The school social worker then conducted a second assessment of Miss A's condition in July 2011. The result again indicated that she needed HA's infirmary service. However, in view of HA's previous rejection of her similar application, the social worker advised that she applied for SWD's "Care and Attention Home for Severely Disabled Persons" (C&A/SD) instead. Nevertheless, SWD insisted that she should queue for HA's infirmary service. In the event, the social worker decided not to make any more application for Miss A.

345. The complainant noted that as she and the other family members were getting older, it would be difficult for them to continue to take good care of her daughter, who would soon reach adulthood and was in great need of infirmary or residential care services. However, SWD and HA ignored her plight, shifted the responsibility to each other and refused to arrange residential placement for her.

Services Provided by the Social Welfare Department and Hospital Authority

346. The rehabilitative residential services provided by SWD are for disabled persons 15 years old or above who cannot live independently or whose family members cannot provide adequate care for them. Of such services, C&A/SD provides the most intensive nursing and personal care. Applicants must first go through assessment by a social worker before they can be waitlisted for the service. However, should they need even more intensive medical care, they should consider HA's infirmary service.

347. The MHIR Service of HA provides an integrated medical care and rehabilitation service for adults with severe or profound mental handicap; while the GI Service is meant for those elderly or disabled with a stable medical condition, but who are bed-ridden or have to rely on other people's assistance in their daily activities such as bathing, toileting, eating and mobility. What they need is frequent attention, not intensive or complicated medical care.

Response from the Social Welfare Department

348. SWD twice advised that Miss A should apply for HA's infirmary service, which was based on her needs as assessed by the social worker. However, its staff had failed to note that for the second assessment, the service Miss A needed (HA's infirmary) did not match the one suggested for her (i.e. C&A/SD by SWD) on the application form. It was not until October 2011 when the case was reported in the media that SWD became aware of HA's previous rejection of Miss A's application.

349. SWD reiterated that Miss A's needs for care and attention exceeded the ambit of C&A/SD.

Response from the Hospital Authority

350. HA considered Miss A not eligible for its MHIR Service because of her normal intelligence, while its GI units were not equipped to take care of patients who have to depend on a mechanical ventilator. Also, such patients were more susceptible to bacterial infection and complications resulting from prolonged hospitalisation.

351. In addition, Miss A did not need immediate hospitalisation as her condition was stable. The complainant was worried that once her daughter reached adulthood, she could not receive medical care comparable to that currently provided by the paediatric and youth ward of a hospital. HA would accordingly devise a medical care plan for Miss A to ensure that she could receive proper care after reaching adulthood. Meanwhile, a medical social worker would be assigned by the hospital to actively cater her welfare needs.

The Ombudsman's observations

352. The Ombudsman noted that when handling the second assessment, SWD had failed to notice the social worker's remarks that HA had previously turned down Miss A's application for infirmary service. Such negligence resulted in its repeated suggestion for her to apply for the same service. No wonder the complainant would consider such repeated suggestion an act to shift responsibility. Furthermore, the two assessments of Miss A's condition by the social worker within nine months had reached the same conclusion. SWD, instead of suggesting again that she queue for HA's infirmary service, should have held an in-depth discussion with the social worker to find out the crux of the problem, or even taken the initiative to contact HA with a view to drawing up together a plan for proper residential service for Miss A.

353. In this light, The Ombudsman considered the complaint against SWD substantiated.

354. HA had rejected the applications of Miss A in light of the nature and scope of its existing services. Its decision was not unreasonable from an administrative point of view. The Ombudsman, therefore, considered the complaint against HA unsubstantiated.

Administration's response

355. SWD and HA have accepted The Ombudsman's recommendations and taken the following actions –

(a) SWD had meetings with HA in October 2011, and met with the complainant together with HA in the same month to discuss the care plan for Miss A. Following the discussion, HA will continue to follow up Miss A's health condition and provide necessary healthcare services for her, while SWD introduced and recommended relevant community support services for the complainant's consideration. SWD and HA will continue to collaborate closely to follow up the welfare needs of Miss A and consider the appropriate long-term care arrangement for her;

(b) SWD and HA have been reviewing the services for persons with severe disabilities and are drawing up a joint-proposal to strengthen the support for them and their carers; and

(c) SWD agrees and has all along requested that its staff to be careful in handling all the information received and contact the referring social workers for clarification as necessary when they process applications for residential care for persons with disabilities. As the case has revealed the need for improvements in the record keeping of the assessment forms, SWD has started to file copies of all assessment forms and relevant documents since January 2012 with a view to ensuring the integrity and accuracy of the records.

Housing Department

Case No. 2011/1216 - Making inappropriate allocations to the complainant, thereby causing delay in her accommodation in public rental housing

Background

Details of Complaint

356. The complainant applied to the Housing Department (HD) for public rental housing (PRH) two years ago and subsequently received two housing offers. She rejected both offers on the grounds that the first flat allocated had negative environmental indicators (EIs) while the second flat was more than 30 years old; she was worried that she might not have the money to renovate it. Since then, HD made no further offers to her. She considered HD's inappropriate allocations have resulted in delay in her accommodation in public housing.

Flats with Negative Environmental Indicators and Renovated Flats

357. HD explained that flats bearing negative EIs (e.g. flats that involved unpleasant incidents) would also be allocated by random computer batching to the Waiting List applicants to ensure utilisation of public housing resources. In fact, these flats might have good sceneries, estate facilities and transport services.

358. Whether the flats to be allocated have negative EIs would not be mentioned in HD's offer letters to applicants. Relevant details would be provided to the applicants by the estate office staff during flat inspection. Applicants could inspect the flats and consider the information given by the staff before deciding whether to accept the offer. The progress of public housing allocation would depend on the availability of flats within an applicant's chosen district. Refusal to accept flats with negative EIs would not delay the allocation process.

359. Recovered flats would be renovated by HD according to the prevailing standards and with damaged facilities replaced. After renovation, these flats would be in a condition equivalent to those newly-built with all the basic facilities (including water and electricity supply) installed so that they are ready for immediate occupation. Whether the flats should be further refurbished should be decided by the tenants.

Reasons for Refusal by the Complainant

360. According to HD, the complainant had been given two offers but did not turn up for flat inspection and other formalities on both occasions. She refused the first offer on the grounds that she had indicated to the estate office her preference over a particular housing estate. As the flat had negative EIs, the offer was not counted as valid. When HD made the second offer to her, she only expressed her dissatisfaction over the allocation in an old housing estate and reiterated her wish for accommodation in a new housing estate within her chosen district. HD found this justification not acceptable and so she only had two more chances of allocation.

Response from the Housing Department

361. In general, HD allows applicants to inspect a flat bearing negative EIs and learn about all the details of the flat before deciding whether to accept the offer. HD considered the arrangement appropriate.

362. The complainant rejected the first offer because she wanted to be accommodated in a housing estate within a certain district. Her refusal to accept the offer had nothing to do with the negative EIs of the flat. It had not caused any delay in her accommodation or affected her chances of allocation. The flat in the second offer had actually been completely renovated but she just refused the offer without inspecting it. The Social Welfare Department later assessed her case and recommended that her request for accommodation in her chosen district be accepted. Nevertheless, due to the limited resource of public housing available in that district and the huge demand, she would need to wait for some time for that allocation.

The Ombudsman's observations

363. In the absence of specific guidelines from HD on the provision of information on negative EIs upon an applicant's enquiry before flat inspection, different estate offices adopted different practices. After The Ombudsman had initiated the investigation, HD indicated that it would draw up instructions to require staff to inform the applicants of the negative EIs of the allocated flats should there be such enquiries. Applicants accepting such offers would be required to sign a document to confirm their knowledge of the relevant information.

364. While The Ombudsman considered this measure could standardise the practice and avoid verbal disputes, it would not apply to applicants who made no prior enquiries about the flats. The problem revealed in this case would remain unresolved and this might give people the impression that there was unfairness in this regard.

365. If applicants had prior knowledge of the negative EIs of the allocated flats, they could then ask the estate offices about the details and consider whether they should inspect the flat. After that, they could make a prompt decision. This should save unnecessary work and manpower arrangements and the flat could be released to the available list for allocation as soon as possible.

Conclusion

366. The Ombudsman considered that as the department responsible for the development of public housing, HD should make every effort to utilise housing resources. In fact, the complainant was offered another flat three months after her refusal to accept the one bearing negative EIs. This proved that HD had not delayed in making allocations. Nevertheless, there was still room for improvement in the allocation of PRH flats with negative EIs.

367. Overall, The Ombudsman considered the complaint substantiated other than alleged.

Administration's response

368. HD accepted both recommendations from The Ombudsman and has taken the following actions –

(a) HD has enhanced the computerised batching system. With effect from 12 March 2012, if a PRH flat with negative EIs is allocated, HD will disclose the relevant information to the applicant concerned in the offer letter, and advise the applicant to approach the relevant estate office for details before deciding whether an inspection would be conducted on the flat; and

(b) HD has already uploaded the relevant details on the allocation of PRH flats with negative EIs on the Housing Authority/HD website on 15 March 2012 for the general public's information.

Immigration Department

Case No. 2010/5273 – (1) Failing to follow established procedures when processing the entry of the complainant's two Indian relative at the airport; (2) Prohibiting the two detained visitors from contacting outside parties; and (3) Failing to arrange an official interpreter to provide interpretation service for the two visitors

Background

Details of Complaint

369. One morning in 2010, the complainant's two relatives from India arrived in Hong Kong. The Immigration Department (ImmD) refused them entry. The complainant alleged that ImmD had –

(a) failed to follow the established procedures in refusing them entry;

(b) denied them contact with the outside during detention; and

(c) failed to provide a qualified interpreter.

The Event According to the Immigration Department

370. Upon arrival at the Hong Kong International Airport, the two visitors concerned were interviewed by an Immigration Officer A. As they had difficulty communicating in English, Officer A asked another Indian passenger, who knew both English and Hindi, to provide voluntary interpretation service. Through the interpreter, Officer A told the visitors that they might contact the local consul, lawyers or relatives. The voluntary interpreter left immediately after the interview.

371. Later, a Senior Immigration Officer examined the two visitors' case and decided to refuse them entry. They were detained in the airport in accordance with the law, pending repatriation. Officer A then issued the visitors a "Refusal Notice" (in English and Chinese) and a "Notice of Detention" (in Hindi). Officer A further asked whether the visitors possessed any "restricted articles", such as sharp objects and camcorders or mobile telephones with camera function. One of the visitors then handed over his mobile telephone. As recalled by Officer A, he had told

the visitor that the mobile telephone would be returned before departure. He also told them that they could approach him if they needed to make phone calls.

372. The two visitors returned to India by aeroplane in the afternoon of the same day.

Response from the Immigration Department

373. ImmD's guidelines stipulated that five notices should be issued to visitors who were denied entry. In addition to the two notices mentioned above, the other three were "Notice on Detention Policy", "Notice to Passenger" and "Notice to Non-Chinese Citizen in Custody". Those three documents detailed detainees' rights and were available in multiple languages (including Hindi). ImmD admitted that Officer A had in this case failed to provide the visitors with those three notices. When he took the mobile telephone of one of the visitors, and subsequently returned it, he had also failed to fill out the relevant forms and seek the visitor's signature for acknowledgement in accordance with the guidelines.

374. Each year, an average of about 10,000 visitors of over 170 nationalities who can understand neither Chinese nor English are interviewed at the airport. It was ImmD's usual practice to invite other passengers of the same nationality as the interviewees' to act as voluntary interpreters on the spot, unless the case was complicated or sensitive or involved an offence. The voluntary interpreter should meet the following criteria – (a) not having any relationship or conflict of interest with the interviewee; and (b) being able to communicate with the case officer and the interviewee effectively. Arranging for an official interpreter to come to the airport would take time and some interpreters were reluctant to come. The arrangement of engaging voluntary interpreters would avoid interviewees' prolonged waiting. ImmD considered that as the two visitors' case was only a normal immigration examination, it was proper to enlist assistance from a voluntary interpreter.

The Ombudsman's observations

375. Officer A's issuing only two notices to the visitors in this case clearly contravened ImmD's guidelines. The other three notices served to explain the factors which ImmD would take into account in determining whether a person should be detained, as well as the basic rights of and treatment for detainees. Quite complicated details were included in the notices. The Ombudsman, therefore, doubted whether Officer A had fully and accurately explained the details to the visitors during the interview merely with the help of a voluntary interpreter. Moreover, it was improper for Officer A to have taken the visitor's property without making any record. The Ombudsman, therefore, considered Allegation (1) substantiated.

376. There was no evidence that ImmD staff had expressly prohibited the two visitors from contact with the outside. However, no interpreter was present when one of the visitors surrendered his mobile telephone. With the language barrier, and not having been issued with the relevant notices, the two visitors might have mistakenly inferred from Officer A's temporary seizure of the mobile telephone that they were forbidden from making contact with the outside. In the light of the above, The Ombudsman considered Allegation (2) partially substantiated.

377. It was indeed not ImmD's standing practice to provide an official interpreter for such interviews. Nevertheless, refusal of entry, detention and temporary seizure of property all involve substantial and fundamental interests of the persons concerned. The Ombudsman considered it grossly inadequate for ImmD to rely on voluntary interpreters without an assurance of quality to communicate with foreign visitors in such cases and to allow officers who themselves do not know the foreign language to assess whether the voluntary interpreters had no problem communicating with the visitors. The Ombudsman, therefore, considered Allegation (3) partially substantiated.

Administration's response

378. ImmD has accepted The Ombudsman's recommendation and implemented/ is implementing the following measures –

(a) the Airport Division of ImmD had promptly briefed all frontline staff and urged strict compliance with the stipulated procedures. The said briefing would be conducted quarterly;

(b) after a review, it has been decided that the contents in the "Refusal Notice" (bilingual in English and Chinese) be translated into 13 languages for the reference of refused landing persons. ImmD is arranging the translation and printing. Moreover, a review is being conducted on simplifying and amalgamating the notices currently used by the control points; and

(c) as ImmD has explained before, for normal immigration examination, the case officer would invite other visitor of the same nationality as the interviewee to act as voluntary interpreter to assist in conducting an interview. With an average of about 10,000 visitors of over 170 nationalities who can understand neither Chinese nor English being interviewed each year, this practice will avoid having the interviewees to wait for a prolonged period of time for an official interpreter.

379. The above notwithstanding, ImmD has invited a systems consultancy firm to review the interpretation service available for secondary examination in the control points and explore the feasibility of other options such as telephone and video conferencing and translation software with a view to identifying a timely and high standard interpretation service for control points. The consultancy study found that no single information technology solution would satisfy all requirements, including prompt availability, security, privacy, accountability and legality, in respect of interpretation service at control points. As such, ImmD has to continue inviting another visitor acting as voluntary interpreters to assist in normal immigration examinations. Nevertheless, taking into account The Ombudsman's recommendation and for better customer service, the case officer would first ask the visitor concerned whether he can communicate effectively with the voluntary interpreter and make sure that the visitor agrees to the interpretation arrangement before the interview is conducted.

Lands Department

Case No. 2010/4868 - (1) Delay in handling the complainant's building plans submission; and (2) Failing to explain the cause of the delay

Background

380. The complainant is the owner of a disused cinema. In March 2006, the complainant's authorised person (AP) submitted a set of building plans (the 2006 Submission) to the concerned District Lands Office (DLO) of the Lands Department (LandsD) to apply for approval for the alteration and additional works at the foyers and ticket booths on the ground floor of the cinema premises. The following day, DLO advised AP that it would formally reply in eight weeks according to its pledge. However, DLO did not inform the complainant or AP of its decision on the 2006 Submission until February 2010. LandsD also failed to explain to the complainant the cause of the delay.

The Ombudsman's observations

381. According to the relevant Special Condition of the Conditions of Sale governing the land lot, the premises is restricted to cinema use. In March 2006, AP forwarded the 2006 Submission to DLO for approval. In May, the Building Authority (BA) informed AP of its approval of the 2006 Submission and copied its approval letter to DLO. Subsequently, AP requested a meeting with DLO to discuss the possibility of adapting the cinema for use as a theatre for stage performance. DLO then requested AP to provide further information to facilitate its consideration of the 2006 Submission. In late May, AP submitted a set of building plans approved by BA to DLO. In June, BA issued its written consent for the commencement of the proposed works. In August, BA advised AP in writing that it had no objection to the completed works as certified by AP. In November, AP wrote to DLO, with a copy of the BA's approval letter of May, asking DLO to confirm whether it had no adverse comment on the proposed works in the 2006 Submission.

382. In October 2009, when handling the complainant's application for lease modification to convert the entire cinema premises for retail use, DLO received a public complaint about pavement obstruction caused by shops on the ground floor of the cinema premises. In the same month, DLO found that part of the foyer had been converted into shops. DLO

warned the complainant in the first instance and asked the complainant to rectify such breach of the Conditions of Sale. In December, DLO issued a second warning letter to the complainant.

383. In January 2010, the complainant's representative verbally told a DLO officer that the 2006 Submission had already been approved by BA, but there was no reply from DLO. Subsequently, DLO checked the file record and found that it had never made a decision on the 2006 Submission. In February, DLO informed AP in writing that the 2006 Submission was rejected. In September, the complainant's legal representative requested LandsD to look into the delay in processing the complainant's 2006 Submission and review the case. In late September, LandsD informed the complainant's legal representative that it had reviewed the case and confirmed DLO's decision to reject the 2006 Submission on the grounds that the proposal did not comply with the lease conditions.

384. In early October, the complainant's legal representative wrote to LandsD again, complaining that LandsD had not accounted for the alleged delay. The complainant's legal representative repeated its request for a review of the case. In late October, LandsD reiterated to the complainant's legal representative the reasons for rejecting the 2006 Submission. The complainant's legal representative then asked LandsD again whether it would respond to its complaint about the delay. In early November, LandsD replied to the complainant's legal representative, without addressing the delay.

385. It is a fact that DLO did not issue a reply on the 2006 Submission until February 2010, the cause of which cannot be ascertained. It is also true that the complainant's legal representative had repeatedly requested LandsD to account for the delay, but LandsD had given no response. In this light, The Ombudsman considered the complaint substantiated.

Administration's response

386. LandsD has obtained legal advice on the matter and communicated with The Ombudsman on LandsD's position on this issue and how it would deal with the recommendation.

Case No. 2011/1623 - Failing to properly regulate some private columbaria allegedly in breach of land lease clauses

Background

387. Several members of the public complained to The Ombudsman in April 2011 against the Development Bureau, Home Affairs Bureau, Home Affairs Department, Planning Department, Food and Environmental Hygiene Department and Lands Department (LandsD) for failing to properly regulate shop premises providing funeral services in the district concerned. The shops in question included Shop A and ten odd unauthorised private columbaria.

388. Upon examination of the complainant's allegations, The Ombudsman decided that one of the investigating jobs is to investigate LandsD's handling of columbaria allegedly in breach of lease conditions.

The Ombudsman's observations

389. As far as LandsD is concerned, The Ombudsman's investigation findings are as follows –

Enforcement of lease conditions

390. A land lease is an agreement between the Government as the landlord and the lessee of the leased land. As pointed out by LandsD, a land lease is made to restrict the use of the land instead of regulating any individual industry.

391. The Ombudsman noted that in one of the three leases that it had examined, there was no lease provision expressly prohibiting the operation of funeral services. However, there were lease terms against the operation of "offensive trade or industry".

Columbaria

392. Regarding the ten odd unauthorised private columbaria as alleged by the complainant and in response to the repeated complaints by a District Council member since May 2010, LandsD had repeatedly sent its officers to conduct inspection, which revealed that such premises were used for the temporary deposit of human ashes. In its reply in July 2011, LandsD mentioned that having examined the leases of three of these

premises, the deposit of human ashes was not considered as a breach of the lease terms. For the remaining premises, the leases of which had been granted years ago and involved some relatively special terms, LandsD was seeking legal advice and could not draw a conclusion yet.

393. As LandsD was still examining the lease terms concerned, The Ombudsman could not comment at this stage on whether the department had properly handled the case. As such, The Ombudsman considered the complainant against LandsD inconclusive.

Administration's response

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

(a) LandsD confirmed in January 2012 that six (including Shop A) of the ten odd allegedly unauthorised private columbaria had not breached the relevant lease terms;

(b) LandsD wrote to The Ombudsman in May 2012 explaining the grounds for not considering Shop A's business as an "offensive trade". The Ombudsman replied in July 2012 advising that LandsD had provided the relevant grounds; and

(c) LandsD is still seeking legal advice on whether the remaining cases are in breach of the relevant lease terms. If so, LandsD would take follow-up action as appropriate.

Case No. 2011/3482B - (1) Failing to take action to prohibit unregistered and uninsured builders from erecting flower plaques mounted on bamboo scaffolding near the pier on an outlying island; and (2) Unreasonably allowing erection of flower plaques for celebrating private events with no relation to public interests

Background

395. The complainant complained in September 2011 that the flower plaques found on a government land near the ferry pier of an outlying island (subject site) had the following problems –

(a) the flower plaques were uninsured and erected by workers without scaffolding licences; and

(b) the photos taken by the complainant showed that the flower plaques were used for celebrating weddings and had no relation to public affairs. He questioned why the District Lands Office (DLO) concerned approved the application for erection of those flower plaques.

The Ombudsman's observations

Allegation (1)

396. The Ombudsman was of the view that to respect local traditions, DLO may approve the erection of flower plaques on government land on the outlying islands, including the subject site, for promoting festive celebrations and club recreational activities.

397. There is no rule at present requiring that the erection of bamboo scaffolding and the mounting of flower plaques have to be carried out by licenced workers. LandsD also did not have the responsibility to regulate the licensing of these workers. Regarding the employees' compensation insurance and third party liability insurance, they ought to be taken out by the flower plaque company as the workers' employer and the applicant who sought to erect the flower plaques respectively. DLO has already, in its approval letter, reminded the applicant to take note of such responsibilities. The Ombudsman considered that what DLO had done was acceptable and Allegation (1) unsubstantiated.

398. However, in order to provide better protection to the general public, the Ombudsman considered that LandsD may resort to the more prudent practice of the Leisure and Cultural Services Department and require the applicant to present a copy of the insurance policy in respect of such erections before using the land.

Allegation (2)

399. In accordance with the established policies, it was appropriate for DLO to approve the application from the organisation concerned (Organisation A) for erecting flower plaques on government land for the celebration of the National Day. However, it was shown that other persons/parties had erected some flower plaques for the celebration of weddings, without DLO's approval on the subject site during the period when approval was granted to Organisation A. Given that Organisation A is a local body and that the plaques were erected on the main thoroughfare near the subject site, it was incomprehensible as to why Organisation A failed to notice that the place had been used by other persons/parties for other purposes. As the approving authority, LandsD must address the issue squarely and issue warnings to Organisation A.

400. As no inspection was made after the approval of the application, DLO was not aware that the subject site had been transferred for use by others and consequently no timely follow-up action was taken. Though it was provided in the approval letter that the applicant had to post the letter throughout the approval period for Government and public inspection, the purpose for erecting the flower plaques was not specified in the letter. Moreover, DLO failed to require that the approval letter had to be displayed in a conspicuous position for public inspection. It was simply difficult for members of the public to monitor.

401. Land in Hong Kong is a precious public resource. An applicant who misuses or permits others to misuse government land as approved for use by DLO for specified purpose, regardless of the period of time, is a serious problem. The misuse as revealed in this case reflected that the approval and monitoring mechanism adopted by LandsD for use of government land was too loose, allowing people to take advantage of the loopholes. As the administrator of government land, LandsD has the duty to ensure that public resource would not be misused.

402. In view of the above, the Ombudsman considered that Allegation (2) was substantiated other than alleged.

Administration's response

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

(a) LandsD wrote to Organisation A in March 2012 to question and warn them for allowing other parties to use the subject site for displaying flower plaques; and

(b) LandsD revised its guidelines in May and June 2012 to improve the arrangements for the application for erection of flower plaques on government land.

Case No. 2011/3721 - Inaction against some shop operators' occupation of the private portion of a pavement

Background

404. The complainant claimed that the ground floor shops of a development had frequently occupied half of the pavement for the sale of their goods. There were also people queuing for minibuses at the spot and pedestrians were forced to walk on the roadway, which was highly dangerous. Having learnt from the Food and Environmental Hygiene Department (FEHD) that the portion of the road was "an area under private management but open for public use", the complainant lodged a complaint to the concerned District Lands Office (DLO) of the Lands Department (LandsD) against the shops about the breach. However, DLO replied that enforcement action was not appropriate since the shops were not occupying the area on a 24-hour basis. The complainant was dissatisfied with DLO's explanation for not taking enforcement action and lodged a complaint to The Ombudsman against DLO.

The Ombudsman's observations

405. In order to improve traffic flow, the lot owner of the development concerned is required under the land lease to leave part of the lot for pedestrian access (the subject land). The lease terms in respect of the subject land are as follows –

(a) the lot owner shall form the subject land for pedestrian use to the satisfaction of the Director of Lands;

(b) unless prior consent of the Director of Lands has been obtained, the lot owner shall not use the subject land for the purpose of storage, parking or erecting any structure; and

(c) the lot owner shall surrender the subject land to the Government at the request of the Director of Lands.

The pavement concerned as mentioned by the complainant is part of the subject land.

406. The Ombudsman considered that the original intention of the lease conditions was to request the lot owner to open the subject land for pedestrian use. As such, DLO has to try its best endeavour to resolve the obstruction problem caused by the shops. In this event, the legal advice DLO obtained was that those shop operators "temporarily" placed their goods on that portion of the pavement had not breached the lease term (b) mentioned above, thus DLO decided not to take lease enforcement action. The Ombudsman considered that the point of law mentioned above was questionable. However, from an administrative point of view, it was reasonable that DLO had not taken lease enforcement action based on the legal advice received.

407. Moreover, DLO had not completely ignored the obstruction problem - it had written to the lot owner requesting for improvement, asked FEHD whether enforcement action would be taken, and also started studying the matter of taking over the subject land under the lease conditions with the Transport Department.

408. In view of these, The Ombudsman considered the complaint unsubstantiated.

Administration's response

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

(a) DLO had served on the lot owner a notice requiring the latter, in accordance with the lease condition, to surrender the subject land to the Government by the specified date; and

(b) LandsD had already revised the Master Document for use in similar cases requiring the lot owner in the relevant conditions to open to the public the land specified for pedestrian use within the lot, before surrender of such lot to the Government.

Case No. 2011/3749 - Delay in following up a complaint about odour and noise nuisance from an illegal garage in the complainant's village

Background

410. The complainant lives in a village. According to him, someone had built some illegal structures and operated a vehicle paint spraying workshop in that village (the site concerned). The smell of the paint and the noise produced by the workshop caused nuisance to the complainant and other villagers. Therefore, they lodged a complaint to the District Lands Office (DLO) concerned of the Lands Department (LandsD). Although DLO issued a letter to the licensee in June 2011 requesting for rectification within one month, the situation remained.

411. The site concerned was regulated by a Government Land Licence (the licence). The licence stipulates that –

(a) the site concerned is only allowed for agriculture purpose with two agricultural structures of specified size; and

(b) upon cancellation of the licence, the licensee has to demolish all the structures on the site concerned.

412. The licence does not stipulate whether it will lapse if the licensee has passed away. However, according to the existing departmental guidelines, if the licensee of a Government Land Licence passes away, his/her immediate family member may apply for a new licence to replace the old one. Otherwise, the old licence will be revoked.

413. DLO received a complaint in May 2011 from the villagers and was informed that there was a vehicle paint spraying workshop at the site concerned. Its operation caused nuisance to the villagers and damaged the environment. Staff of DLO carried out inspection on the same day. It was revealed that the site was used for vehicle repair workshop, which violated the permitted use of the licence. Moreover, the structures on site also exceeded the size permitted.

414. DLO issued a letter in early June to require the licensee to rectify the above irregularities within one month. In mid-June, the son of the licensee (the occupant) informed DLO that the licensee had passed away many years ago. He promised to rectify the above irregularities but requested DLO to offer him a grace period so as to conclude the business

of the workshop. The staff of DLO accepted the request of the occupant, but did not specify a deadline.

415. In September, The Ombudsman enquired LandsD about the complaint lodged by the complainant. The staff of DLO conducted inspection at the site concerned again in end September and early October and confirmed that the irregularities remained. DLO issued a letter to the occupant in mid-October informing him that the licence would be revoked on a specified date in November and he was requested to demolish the unauthorised structures before that date. The staff of DLO inspected the site after the due date and found that the occupant did not clear the site concerned and demolish the structures as required.

416. DLO posted a notice in January 2012 to demand the occupant to remove the unauthorised structures by a specified date in February 2012 and cease occupation of the site concerned. During the site inspection conducted in late February, DLO found that the unauthorised structures still existed.

The Ombudsman's observations

417. The staff of DLO were aware that the licensee had passed away many years ago in June 2011 and the occupant did not apply for a new licence. The occupant was unlawfully occupying government land. According to the departmental guidelines, DLO should revoke the licence and demand the occupant to immediately remove the unauthorised vehicle repair workshop, which caused environmental and noise nuisance to the villagers. However, DLO offered the occupant a "grace period" without time limit to allow him to remove the unauthorised structures by himself. Furthermore, DLO had not taken any follow-up actions before enquiry from The Ombudsman. The matter was not taken seriously. The Ombudsman therefore considered the complaint substantiated.

Administration's response

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

(a) although DLO arranged the contractor to commence removal works in March 2012, the occupant had started to remove the structures on the government land concerned and committed to

complete the removal by April 2012. DLO conducted a site inspection after the due date and found that the structures concerned were demolished. In the same month, DLO conducted a site inspection again and noted that the government land concerned was no longer occupied; and

(b) as the structures concerned were removed by the occupant himself, the recommendations on the recovery of demolition costs and relevant fees are therefore not applicable.

Leisure and Cultural Services Department

Case No. 2011/1181 - Failing to respond to the complainant's complaint

Background

Details of Complaint

419. In January 2011, the complainant noticed that two glass panels on the roof of a pedestrian access to a playground were broken and posed a danger to the passers-by. He wrote to the Leisure and Cultural Services Department (LCSD) and asked for follow-up actions. After two months, he found the glass panels still remain unrepaired. In response to his further enquiry, LCSD replied that they were ordering the glass materials and would carry out the works in May. Considering LCSD to have delayed in handling the matter, the complainant complained to The Ombudsman.

420. After receiving The Ombudsman's referral, LCSD took another two and a half months to give the complainant a substantive reply, making him even more dissatisfied.

Sequence of Events

421. The playground was completed in late October 2009 and handed over to LCSD for management, with one year of Defects Liability Period (DLP) provided by the Housing Department (HD).

422. In August 2010, LCSD noticed the broken glass panels on the roof of the covered pedestrian access. The damage was believed to be caused by falling objects from a nearby construction site. HD denied maintenance responsibility because the damage was not resulted from any defects in construction or materials. LCSD then informed the Architectural Services Department (ArchSD) to follow up.

423. For public safety, ArchSD removed the broken glass panels in late August and covered the opening with wooden planks to provide temporary shelter from rain. Since ArchSD would only take over the daily maintenance service for the venue upon expiry of DLP, special fundings from LCSD were required for ArchSD to start the repairs.

424. At that time, the venue manager (Manager A) of LCSD responsible for following up with the repairs erroneously believed that the recurrent costs provided for the venue would be automatically transferred to ArchSD upon expiry of DLP at the end of October 2010. As such, she only forwarded the specifications of the glass materials to ArchSD without attending to the funding arrangements. Neither did ArchSD mention to her anything about the charges for the repairs. It was not until she received the complainant's enquiry in January 2011 that she realised that ArchSD had not commenced the repair works pending the requisite funds.

425. After clarifying the funding arrangements with the Finance Section, Manager A applied for the issue of an allocation warrant to ArchSD in the same month. It took three months to order the glass panels and ArchSD finally completed the repair works in mid-May 2011.

Response from the Leisure and Cultural Services Department

426. LCSD admitted that Manager A had not adequately communicated with ArchSD when discussing the repair works. Had she fixed a reasonable completion date with ArchSD and followed up with the work progress more proactively, the delay could have been avoided. LCSD had reminded Manager A of the proper procedures in handling the repairs of venues, and her supervisor would also give her more guidance.

427. To prevent recurrence of similar incidents, LCSD issued the "Guidelines on Repair and Maintenance of Leisure Facilities" (the Guidelines) to the staff of all its district offices in October 2011. The Guidelines set out the funding arrangements between LCSD and ArchSD, especially in relation to newly completed facilities and facilities still under a DLP. Frontline staff members are also required to notify their senior managers of all repair works not completed within one month to ensure timely follow-up actions.

428. As regards the delay in replying to the complainant, LCSD explained that it was because of the need to reach consensus with ArchSD on the repair responsibility and funding arrangements. LCSD apologised to the complainant for the delay.

The Ombudsman's observations

429. LCSD was aware of the damaged glass panels in August 2010 but took nine months to repair the glass roof. There was clearly a delay. Manager A had assumed that ArchSD would have automatically received the funds and commenced the repair works, but would also take the initiative to inform her should it not receive the funding. Consequently, she was totally unaware that the repair works had not commenced at all. As a matter of fact, there had not been any relevant guidelines in LCSD before this incident, thus The Ombudsman believed that its frontline staff probably lacked a correct understanding of the funding arrangements and that it was not just the problem of any individual staff.

430. LCSD gave a reply to the complainant two and a half months after The Ombudsman's referral, which was longer than the usual time of around one month. Besides, the reply failed to explain clearly the reason of the delay and did not properly address the complainant's concern.

431. LCSD failed to provide clear guidelines to its staff, resulting in delay of works. It also failed to reply to the complainant within a reasonable time. The Ombudsman, therefore, considered the complaint substantiated.

Administration's response

432. LCSD has accepted The Ombudsman's recommendations, and issued the Guidelines to the staff of all its district offices in October 2011, which set out funding arrangements between LCSD and ArchSD, especially those in relation to newly completed facilities or those still within DLP. The Guidelines also stipulate the time of response for different categories of repair (e.g. emergency, urgent and general repair), and communication arrangements between LCSD and the works departments concerned for reporting and monitoring the repair works.

433. To ensure timely completion of all repair works, the Guidelines stipulate that repair works cannot be completed within a month should be brought to the attention of the respective Chief Leisure Managers. Quarterly meetings will be held between LCSD and representatives of the works departments to ensure that all outstanding repair works can be completed within a reasonable period of time.

Case No. 2011/2557 - Mismanagement of the grass pitch in a recreation ground

Background

434. A member of the public complained that he was unable to book the natural turf pitch in a recreation ground as the facility was always booked by other organisations.

The Ombudsman's observations

435. LCSD is obliged to provide designated training centre for the squad members of sport. There is a misunderstanding about the management and operation of the natural turf pitch as the department had not clearly made known the related policy, allocation of bookings and maintenance arrangement to the public. Improvement on theses areas by LCSD is required. Generally, The Ombudsman considered that there are no administrative malpractices for the case, and the allegation is not substantiated.

Administration's response

436. LCSD has accepted The Ombudsman's recommendation and uploaded onto its webpage the special booking/allocation arrangements for those leisure venues that deviate from the existing guidelines.

Official Receiver's Office

Case No. 2011/1016 - Unreasonably requesting an informant to conduct a bankruptcy search and to verify the information he provided to ascertain a suspected person's identity

Background

Details of Complaint

437. The complainant suspected that a bankrupt estate agent was using a colleague's account to receive his commissions. He reported the case to the Official Receiver's Office (ORO) by email and provided the name, address, estate agent's licence number and employer's name of the suspected person.

438. Upon ORO's request for the bankruptcy case number of the suspected person, the complainant made an online search at his own expense and advised ORO of the case number. He was later further requested to verify with the employer concerned to ascertain whether the suspected person was a bankrupt and to provide supporting documents. The complainant, unable to obtain such information, alleged that ORO was unreasonable in making such demands to an informant.

Sequence of Events

439. On receipt of the report from the complainant, a General Registry (GR) staff input the English name provided by him into ORO's Management Information System (ORMIS) and found 11 bankrupts with the same English name. Only one of the bankrupts' Chinese name and English alias also matched exactly with the information provided by the complainant.

440. GR mistook that person to be the suspected person and so asked the responsible case officer (Officer A) to follow up. However, Officer A noticed that the address was at variance and so GR asked the complainant to provide the suspected person's bankruptcy case number or Hong Kong Identity Card (HKIC) number for cross-checking. In response, the complainant conducted a bankruptcy search on ORO's website and found a case number, which belonged to the same bankrupt aforementioned, whose Chinese and English names were an exact match. While providing the case number, the complainant also requested ORO to contact the Estate Agents Authority (EAA) to further verify the person's identity.

441. Based on that case number, Officer A cited the English name and HKIC number of the bankrupt of that case to make an enquiry with EAA. However, EAA replied that this person was not a licenced agent. Thereafter, Officer A also issued a letter to the bankrupt of that case, requesting him to give an updated account of his employment status.

442. Since the identity of the suspected person was still not confirmed and an email reminder was received from the complainant, Officer A requested GR to seek further information from the complainant, asking him to verify with the employer concerned and provide the supporting documents. At this point, GR reminded Officer A that doing so might lead to complaints, but it eventually issued the email when Officer A insisted that it was necessary.

443. After The Ombudsman commenced the inquiry, ORO scrutinised the particulars of the 11 bankrupts with the same English name again and finally identified another person whose address was similar to the one provided by the complainant. It was then discovered that the occupation and estate agent's licence number submitted earlier by that person also tallied with the details in the complainant's report. The identity of the suspected person was thus finally confirmed.

Response from the Official Receivers Office

444. ORO explained that, depending on the circumstances of each case, an informant might or might not be able to engage the assistance of the employer concerned. In the interest of time, Officer A had asked the complainant to make further verification. However, ORO conceded that Officer A lacked sensitivity and failed to fully consider the difficulties it would cause to the complainant. ORO apologised for that.

445. ORO also admitted that had GR been able to go the extra mile and scrutinise all the particulars when searching ORMIS, it should have identified the correct individual at an early stage. In this light, ORO have drawn up relevant guidelines requiring that staff should not only search by names, but should also scrutinise all other information provided by informants.

The Ombudsman's observations

446. In his first email making an offence report, the complainant had already provided the name, address and estate agent's licence number of the suspected person. In fact, it was possible to confirm the suspected person's identity simply with the address. Nevertheless, ORO repeatedly asked the complainant for further information, sent a letter to EAA and made enquiry with an unrelated bankrupt based on a wrong case number. All these actions were a complete waste of time. It showed ORO's carelessness and impropriety in handling the matter.

447. After examining all the email correspondence, The Ombudsman considered ORO to have failed to communicate clearly when seeking further information from the complainant, resulting in his misunderstanding that he had to conduct a bankruptcy search at his own expense. Had ORO clearly told the complainant that he was only required to furnish the information already in his possession and provided him with the case officer's telephone number for enquiries, it might have avoided giving him a wrong impression that ORO was shirking the responsibility of investigation to him.

448. The Ombudsman could understand that ORO might need to seek further information from informants in the course of investigation. However, ORO should show consideration for the informants and state the reasons when making such demands to avoid misunderstanding.

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

Administration's response

450. ORO has accepted The Ombudsman's two recommendations. ORO admitted that the case officer was not sensitive enough and offered an apology. ORO also admitted that had GR gone beyond the usual search method and checked the address of the suspect when searching ORMIS, the correct person could have been identified at an early stage. It has implemented The Ombudsman's recommendations as follows –

(a) ORO has issued a General Reminder in December 2011 to all Insolvency Officers and clerical staff in GR responsible for conducting searches in ORMIS reminding them to communicate with informants clearly at all times. In particular, when

deciding whether it is necessary to request the informant to provide further information, officers of ORO should make a thorough search with reference to all of the information provided first. Besides, officers should state the reason when requesting the informant for further information;

(b) ORO has issued the Guidelines for Searching Bankruptcy Cases under ORMIS in August 2011 to all Insolvency Officers and clerical staff in GR responsible for conducting searches in ORMIS. In particular, staff in GR are required to verify all other information in ORMIS apart from checking the name before referring the case to the case officer for follow-up and verification. Case officers were also reminded to make thorough verification with reference to all the information provided by informants; and

(c) the effectiveness of the Guidelines was reviewed in November 2011 and March 2012. Based on these reviews, ORO was satisfied with staff's compliance with the General Reminder and the Guidelines. Staff would be reminded to observe the General Reminder and the Guidelines from time to time.

Case No. 2011/2730 and others - Being unfair to other bankrupts in deciding not to claim the money obtained from the "Scheme $6,000" from those bankrupts whose property was held by the Office as trustee

Background

Details of Complaint

451. Scheme $6,000 (the Scheme), launched by the Government in late August 2011, gave out a sum of $6,000 to each holder of a valid Hong Kong permanent identity card aged 18 or above. Bankrupts who met the eligibility criteria could also register for the Scheme.

452. Under the Bankruptcy Ordinance (Cap. 6), the money thus obtained by a bankrupt is regarded as "after-acquired property" and subject to claims by trustees. However, the Official Receiver's Office (ORO) decided not to claim the $6,000 from bankrupts whose property was held by the department as trustee (ORO cases). As for other bankrupts whose cases were managed by outside trustees (outside cases), the trustees had the discretion to decide whether or not to claim the money.

453. A number of bankrupts of outside cases lodged a complaint with The Ombudsman, alleging that ORO's decision was inappropriate and unfair to them.

Reasons for the Official Receiver's Office's Decision

454. ORO indicated that the Scheme was intended to "leave wealth with the people". Few creditors would actually benefit even if the department made a claim against the bankrupts for that $6,000. It was because ORO had a priority right to deduct from such after-acquired property the outstanding legal fees and administration expenses that a bankrupt or creditor must settle with the department. However, as most bankrupts of ORO cases had little or no assets at all, if ORO made a claim for that $6,000, little would be left for apportionment to creditors after deducting such fees and expenses.

455. In the past, when Government introduced relief measures (such as rent and rates exemptions) targeted at public housing tenants and low income groups, ORO did not make a similar non-claim decision. Nevertheless, most bankrupts who benefitted from such measures would spend the money thus obtained on family needs. Therefore, ORO

normally would not make a claim when the bankrupts reported the income.

456. Under the Scheme, eligible persons must submit a registration form in order to receive the $6,000. If the department had decided to make the claim, its staff would have to ask the bankrupts individually if and when they received the money so that the notice of claim could be served on them within the legal timeframe. In case the bankrupt had obtained and spent the money, or waited till after his/her discharge to register for the money, follow-up action would be even more complicated. As there were over 36,000 ORO cases, claiming from the bankrupts the $6,000 under the Scheme would require considerable staff and other resources and was, therefore, not cost-effective.

Outside Cases

457. The majority of bankruptcy petitions presented by a bankrupt with an asset not exceeding $200,000 were managed by ORO. The rest would be contracted out randomly to outside trustees. In some cases, the trustees were appointed by the creditors.

458. Concerning the Scheme, outside trustees could make their own decision as to whether or not to claim the money from the bankrupts and ORO was in no position to give them instructions. Should a creditor feel aggrieved because of the trustee's decision not to claim the money, he/she would have a right to appeal to the Court.

The Ombudsman's observations

459. To "leave wealth with the people" is neither a primary duty of ORO nor a factor ORO should consider in exercising its discretion. The money the Scheme gave out was not purpose-specific. Even if a bankrupt used it to repay a debt, the objective of "leaving wealth with the people" could be regarded as fulfilled.

460. ORO's decision not to claim the money from the bankrupts of all ORO cases was based on a generalised presumption and it probably neglected the creditors' right to be apportioned the property in some cases. This could be unfair to them. The fact that no creditors had ever applied to the Court to reverse the decision did not mean that none of them objected to it or had their interests impaired as a result. ORO's duty to consider each bankruptcy case on its own merits had given way to administrative convenience. This was a deviation from established

practices.

461. The complainants' dissatisfaction stemmed from ORO's failure to do what outside trustees would, i.e. to consider the actual circumstances of individual bankrupts before deciding whether or not to claim the money. As a result, bankrupts of all ORO cases were able to keep the $6,000, but those of outside cases (such as the complainants) were subject to the possible claims of their trustees.

Conclusion

462. The ORO decision meant that the treatment bankrupts received depended on whether their cases had been contracted out or not. Bankrupts of outside cases had a slimmer chance of keeping the money than those of ORO cases. ORO's decision also put the interests of some creditors at jeopardy and was, therefore, not appropriate.

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

Administration's response

464. ORO has agreed to take into account The Ombudsman's recommendation to follow the due process and handled the cases according to established practices in any future similar exercises.

Planning Department

Case No. 2011/1360 and 2011/1361 - Failing to raise objection when consulted by the Food and Environmental Hygiene Department regarding a shop's application for Undertaker's Licence, despite its knowledge that the land occupied by the shop was not permitted for burial service purposes

Background

465. In April 2011, some residents of the Hung Hom district lodged a complaint to The Ombudsman against the Development Bureau, Home Affairs Bureau, Home Affairs Department (HAD), Planning Department (PlanD), Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD) for failing to properly regulate the burial shops and private columbaria in the district. The Ombudsman initiated a full investigation into the matter on 27 April 2011.

466. For the complaint concerning PlanD, the complainant alleged that PlanD was aware that the land occupied by Shop A had been zoned "Residential (Group A) 4", which was not permitted for burial services purposes. However, PlanD did not raise objection when consulted by FEHD regarding the application for an Undertaker's Licence from Shop A.

467. Shop A falls within the "Residential (Group A) 4" zone on the Hung Hom Outline Zoning Plan No. S/K9/24 (OZP) approved by the Town Planning Board (TPB). According to the Notes of the OZP, "Office" and "Shop and Services" uses are always permitted on the lowest three floors of a building within the "Residential (Group A)" zone, where application for planning approval from the TPB is not required. "Funeral Services Centre" is not a permitted use as it is not listed in the Notes.

468. According to the "Definitions of Terms/Broad Use Terms Used in Statutory Plans" (Definitions of Terms), the definitions of "Office", "Shop and Service" and "Funeral Services Centre" are summarised as follows –

	Use	Definition	Remarks
(1)	Office	Means any premises used as a place of business and for conducting clerical, administrative, documenting and other business/industrial-related work.	It includes audio-visual recording studio, design and media production and professional consultancy firm.
(2)	Shop and Services	Means any premises where goods are sold or services are provided to visiting members of the public.	It includes bank, barber shop, beauty parlour, convenient store, supermarket, department store, fast food shop, courier service counter, clinical laboratory, medical consulting room, money exchange, money lending office, pawn shop, photographic studio, small-scale printing and xerox service, real estate agency, retail shop, securities brokerage, service trades, showroom, tourist information office, employment agency and travel/ticket agency.
(3)	Funeral Services Centre	Means any premises for the specific purpose of development by the public or private sectors for services and industries in connection with funeral requirements.	It may be an ancillary use of a cemetery, columbarium and crematorium. [Subsumed under "Columbarium" and "Crematorium".]

469. In June 2009, FEHD received an application for an Undertaker's Licence from Shop A and consulted HAD, LandsD and PlanD.

470. In August 2009, PlanD replied to FEHD regarding Shop A's application as follows –

(a) Shop A fell within the "Residential (Group A) 4" zone on OZP. As it was stated in the application that the premises of Shop A would only be used as the undertaker's office and "Office" use did not exclude those offices associated with the services provided by undertakers as shown in the remarks of the "Definitions of Terms" issued by TPB, PlanD considered that the application involved "Office" or "Shop and Services" use, which was always permitted under OZP, and thus raised no objection to the application; and

(b) nevertheless, given the street frontage of Shop A and its close proximity to other shops, PlanD reminded FEHD that strict licensing conditions should be stipulated to minimise disturbance to nearby residents.

As the applicant complied with all licensing conditions, FEHD issued an Undertaker's Licence on 16 December.

The Ombudsman's observations

471. The Ombudsman considered that PlanD did not object to FEHD's approval of the Undertaker's Licence application from Shop A on the ground that it was indicated in the application that premises would only be used as undertaker's office. Nevertheless, PlanD reminded FEHD that strict licensing conditions should be stipulated to minimise disturbance to nearby residents. The response given by PlanD on consultation by FEHD was justified and reasonable.

472. Nevertheless, the proposed use of Shop A premises as undertaker's office involved burial services after all and was related to the "Funeral Services Centre" use under the "Definitions of Terms". Dispute is likely to be caused. The Ombudsman urged PlanD to review this issue.

Administration's response

473. In view of The Ombudsman's concern on the funeral services involved in the undertaker's office, the TPB Secretariat submitted an amendment proposal on the "Definitions of Terms" to TPB on 23 March 2012 to avoid misinterpretation by the public of the definitions of the concerned uses. The proposed amendment clearly set out that "Funeral Services Centre" was an ancillary use of a cemetery, columbarium, crematorium and funeral facility. TPB has agreed to such amendment and the "Definitions of Terms" was amended accordingly on the same date.

Securities and Futures Commission

Case No. 2011/1241 - Delay in processing and failing to approve an application for personal licence

Background

Details of Complaint

474. In January 2009, the complainant, an insurance agent, passed the relevant examinations and applied to the Securities and Futures Commission (SFC) to become a licenced representative of his insurance company (Company A) to carry on Type 1 (dealing in securities) and Type 4 (advising on securities) regulated activities (RAs). To his dismay, SFC had not approved his application after more than two years. The complainant alleged that SFC had delayed in processing his licence application.

Licensing Regime

475. Under the Securities and Futures Ordinance (SFO) (Cap. 571), SFC is empowered to licence corporations and individuals for carrying out the SFO-defined RAs in Hong Kong. If a licenced corporation ceases its business in RAs, it must notify SFC and its licence will be revoked. This will cause the personal licences held by any licenced representatives of that corporation to be revoked simultaneously, and its employees who have yet to hold any licences to be disqualified from doing so, because individuals cannot be licenced unless the corporation employing them has a licence for the same types of RAs.

476. SFC pointed out that persons whose business was solely concerned with investment-linked assurance schemes or mandatory provident fund schemes were regulated by the Insurance Authority or the Mandatory Provident Fund Schemes Authority (MPFA), and were not required to hold SFC licences. As such, SFC would not approve their licence applications, so as to avoid misleading their clients into believing that the sale of insurance products fell within SFC's purview. Yet, SFC found it necessary to issue a clarification circular in August 2009 for the insurance industry as there were apparently confusion about the licensing requirements.

Sequence of Events

477. In January 2009, when handling certain licence applications from Company A's staff members, SFC found that Company A did not appear to be conducting Type 1 and Type 4 RAs though it was licenced for such business. In February 2009, SFC requested Company A to clarify the nature of its business activities. Meanwhile, SFC verbally informed Company A that all licence applications from its staff would be put on hold until SFC was satisfied that Company A was engaging in RAs. In August, Company A asked for more time to prepare a reply to SFC because it was subjected to an MPFA review at that moment.

478. In February 2011, the complainant contacted SFC to enquire about the progress of his application. SFC replied that since it still had doubts about the business nature of Company A, it could not process his licence application and his application fees would not be refunded. In March 2011, SFC wrote to Company A again, requesting clarification on whether it was conducting any RAs.

Response from the Securities and Futures Commission

479. SFC commits in its performance pledges to process any application for a normal representative's licence within eight weeks. This timeframe was not applicable to the complainant's case due to its complexity, as SFC must first verify whether Company A and its staff were required to hold such licences.

480. As to why the verification had not been completed in more than two years, SFC explained that it would not revoke Company A's licence lightly taking into account the financial implication and inconvenience that might be caused. It might even harm the company's reputation. Therefore, Company A was given sufficient latitude to sort out and restructure its business. During the period, withholding the applications from individual staff was preferred to rejecting them outright. Otherwise, they might need to re-apply and pay the application fees again if Company A could establish the relevant new business subsequently. SFC considered the complainant not prejudiced in any way by such deferral because he seemed to have only conducted insurance business.

481. SFC also asserted that since a licenced corporation had to endorse the licence application forms of its employees to confirm their accuracy, such applications were in fact jointly made by the company and the individuals. Should SFC have any enquiries about the individual applications, it would only contact the licenced corporation directly. The company was thus expected to advise its staff accordingly. Therefore, SFC had not given the complainant any direct written notifications until he made an enquiry with it in February 2011.

482. SFC stressed that insurance agents should familiarise themselves with the licensing requirements. If they unnecessarily took examinations in the mistaken belief that they would be entitled to a licence after getting a pass, they must bear their own responsibility. Since 2009, SFC had not only issued a clarification circular to industry participants to reiterate the licensing requirements, but had also dealt with a large number of cases similar to Company A. Considering the limited resources, SFC contented that it was unfair to view the complainant's case in isolation and criticise SFC for delay.

The Ombudsman's observations

483. The Ombudsman accepted that SFC was apt to exercise caution in processing licence applications where it had doubts. However, in this case, when Company A asked for an extension of time in August 2009 to prepare its reply, SFC did not specify a deadline. Thereafter, no further progress was made for one and a half years, until SFC wrote to Company A again in March 2011. This inevitably created an impression that SFC's follow-up actions were slipshod and inefficient. This might even call into question whether SFC had fully discharged its regulatory duties.

484. SFC considered it sensible and pragmatic not to revoke Company A's licence hastily. In this way, SFC actually exercised discretion to permit an unqualified company and its existing licenced employees to maintain their licences for over two years, defeating its regulatory purpose of protecting the public from being misled. Nevertheless, staff members of the same licenced corporation were not granted the licences despite passing their examinations. The complainant certainly had reason to feel aggrieved and criticise SFC for inconsistency and delay in handling licensing matters.

485. Moreover, SFC's communication with the complainant was far from adequate. In April 2009, it only verbally notified his company of withholding his licence application. It was not until the complainant made an enquiry in February 2011 that SFC gave him a written explanation. Though SFC contended that companies were obliged to inform their staff of the application status, such arrangement was not mentioned in the relevant laws or the application form. The Ombudsman, therefore, did not accept SFC's shift of the responsibility for informing applicants to their companies.

486. In light of the above, The Ombudsman considered the complaint partially substantiated.

Administration's response

487. SFC has generally accepted The Ombudsman's recommendation and taken the following actions –

(a) for the recommendation on drawing up guidelines regarding those cases to which its performance pledges would not apply, SFC's Licensing Department has reviewed the current procedures concerning the handling of applications to which the SFC's performance pledges do not apply and has compiled a set of internal guidelines which address these situations;

(b) the comments and observations contained in The Ombudsman's Report were communicated to, and discussed with, staff of the SFC's Licensing Department. The internal guidelines referred to in the preceding paragraph were circulated to all staff of the Licensing Department; and

(c) for the recommendation on reviewing the current practice of only communicating with licenced corporations about the progress of individual staff members' licence applications, SFC noted that the SFC's Licensing Information Booklet (the Booklet) has clearly informed licenced corporations and individual applicants that licenced corporations are primarily responsible and liable for verifying and endorsing the applications of individual applicants who it is intended to become accredited to them. Informed intermediaries should well understand that, in relation to an application by which an individual is seeking to be licenced, there must be a single line

of communication between SFC and the licenced corporation which bears ultimate responsibility for the application. The reasons for this are as follows –

(i) an application by an individual to be licenced is made jointly by the applicant and the licenced corporation. The licenced corporation should share its communications with SFC with the individual applicant;

(ii) licenced corporations have compliance professionals whose role is to ensure that they discuss their communications with SFC with individual applicants and guide its individual applicants accordingly. After reviewing the arrangement, SFC believes the current practice serves the purpose and is most cost effective; and

(iii) to avoid miscommunications, SFC also considers that the principal means of communication should be between SFC and the licenced corporation.

To avoid confusion, SFC will make appropriate amendments to the Booklet and bring its contents up-to-date. The revised Booklet will be published shortly by SFC's Licensing Department.

Social Welfare Department

Case No. 2011/2856 - Failing to consult the complainant's mother before refusing to disclose her address to the complainant

Background

488. The complainant inquired Ms A, a social worker of the Social Welfare Department (SWD)'s Integrated Family Service Centre, which Care and Attention Home (C&A Home) his mother was admitted to. Ms A replied that since the complainant's third elder sister requested keeping their mother's information confidential, SWD would not disclose to the complainant the whereabouts of his mother.

489. The complainant later found the C&A Home concerned on his own. The complainant, together with his eldest sister, went to that C&A Home to visit their mother but their visit was refused by the staff of that C&A Home. Subsequently, the eldest sister was allowed to visit the mother upon police intervention. Their mother expressed the wish that she was not unwilling to meet these visitors.

490. The complainant complained that SWD, only acceding to the request of his third elder sister for keeping his mother's whereabouts confidential and without consulting the view of his mother, refused to disclose to him which C&A Home his mother was staying. It hindered the complainant and his eldest sister visiting their mother.

The Ombudsman's observations

491. The case record of SWD revealed that Ms A had visited the complainant's mother and learnt that someone had made a request to SWD for keeping her mother's accommodation confidential. However, there was no record indicating that their mother had made the same request.

492. Although Ms A stated that she had obtained the confirmation from the complainant's mother about her wish for keeping her accommodation confidential, there was no evidence supporting the statement. If Ms A had obtained such confirmation from the mother, she should have at least recorded the request in order to avoid any disputes in future. The Ombudsman considered that there was inadequacy in SWD's handling of this incident. The complaint was partially substantiated.

Administration's response

493. SWD has accepted The Ombudsman's recommendation. SWD had promulgated internal circulars providing guidelines on the release of service users' personal data to third parties. Staff have been reminded to follow these guidelines. Moreover, SWD has reminded all management staff to require staff of all service units to obtain written confirmation from the service users concerned as far as practicable when the service users request to keep their personal information confidential. In case there is difficulty in obtaining written confirmations from the service users concerned, the responsible caseworkers should clearly and thoroughly document such request.

Transport Department

Case No. 2010/5125 - Failing to proactively follow up a complaint against a minibus that continued to run on the road with a defective speed display device

Background

Details of Complaint

494. In late October 2010, the complainant boarded on a green minibus and noticed that its speed display device (SDD) was covered by a sheet of paper, on which a Chinese character meaning "out of order" was written. He reported the matter to the 1823 Call Centre (the Call Centre) and requested the Transport Department (TD) to follow up.

495. After nearly four weeks, the complainant happened to take the same minibus (with the same registration mark and driver) and found that SDD was still covered. Dissatisfied with the tardiness of TD in following up the matter, he contacted the Call Centre again and lodged a complaint with The Ombudsman.

Legal Provisions

496. With effect from 1 May 2008, it is mandatory for all public light buses to be fitted with an SDD, which shall also be maintained in good working order and kept free from any obstruction for easy reading by passengers. Any person using a vehicle on the road which does not comply with the provisions commits an offence and is liable to a fine of $10,000 and imprisonment for six months.

Transport Department's Follow-up Action

497. After receiving the report of the complainant through the Call Centre, TD called the minibus operator in early November, requesting the latter to investigate the matter, repair SDD as soon as possible and instruct the driver not to tamper with SDD.

498. In its first reply to TD, the operator reported that inspection by a repair service company was arranged on 10 November. It was found that SDD kept flashing because of a faulty cable, but the repair works had to be deferred to 20 November as the technician had not brought a spare cable. Thereafter, the operator reported to TD again that, after replacing

the cable, another defect was identified which required another week for ordering a necessary spare part from the original manufacturer. All repairs were finally completed on 30 November.

499. TD explained that since SDD could not function on its own, it must be delivered together with the minibus to a garage for maintenance and repair. So, the minibus in question should not be available for deployment during that period. By requesting the operator to repair SDD, TD was in effect requesting the operator to withdraw the minibus from service at the same time. Besides, minibus operators had the duty to comply with legal requirements. TD should not need to remind them individually every time.

500. In fact, the operator informed TD that it had instructed the minibus to stop service after being notified of the defective SDD by the driver. However, due to some internal miscommunication and in order to maintain the service level of the route, the minibus in question remained in service.

Improvement Measures by the Transport Department

501. In this incident, TD had cautioned the operator and put a remark in its evaluation report. Should the operator commit the same contravention again, TD would consider punitive measures such as issuing a warning letter and the suspension of the operating licence. To expedite repairs, TD had also recommended that the operator should keep stock of spare parts and SDDs. The operator accepted this recommendation.

502. In April 2011, TD issued two sets of guidelines standardising the actions to be taken by staff and the timeframe in handling complaints concerning SDDs on red and green minibuses. According to the guidelines, upon receipt of a complaint, staff must request the vehicle owner or the operator on the same day to repair SDD and stop the deployment of the minibus in question immdediately.

The Ombudsman's observations

503. Although TD was twice informed by the operator that repair works remained outstanding, it failed to remind the latter to stop deploying the minibus immediately on both occasions. Even after receiving through the Call Centre the complainant's report in late November that the minibus concerned was still in service, TD did not take vigorous measures to rectify the situation. The way TD handled the matter was unacceptably lax.

504. TD had presumed that the minibus would be unavailable for deployment during the time of repairs. Nonetheless, as it was reported that the technician had not brought a spare cable, apparently the minibus was not sent to a garage for inspection. Since SDD was not an essential component for the operation of a vehicle, it was possible that the minibus with an SDD waiting for repair continued to run on the road, although that would be against the law. TD's argument that a request for repairs was effectively the same as a request for withdrawing the minibus from service was hardly convincing.

505. TD condoned the repeated delay of the operator in carrying out repairs and never checked whether the minibus in question had been put out of service. Instead, TD relied on the operator to voluntarily comply with the law. It was only after the commencement of The Ombudsman's inquiry that TD drew up the relevant guidelines.

506. The Ombudsman, therefore, considered the complaint substantiated.

Administration's response

507. TD has accepted The Ombudsman's recommendation and implemented the following measures –

(a) in June 2011, TD issued internal guidelines to remind its staff to issue timely, clear and comprehensive replies to complainants regarding the progress and investigation result of complaint cases;

(b) in April 2011, TD set up a mechanism to monitor the complaint cases related to defective SDDs, and the effectiveness in handling such cases; and

(c) in August 2011, TD suggested to the Green Minibus and Red Minibus trades that they should keep stock on the spare parts or spare SDDs with a view to shortening the time required for repairs.

Case No. 2010/5511 - Failing to properly plan and provide sufficient motorcycle parking spaces in a certain district

Background

508. On 16 November 2010, Transport Department (TD) received an enquiry referred by the 1823 Call Centre (the Call Centre) on motorcycle parking spaces in the vicinity of a particular Home Ownership Scheme estate (the HOS estate) in a particular area. On 24 November 2010, TD replied through the Call Centre to the complainant indicating that the department needed more time to process the enquiry and would reply later.

509. TD then conducted a site investigation at a nearby housing estate (the housing estate) in order to better understand the situation of the housing estate's car park. On 10 December 2010, TD replied to the complainant that residents of the HOS estate could use the motorcycle parking spaces of the housing estate car park. If the residents felt that there were insufficient parking spaces in the HOS estate, they could provide their views to the estate management office and request to increase the provision of parking spaces in the estate. Besides, there were also temporary car parks operating under short-term tenancy arrangements near the HOS estate, which provided parking spaces for motorcycles.

510. As the complainant was not satisfied with TD's reply, TD made further enquiries with the estate management office of the HOS estate and the Link Management Limited (the Link). TD was advised that residents of the HOS estate could only use the private car parking spaces and light good vehicle parking spaces at the housing estate car park, but could not use the motorcycle parking spaces there. The lease of the housing estate allocated a certain number of parking spaces for private cars and light goods vehicles for use by residents of the HOS estate, but no motorcycle parking spaces were allocated.

511. In fact, to better utilise resources, the Housing Authority (HA) applied to the Town Planning Board for planning permission in 2004, and applied to the Lands Department for short term waivers on related lease conditions so that it could rent out the surplus parking spaces of the housing estate's car park (including motorcycle parking spaces) to non-residents (including residents of the HOS estate). The short-term waivers and planning permission in question were only applicable to HA, and were effective until May 2006 and March 2007 respectively.

512. Since then, HA had been renting out surplus parking spaces of the housing estate car park to non-residents, and the arrangement included the renting out of a few dozens of motorcycle parking spaces to residents of the HOS estate. When HA sold its shopping facilities and car parks (including that of the housing estate) to the Link in November 2005, the relevant waivers and permission expired. After taking over the facilities, the Link continued to rent out the surplus parking spaces to non-residents, but this actually breached the lease conditions. On 18 January 2011, TD clarified the situation with the complainant by phone. The complainant did not raise further enquiry on the case.

513. The complainant considered that the above arrangement of not renting out motorcycle parking spaces to non-residents of the housing estate was contrary to the original planning intent. On 14 December 2010, the complainant lodged a complaint against TD with The Ombudsman, and lodged further complaints against the Housing Department and Lands Department on 25 March 2011.

The Ombudsman's observations

514. In planning and developing estates under the HOS, HA would make reference to the Planning Department's "Hong Kong Planning Standards and Guidelines" (the Guidelines) and seek the relevant government departments' views on the provision of car parking facilities. If an HOS estate does not have any car parking facilities, HA would reserve a certain number of parking spaces in nearby public housing estate car parks for the residents of that HOS estate. However, the Guidelines only covered private cars and light goods vehicles parking spaces, but not motorcycle parking spaces.

515. According to the Guidelines and the land lease of the housing estate, the housing estate's car park did not have to provide motorcycle parking spaces for the use by non-residents (including residents of the HOS estate). HA applied for and was granted planning permission and short-term waivers to rent out surplus parking spaces to non-residents. The absence of this rental arrangement due to restrictions of the lease was not against the planning intent.

516. When the Link took over the housing estate's car park, the planning permission and short term waivers granted to HA had expired. It was a breach of the lease conditions for the Link to continue renting out surplus motorcycle parking spaces to non-residents without re-applying for the planning permission and short term waivers.

517. In the past, residents of the HOS estate were able to use the motorcycle parking spaces in the housing estate's car park, but this arrangement was not part of the planning intent, nor was it in the lease conditions. It was only a service provided to the non-residents of the housing estate by HA after obtaining the necessary planning permission and short term waivers. The same service by the Link was provided without the necessary permission and waivers.

518. TD, being the dedicated department responsible for district traffic and transport issues, was not aware of the above situation and provided an inaccurate reply to the complainant. It showed that the staff of TD did not fully understand the Guidelines and the land lease, and was imprudent to reply to the complainant without careful investigation. However, TD subsequently clarified the situation with the complainant on 18 January 2011.

519. Regarding the planning and supply of motorcycle parking spaces in that particular area, TD considered that there were sufficient motorcycle parking spaces to meet the demand after reviewing the overall situation of the district. However, TD would continue to search for suitable locations in the district to provide more on-street motorcycle parking spaces. The Ombudsman therefore considered the complaint against TD was substantiated other than alleged.

Administration's response

520. TD has accepted recommendation and reminded the relevant officers to be more prudent and to check the accuracy of information before making a reply in dealing with similar cases.

Water Supplies Department

Case No. 2011/0098 - (1) Failing to initiate follow-up action when an anomalous water meter reading was observed; and (2) Acting arbitrarily in estimating the complainant's water consumption

Background

Details of Complaint

521. The complainant's water bills were used to be only around $20. A few months after moving into her new flat, however, she received a water bill demanding for more than $400. She called the Water Supplies Department (WSD) hotline to enquire. The staff explained that the reading recorded by the meter reader was lower than the final reading estimated by WSD for the former registered consumer. Therefore, WSD had estimated her water consumption based on the consumption records of the former consumer. The complainant was dissatisfied that WSD did not initiate follow-up action when it noticed the anomalous meter readings. Instead, it just arbitrarily estimated her water consumption.

Course of Events

522. At the end of July 2010, the water meter reading as recorded by WSD for the flat in question was 209. On 2 August, the former registered consumer of the meter applied to WSD for immediate closure of his water account. WSD, based on his consumption history, estimated the meter reading to be 241 on that day. This estimated final reading then became the initial reading of the water meter when the complainant applied to take up the consumership on the same day.

523. At the end of November, a water meter reading of 232 was recorded for the complainant's flat during a routine meter reading. As it was lower than the initial reading of 241, WSD treated it as an anomalous negative reading which would not be used to calculate the water bill. Instead, WSD made an estimate of her water consumption from early August to mid-November based on the water consumption history of consumers in the same category as the complainant. A water bill of more than $400 was issued to her subsequently in early December.

524. On 10 December, the complainant called the WSD hotline. The staff told her that the estimate for her water consumption was based on that of the former registered consumer. However, WSD would arrange

for a special meter reading at her flat and issue a new water bill upon completion of an investigation. Three days later, she called the hotline again and was told that her case had been referred to the Customer Accounts Section for follow up. At the end of December, WSD's computer system issued a works order, requesting a special meter reading at her flat.

525. On 6 January 2011, a special meter reading was conducted and a reading of 241 recorded. On 11 January, WSD wrote to the complainant, informing her that the initial reading of her water meter had been re-estimated and the water charges from early August 2010 to early January 2011 was $56 after adjustment.

Response from the Water Supplies Department

Allegation (1) – No follow-up action on recording an anomalous reading.

526. When an anomalous negative reading such as the one described above is observed at an initial meter reading, WSD's computer system will automatically estimate a meter reading according to the category to which the new registered consumer belongs. It will then calculate the amount of water consumption and issue the first water bill. The new consumer can raise an objection to the department on the estimated charges. If warranted, WSD will arrange for a special meter reading and use the actual reading as the basis to re-estimate the initial reading and adjust the water bill.

527. WSD received the water charge dispute raised by the complainant on 10 December and arranged a special meter reading on 6 January the following year. Both the initial reading and the water bill were adjusted afterwards. The department had, therefore, followed up the complainant's case properly.

Allegation (2) – Arbitrary estimation of water consumption.

528. The former registered consumer, instead of giving WSD 14 days' notice with regard to termination of water supply as required by law, applied for immediate closure of his water account on 2 August. Consequently, WSD could not arrange to take a final reading on that day. While a meter reading had been conducted on 29 July, the water bill was not yet issued. WSD, therefore, had to estimate his water consumption for the period till 2 August based on the average daily consumption in the same period the previous year. Eventually, the final reading was

estimated at 241.

529. The complainant took up the account on 2 August but a negative reading was noticed by the meter reader upon the initial reading at the end of November. Without past consumption records, WSD's computer system had to resort to estimation to determine her water consumption. Should the actual meter reading recorded at a later time prove that the estimate was too high or too low, it would be rectified to ensure that the consumer would not be overcharged. So, WSD was not arbitrary in estimating her water consumption.

530. The complainant telephoned WSD twice in early December and the computer system issued a works order for special meter reading only in late December. That was because WSD needed time to observe her water consumption pattern.

The Ombudsman's observations

Allegation (1)

531. Whether WSD will proactively follow up a case after it has issued a water bill to a new consumer based on an estimated consumption depends on the reaction of the consumer. If the consumer raises an objection, the department will review the case. Otherwise, it will wait until the next routine meter reading (i.e. four months later). Follow-up action will only be taken if a negative reading is recorded again. However, the problem will have dragged on for eight months by then.

532. In this particular case, WSD was aware of the anomaly after the meter reading at the end of November. However, it arranged for a special reading and adjusted the water bill only after the complainant raised an objection in December. Therefore, while WSD handled the case in accordance with established procedures, it failed to follow up the case proactively.

Allegation (2)

533. It was indeed unreasonable for WSD to have estimated the final reading for the former consumer based on his water consumption during the same period the previous year (from late March to early August) and used it as the initial reading of the complainant's water meter. The former account was closed on 2 August, just four days after the routine meter

reading done on 29 July. WSD could have estimated only the water consumption on these four days and added it to the actual consumption of the previous 128 days (late March to 29 July) to arrive at an approximate consumption for that period. Estimation for the whole period was simply unnecessary. Besides, WSD's estimate was gravely inaccurate. The actual meter reading of the complainant's meter at the end of November was only 232, which was even lower than the originally estimated final reading of 241 on 2 August (nearly four months ago).

534. Furthermore, the first water bill issued to the complainant exceeded $400, more than seven times the adjusted bill of $56 following the special meter reading. This inevitably gave the complainant an impression that WSD was arbitrarily estimating her water charges.

Other Observations

535. The WSD hotline staff provided incorrect information to the complainant on 10 December when he said that her water consumption was estimated on the basis of the past consumption of the former registered consumer. This was indeed improper.

Conclusion

536. WSD failed to take the initiative to follow up the problem and was gravely inaccurate in estimating the complainant's water consumption and the water charges. This was unfair to the complainant. Overall, The Ombudsman considered this complaint substantiated.

Administration's response

537. WSD has accepted The Ombudsman's recommendations and implemented the following actions –

(a) according to the Waterworks Regulations (Cap. 102), a consumer who wants an inside service to be disconnected shall give the Water Authority not less than 14 days' notice of the date on which the disconnection is to be made. WSD will also arrange for special meter reading to take the final meter reading of the account to be terminated. In view that some consumers fail to give sufficient notice, apart from continuing to step up the publicity on the requirement of giving sufficient notices, WSD has, following the recommendation of The Ombudsman, revised the computer system setting in January 2010. Under the new setting, even if a consumer cannot give 14 days' advance notice, WSD will still endeavour to take the final meter reading on or before the account termination date as long as a consumer gives at least 3 days' advance notice;

(b) if a consumer fails to give advance notice of 3 days or more to the WSD, WSD will not be able to take the final meter reading on or before the account termination date due to resource constraint. Since a meter reading taken after the account termination date may include the water consumption by both the out-going and in-coming consumers, it is not appropriate to use a meter reading so taken as the basis of estimating the water consumption of the out-going consumer. Under such circumstances, the WSD will not arrange special meter reading after the account termination date, but instead, it will use an objective mechanism to estimate the final quantity of water consumption of the out-going consumer with a view to better reflecting his/her actual water consumption in the period;

(c) WSD has enhanced the computer programme for handling negative meter readings such that a more comprehensive basis would be used in estimating the amount of water consumption for accounts which have recorded negative meter readings. For the case concerned, the computation will be –

    (i) if previous water consumption record of the account is available in the computer system, the record will be used

as the basis for estimating the water consumption of the account for the period concerned; and

(ii) if previous water consumption record of the account is not available in the computer system, the average quarterly water consumption of all domestic households in Hong Kong will be used as the basis for estimating the water consumption of the account for the period concerned; and

(d) WSD has issued a guideline on answering public enquiries to all hotline staff, reminding them to ensure the accuracy and correctness of information provided to members of the public. Besides, to enhance the knowledge of hotline staff on the estimation of water consumption, WSD has also included the topic in the induction course as well as refresher courses for hotline staff.

Part III
– Responses to recommendations in direct investigation cases

Government Secretariat – Development Bureau, Government Secretariat – Environment Bureau, Planning Department, Agriculture, Fisheries and Conservation Department, Environmental Protection Department and Lands Department

Case No. DI/227 - Government Measures to Protect Country Park Enclaves

Background

538. In June 2010, a number of complaints were received from the public about the development works at a country park enclave (enclave) bordering Sai Kung East Country Park ("the Sai Wan Incident"). The complainants alleged that Government had failed to prepare a statutory plan for the site, thereby creating a loophole for unauthorised development that caused damage to the land. Against this background, The Ombudsman initiated a direct investigation to examine whether –

(a) the Government had taken adequate measures to protect such enclaves; and

(b) the Administration had taken appropriate follow-up actions in respect of the Sai Wan Incident.

Administration's response

539. The Environment Bureau (ENB), Development Bureau (DEVB), Planning Department (PlanD) and Agriculture, Fisheries and Conservation Department (AFCD) have accepted The Ombudsman's recommendations and taken/are taking the following actions –

(a) there are 77 enclaves in Hong Kong, of which 23 had been included in the Outline Zoning Plans (OZPs) before the "Sai Wan Incident". As per The Ombudsman's recommendation, PlanD would prepare statutory plans for around half of the remaining 54 enclaves. As at 25 September 2012, PlanD had already prepared 14 Development Permission Area Plans (DPAPs) for 19 enclaves (Detailed information for the enclaves

is at the ***Annex***). The preparation of DPAPs for the remaining enclaves is expected to be completed by 2013. As DPAPs are only effective for three years, PlanD also plans to prepare the concerned OZPs by 2016-17 as appropriate;

(b) AFCD had assessed that the country park enclave of Tai Long Sai Wan (Sai Wan) would be suitable for incorporating into the Sai Kung East Country Park (SKECP), which was also endorsed by the Country and Marine Parks Board (CMPB) at its meeting of 11 October 2011. However, during the consultation with the Sai Kung District Council (SKDC) on 7 February 2012, the majority of SKDC Members showed strong opposition to the proposal and urged the Administration to respect the private property rights of local villagers. Subsequently SKDC set up a Task Force with a view to addressing as far as possible the concerns of the rural community, which primarily focus on whether and if so how small house applications may be handled if the enclave were to be incorporated into the country park, and the request of improving accessibility and other support to villagers residing in the enclaves;

(c) to address the villagers' concerns, AFCD prepared a "Note on the Use or Development of Land within a Country Park Enclave after Inclusion into a Country Park" for discussion by the Task Force on 18 June 2012. CMPB chairman and two other CMPB members were also invited to exchange views with the Task Force over the subject on the same occasion. After three rounds of meetings and one site visit, the Task Force concluded its deliberation and submitted a report to SKDC on 17 July 2012. The Task Force in its report recommends that amongst others, the Administration should protect the interests of the villagers or property owners if Sai Wan would be designated as a country park;

(d) apart from Sai Wan, AFCD also assessed the suitability of country park enclaves of Kam Shan and Yuen Tun for country park designation, and recommended incorporating the enclaves of Kam Shan and Yuen Tun into Kam Shan Country Park (KSCP) and Tai Lam Country Park (TLCP) respectively. The Development and Housing Committee of the Sha Tin District Council had been consulted on the proposed designation of the country park enclave of Kam Shan on 3 May 2012 while the

Tsuen Wan District Council had been consulted on the proposed designation of the country park enclave of Yuen Tun on 29 May 2012. The two District Councils supported the respective proposed designations in-principle. Members of CMPB, at its meeting on 13 June 2012, were informed of the progress of consultations, and supported AFCD's proposals to incorporate the country park enclaves of Kam Shan and Yuen Tun into the KSCP and TLCP respectively; and

(e) the results of engagements with the District Councils were reported to CMPB at its meeting on 8 August, CMPB unanimously supported the Administration to seek a direction from the Chief Executive in Council on the proposal to incorporate the country park enclaves of Sai Wan, Kam Shan and Yuen Tun into the respective country parks in accordance with the Country Parks Ordinance (Cap. 208). AFCD will continue to proceed with the incorporation of suitable enclaves into existing country parks.

Water Supplies Department

Case No. DI/218 - Water Meter Reading and Billing System

Background

540. Of the complaints received by The Ombudsman about water bills, a considerable number concerned consumers feeling aggrieved by the long time taken by the Water Supplies Department (WSD) to deal with defective meters and associated bill adjustments, resulting in large sums of money involved.

541. Against this background, The Ombudsman initiated a direct investigation to examine WSD's arrangements for reading meters and billing customers, replacing and testing defective meters, and adjusting bills, with a view to identifying areas for improvement.

Administration's response

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

(a) WSD has taken measure to facilitate meter readers' (MR) understanding of the implications triggered by the MR codes they input. A detailed flowchart on the various actions triggered by MR codes has been compiled and distributed to all MR offices to put on the notice board for the MRs' reference;

(b) MR codes in use have been reviewed and simplified to 55. A new set of Meter Reader Remark Code Inputting Instructions (MRRCI Instructions) containing a revised list of MR codes was issued in March 2012. All MRs have been briefed on the content of the revised MRRCI Instructions;

(c) arrangement has been made to implement a special programme to check the accounts with long period of zero water consumption for early identification of defective meters. A working group has been set up for continuous monitoring of the checking programme in a bid to keep under review the rules of the system checks for identifying defective meters. The working group will also tighten the rules as and when appropriate;

(d) WSD has implemented additional measures for identifying defective communal meters. Based on the checking of accounts mentioned above, a list of suspected defective communal meters, which zero consumption is recorded in a specific period without any MR codes, is identified. Special inspection checks are being conducted for those suspected defective communal meters identified and the follow-up actions include –

(i) replacement of communal meters confirmed to be defective; and

(ii) attaching a tag to these meters. This is to alert MRs of possible defects of the meters, and to remind MRs to input appropriate MR codes when taking readings;

(e) the rules and assumptions for using consecutive inputs of the same MR code to trigger action have been reviewed. The administrative arrangements for inputting and handling of consecutive input of the same MR code has been revised with a view to avoiding interruption to the subsequent chain of actions so triggered;

(f) the contractor responsible for the maintenance and enhancement of the customer service and billing software (entitled Customer Care and Billing System or CCBS) has been requested to deploy additional resources to expedite the system change requests raised by WSD. As at July 2012, among the 29 change requests mentioned in The Ombudsman's Direct Investigation Report, 22 of them have been completed; two are withdrawn due to technical infeasibility resulting from incompatibility of new software with the existing hardware which, given computer resources constraint, has been unable to accord priority for enhancement for the time being; and the rest of the improvements are expected to be finalised by the end of 2012;

(g) WSD has stepped up its effort in monitoring the progress of issued works orders so as to ensure that follow-up actions are taken timely. A newly set up working group is in operation to coordinate and accord appropriate priorities to difficult/special cases and where necessary, provide guidelines and instructions to enhance work efficiency and effectiveness in handling these cases in future;

(h) with the issue of the revised MRRCI Instructions, more detailed and specific guidelines are given to MRs to enhance their effectiveness in identifying defective meters. MRs are required to collect adequate site information and record their observation in reporting the "NR" cases on site as far as possible[1;]

(i) with a view to allowing consumers having better understanding of the reason for adjusting their water bills, explanatory letters are now attached to all bills with adjustments. To this end, a set of standard letters covering different scenarios of bill adjustment have been appended to the relevant departmental instruction for the use of staff;

(j) in order to draw consumers' attention to important message promulgated through water bills, the design of water bill has been enhanced to the effect that all bill messages and reminders related to the consumer's account will be printed in bold font. Apart from this, a remark will be printed at the bill top and the stub portion of the water bills to draw the attention of the consumer to overdue payment;

(k) instructions related to the operation of the Meter Reader Section and the Customer Accounts Section have been reviewed and updated where necessary. WSD will continue launching similar review on departmental instructions regularly and draw up specific operational guidelines as and when necessary; and

[1] "NR" will be recorded for water mater meters with zero reading but that there should be water consumption.

(l) a series of experience sharing sessions and training with a view updating and strengthening staff's knowledge and skill in daily operation and customer service have been arranged. WSD will continue to provide timely and adequate training to all staff to enhance service quality.

Government Secretariat – Education Bureau and Social Welfare Department

Case No. DI/216 - Special Education Services for Students with Moderate to Severe Emotional and Behavioural Difficulties

Background

543. Under the current education system, students "with moderate to severe emotional and behavioural difficulties" can be transferred from mainstream schools as a transitional arrangement to Schools for Social Development (SSDs) for more intensive guidance. SSDs help students to overcome their transient adaptation problems and improve their daily living skills so that they can return to mainstream schooling as soon as possible. Each class of SSDs comprises only 15 students to afford every student sufficient attention and counselling.

544. At present, there are seven SSDs in Hong Kong, including five boys' schools and two girls' schools, which provide day places and day-cum-residential places.

545. The Ombudsman noted that students in need of SSD placements often had to wait for a long time. Against this background, The Ombudsman initiated a direct investigation to examine the administration by the Education Bureau (EDB) and the Social Welfare Department (SWD) in respect of the vetting of applications and allocation of students to SSDs.

Administration's response

546. EDB and SWD have accepted The Ombudsman's recommendations and implemented/are implementing measures as reported below.

Referrers must provide updates on students in a timely manner

547. EDB and SWD have reminded the referrers to strictly observe the requirement for timely updating of the students' latest service need by submitting a standard form on a monthly basis. If individual referrers do not report on time, the Central Co-ordinating Referral Mechanism

(CCRM)[2] will contact the referrers and request them to submit the required information. In the event that a referrer fails to update the students' condition through the standard report form for more than three months, CCRM will send a written request to the referrer for providing the latest information within seven working days. This is to avoid keeping those students who have already withdrawn their application on the waiting list.

To meet the unsatisfied demand for Schools for Social Development places

548. EDB is actively following the established Government procedure to apply for funding to build a new SSD/Residential Home (RH) for girls and to relocate and expand a SSD/RH for boys, so as to increase school and residential places.

To ensure that all relevant parties start the process of filling the anticipated vacancies as soon as possible

549. EDB and SWD have required SSDs/RHs to update CCRM at least once a month by phone and standard forms, on the existing vacancies and anticipated vacancies available within a month. CCRM will refer cases to SSDs/RHs for admission in accordance with the order on the waiting list. If SSDs/RHs anticipate that vacancies may be available in more than one month's time (e.g. in June/July before the summer vacation, SSDs/RHs may be able to estimate more accurately the vacancies available in September), they must set out in the standard form the estimated time for available places to enable filling of the places as appropriate.

[2] Upon parents' consent, mainstream schools may refer their students with emotional and behavioural difficulties to CCRM, which is jointly managed by EDB and SWD. The Vetting Committee under CCRM will assess the cases and refer those approved cases to SSDs/Residential Homes (RHs) for admission.

To standardise the mechanism for reporting and filling available places

550. As mentioned above, EDB and SWD have enhanced the mechanism for reporting and filling vacancies, and defined "estimated vacancies to be available soon" as vacancies to be available "within one month". EDB and SWD have updated the relevant guidelines in the respective circular for stakeholders' compliance.

To monitor the Schools for Social Development to ensure their compliance with the relevant requirements for reporting and filling available places

551. EDB and SWD have implemented the following monitoring mechanism to ensure that SSDs/RHs comply with the requirements for reporting and filling available places –

(a) if an SSD/RH fails to provide comprehensive details in a timely manner in the monthly reporting of vacancies to CCRM, CCRM will give an oral or written advice to its principal/ superintendent according to the extent of such omissions; and

(b) in case the SSD/RH fails to make improvement after two consecutive advices, CCRM will write to the management of its operating organisation and request improvement. Warning letters will be issued whenever necessary.

To make more than one referral when a vacancy arises in a School for Social Development, so as to maximise admission

552. According to experience, applications from primary students for admission to SSDs are fewer than those from secondary students and the number of withdrawal cases for the former has been very small. As such, it may not be useful for CCRM to refer "extra cases" to the primary sections of SSDs; on the contrary, it may delay admission of these "extra cases" and give rise to unfairness to the applicants. For this reason, SSDs/RHs opined that there is no need to refer "extra cases" to the primary sections of SSDs. Nevertheless, SSDs/RHs agreed to adopt the following measures for the secondary sections of SSDs –

(a) if a secondary section of a SSD or RH reports five vacancies or more at one time, CCRM will refer "extra case(s)" on top of the reported number to SSD/RH for follow up; and

(b) SSDs/RHs must strictly adhere to the 28-day rule to complete the admission process. For cases failing to complete the admission process within the time limit, the day/boarding places will be allocated to the "extra case(s)".

The Administration will review the implementation and effectiveness of the measures by the end of 2012/13 school year.

To improve the procedures of making referrals to Schools for Social Development

553. In order to improve the procedures of referring cases to SSDs and enhance its efficiency, EDB and SWD have implemented improvement measures. When SWD informs EDB of the vacancies in a particular RH and the referral list, it will send in parallel the referral list and contact details of the referrers to SSDs/RHs concerned. SSD/RH can contact the referrers as soon as possible to arrange interviews for the students, without having to wait for the student's information be sent by EDB.

To be more flexible with the class size

554. EDB has informed SSDs that, with effect from the 2012/13 school year, SSDs are allowed to admit more students for individual classes on the following three conditions in order to meet the demand for school places –

(a) the total enrolment of the whole school not exceeding the total number of places of the approved classes;

(b) the total number of students in a class not exceeding the permitted capacity of that classroom; and

(c) SSD should adopt appropriate teaching arrangements to avoid any adverse impact on the learning of the students.

EDB has also advised the schools to abide by the relevant ordinances of the Fire Services Department and the Department of Health when making flexible arrangements for student admission.

Criteria for discharging students and attention to long stay cases

555. From the perspective of education and counselling, SSDs generally require one or two years' time to handle the students' learning, emotional and behavioural problems. According to statistics, more than 40% of the students would be discharged from SSDs within 12 months, and about 80% of the students will be discharged within 24 months. EDB, SWD and SSDs/RHs have agreed to carry out the following improvement measures with a view to ensuring that similar procedures and criteria are adopted by SSDs/RHs for handling the discharge arrangements and following up with those students with relatively longer stay –

(a) *Criteria for Discharge*
The suitability of a student for discharge should be based on professional judgments. EDB, SWD, SSDs and RHs consider it inappropriate to adopt "one-size-fits-all" quantitative criteria for determining the time of discharge of individual students. Nevertheless, all parties have agreed to assess the suitability for discharging a student in consideration of his/her behaviour, family and academic conditions; and

(b) *Discharge Arrangements*
Upon admission of a student, the SSD/RH will regularly review his/her progress as well as education and welfare plan. When a student has stayed for about one and a half years, SSD/RH will conduct a comprehensive review on his/her progress and discuss discharge arrangements with a time frame to help the student return to ordinary schools and/or integrate into the community as early as possible.

Review on long stay cases

556. EDB, SWD, SSDs and RHs have agreed to establish a review mechanism for handling long stay cases. Under the mechanism, SSDs are required to provide on a regular basis explanations for long stay cases and the discharge plan. Based on the information provided by SSDs, EDB will study the reasons for individual long stay cases. If necessary, EDB will conduct school visits to check records and observe the students for review and follow-up purposes.

Social Welfare Department

Case No. DI/147 - Mechanism for Monitoring Private Residential Care Homes for the Elderly

Background

557. At present, 13% (over 930,000) of Hong Kong's population are aged 65 or above and the proportion of the elderly will rise to 18.7% in 2021, and reach 25.8% in 2031. The provision of adequate care services for the elderly is thus of increasing importance. Accordingly, The Ombudsman initiated a direct investigation to examine the Social Welfare Department (SWD)'s mechanism for monitoring the standard and operation of private Residential Care Homes for the Elderly (RCHEs) and its means of facilitating public access to information relating to the RCHEs.

Administration's response

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

(a) SWD is updating the Code of Practice (CoP) by incorporating Guidelines on new and revised service standards issued since October 2005. The revised CoP is expected to be completed within 2012-13;

(b) SWD will continue to monitor and improve the inspection rate. Both routine inspections and re-inspections are included in the inspection targets. SWD will suitably deploy inspection resources using a risk-based inspection approach in order to maintain a higher inspection frequency for private RCHEs;

(c) SWD will conduct more non-office-hour inspections. At least one inspection of such would be conducted for each private RCHE every year;

(d) for RCHEs with irregularities (especially those given written notices under section 19 of the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459)), SWD will speed up and complete re-inspections by the due date;

(e) SWD has implemented the following measures so that members of the public can easily acquire information which may help them selecting RCHEs –

(i) additional basic information on private RCHEs has been provided on the SWD website, including fee, religious background, residents' gender, diet, etc. since February 2012;

(ii) for each private home under the Enhanced Bought Place Scheme (EBPS), detailed information such as service objectives, number of staff, service scope, area, number of beds, facilities, etc. has also been posted on the SWD website since March 2012;

(iii) SWD had used a new and more conspicuous header[3] in their website to show the record of RCHEs which have been successfully prosecuted since February 2012 for public's ease of reference. The posting period of RCHE conviction records has been extended from six months to two years since September 2011; and

(iv) conviction record and the validity period of the last and current licence (which is performance-related) of individual private RCHEs have been included in their basic information pages as appeared on the SWD website since March 2012; and

(f) since March 2012, SWD has shown on its website the accreditations obtained by each private RCHE, such that private RCHEs will have a greater incentive to participate in accreditation schemes. Accredited RCHEs have also been given higher scores under the EBPS. In addition, SWD will continue working with the Hong Kong Accreditation Service, a unit under the Innovation and Technology Commission of the Hong Kong Government and the RCHE sector in a Task Force on Certification of RCHEs with a view to introducing an accreditation scheme for certification bodies which certify the standards of RCHE service providers' management systems.

[3] Under the sub-page Services for the Elderly > Record of RCHEs Successfully Prosecuted in SWD's website.

Lands Department

Case No. DI/219 - Granting of Short Term Tenancies at Nominal Rent

Background

559. It is Government policy to grant short term tenancies (STTs) for temporary uses of vacant government land that has no intended use or is not required for development in the near future. Where STTs are for non-profit-making purposes and have the policy support of relevant policy bureaux or Government departments, the District Lands Offices (DLO) concerned under the Lands Department (LandsD) will approve the applications and grant the tenancies at nominal rent.

Administration's response

560. LandsD has accepted The Ombudsman's five recommendations with details as reported below.

Recommendation (1)

561. All bureaux/departments providing policy support have had a good grasp of their roles and responsibilities in the vetting of applications for STTs at nominal rent. Where appropriate, the tenancy agreements would contain conditions that set out the monitoring responsibilities of relevant bureaux/departments. LandsD issued a memorandum in 2011 to all Heads of Bureaux, explaining their roles in the renewal of STTs at nominal rent, including reconfirming the tenant's status, the user of the site and whether policy support will continue to be given. DLOs will provide them with inspection reports to facilitate their work.

562. LandsD will strengthen the communication within the Government so that the relevant bureaux/departments can comment on the proposed use of STT applications and assess whether the proposed use and tenancy arrangements are in line with their policy objective. LandsD will also consider whether it would be necessary to specify that policy support has to be given by officers at directorate level in the bureaux/departments concerned.

Recommendation (2)

563. In processing applications or renewal of STTs at nominal rent, DLOs will provide a form to the relevant policy bureaux/departments requiring them to provide clear and detailed information on their decision, the factors that have been considered and the justifications for the support given. DLOs will file the information provided by bureaux/departments for record so as to enhance future monitoring of those tenancies.

Recommendation (3)

564. DLOs have to accord with the departmental instructions issued in November 2006 to conduct site inspection every three years. The inspection reports will be provided to the relevant policy bureaux/departments for reference when seeking their views on whether their support for the STT renewal will be given. DLOs have been following the arrangement.

Recommendation (4)

565. DLO staff are required to discharge STT enforcement work in accordance with the departmental instruction issued in November 2010 and that as subsequently updated. Each DLO runs a system of District Review Board meetings as led by the District Lands Officer to regularly review all aspects of work regarding STTs. LandsD has also set up a computer system for STT management. Through regular meetings and checking of computer records, both DLOs and LandsD Headquarters can monitor the dates of inspections of STT sites and the follow up actions on tenants in breach of leases to ensure that the necessary work is carried out.

Recommendation (5)

566. Under the said system of District Review Board meetings, LandsD will regularly review the progress of processing tenancy breaches. In addition, LandsD has started formulating the work procedures for the regularisation of breaches and will introduce departmental guidelines for the relevant procedures.

567. As each case is unique and different problems may emerge during the processing, it is not possible to stipulate a uniform timeframe for all cases. LandsD will adopt a step-by-step approach to first introduce the aforesaid guidelines and then consider formulating the appropriate performance pledges, taking into consideration the experience gained in the implementation of the guidelines.

Part IV
Responses to recommendations in review cases concluded by full investigation

Government Secretariat – Commerce and Economic Development Bureau

Case No. 2006/3082 - Impropriety in processing an application under the Patent Application Grant Scheme

Background

568. In July 2005, the complainant applied to the Innovation and Technology Commission (ITC) of the Commerce and Economic Development Bureau (CEDB) for funding support under the Patent Application Grant (PAG) Scheme for patent application of the company's invention.

569. Although ITC had appointed the Hong Kong Productivity Council (HKPC) to help implementing the scheme, ITC is responsible for the final approval of applications. In April 2006, ITC declined the complainant's application as the patentability of its invention could not be ascertained. In August 2006, the complainant complained to The Ombudsman about maladministration by HKPC and ITC in handling the application.

570. The Ombudsman's preliminary inquiries showed no evidence of maladministration in ITC's supervision of PAG scheme or its handling of the complainant's case. In May 2007, The Ombudsman informed the complainant of the findings.

571. At the complainant's request, The Ombudsman reviewed the case by conducting further inquiries. In March 2008, The Ombudsman concluded that patentability of inventions is a professional matter within the realm of patent laws and the patent protection system. It is outside The Ombudsman's purview of monitoring administrative actions. The Ombudsman maintained his stance of May 2007.

572. On 24 June and 24 July 2008, the complainant raised new arguments. After due consideration, The Ombudsman decided on 9 January 2009 to conduct an investigation to further review the complainant's case. While patentability of inventions remains a professional matter outside The Ombudsman's purview, The Ombudsman concluded on 11 September 2009 that –

(a) HKPC, acting on behalf of ITC, had failed to choose the most appropriate patent office for assessing the patentability of the complainant's invention;

(b) ITC had failed to monitor properly HKPC's choice of patent office for the complainant's case; and

(c) it was not evident from the complainant's case that HKPC was not qualified to implement PAG scheme.

573. The Ombudsman recommended that ITC conduct a full review of the operation of PAG scheme.

574. On 2 September 2010, the complainant expressed its dissatisfaction with the findings of the investigation. It raised a number of points and requested another review of the case.

575. After careful deliberation, The Ombudsman decided to conduct another investigation to review the complainant's case for the third time.

The Ombudsman's observations

Allegation (1) - Failing to inform the patent office of the criteria for assessing patentability of the complainant's invention

576. The Ombudsman agreed that it was not essential for HKPC to inform Australian Patent Office (APO), a Patent Cooperation Treaty (PCT) member which had, for years, been providing patent search services in accordance with such international practices, of the ITC's operation guidelines for implementation agency (ITC guidelines) when requesting its service for PAG scheme.

577. Although HKPC had not informed APO of its assessment criteria as contained in ITC guidelines, the APO examiner had in fact considered and assessed the aspects of "novelty" and "inventive step" in the complainant's invention as indicated in his comments to the complainant dated 20 November 2005. The APO report of 19 August 2005 had also listed the prior arts documents, that is existing patents that the complainant's patent proposal appeared to overlap. *Prima facie*, APO had met ITC's requirements of assessing the novelty and inventive step of the complainant's invention. The Ombudsman considered Allegation (1) unsubstantiated.

Allegation (2) - Insisting on using a questionable patent search report as basis for seeking third-party advice on the patentability of the invention

578. The Ombudsman considered it not unreasonable of HKPC to refuse obtaining a fresh search report from another patent office. The third-party patent agent/attorney's role was to perform an independent review on the patentability of the subject invention and to see if his advice was different from the findings of the initial search report. Having a fresh search report would not better serve this purpose. The Ombudsman considered Allegation (2) unsubstantiated.

Allegation (3) - Failing to inform the complainant of the true criteria for assessing applications for the Patent Application Grant

579. The Ombudsman noted that the PAG application form contained only brief information on what a patent search-cum-technical assessment actually was. The Ombudsman had twice questioned ITC whether defining essential features of an invention within the patent claims using the principles of construction of patent claims was important in assessing the patentability of the invention although the clarity of such definition was not in itself an assessment criterion under PAG scheme. However, The Ombudsman considered that ITC had not answered clearly and directly. The Ombudsman considered that although patent search and registration might be highly technical in nature and involve professional inputs from different stakeholders like scientists, lawyers, or even industrialists, as an implementation agent of the scheme, HKPC should be able to advise in general terms factors that may affect the result of a patent search-cum-technical assessment.

580. In fact, in the complainant's case, the examiners of APO had repeatedly mentioned the importance of claims construction. The comments from APO indicated that in general whether an applicant could construct his claims well in accordance with the PCT International Search and Preliminary Examination Guidelines (the PCT guidelines) was essential for the search (which was based on his claims) to accurately reflect the patentability of the invention. The Ombudsman considered Allegation (3) partially substantiated.

Allegation (4) - Asking the complainant for feedback on a patent search report which did not contain the examiner's comments

581. Although the APO report did not contain detailed comments of the examiner, it had identified the passages and figures of those seven prior art documents considered relevant to the patent claims of the complainant. The Ombudsman considered that whether such details were sufficient for an applicant to provide distinctions between his invention and the prior arts depended on the circumstances of individual cases. Nevertheless, the complainant's subsequent correspondence with APO revealed that the construction of claims was also an issue. If such comments had been included in the original report, the complainant could have set out the distinctions and amended its patent proposal more to the point. The Ombudsman considered Allegation (4) partially substantiated.

Allegation (5) - Unclear charging policy for the patent search-cum-technical assessment and insufficiency in the materials for applicants to inform them of the different charges

582. The Ombudsman had obtained clarification from ITC that the complainant was in fact required to pay $3,000 as the initial deposit for the concluding stage of assessment, covering charges for conducting an assignee search, ordering the patent documents and writing the assessment report. Besides, the complainant had to pay $7,500 for a search report from APO and $3,800 for third-party advice.

583. Furthermore, the complainant would have to pay an administration fee to HKPC, amounting to about 20% of the total cost involved in the patent application, if its PAG application was eventually approved by ITC.

584. The Ombudsman noted, however, that –

(a) the seventh item of the ITC guidelines stipulated that "the implementation agency should only charge the applicant for the direct out-of-pocket expenses arising from the vetting of the applications, such as patent searches, if applicable. For the avoidance of doubt, the applicant should not be charged for interview fees, processing fees and consultation fees during the vetting process";

(b) the declaration section of the application form mentioned that the applicant had to pay $3,000 as deposit for the patent search-cum-technical assessment, the cost of which ranged from $3,000 to $7,500. However, the application form contained no detail regarding the procedures actually involved in a patent search-cum-technical assessment;

(c) the declaration section also mentioned the administration fee to HKPC if the PAG application was approved by ITC;

(d) in its letter dated 22 July 2005, HKPC asked the complainant to pay $7,500 for obtaining a search report from The APO. The letter again did not provide any details regarding the procedures of a patent search-cum-technical assessment; and

(e) in response to the complainant's question on why an applicant had to pay $3,000 as administration fee, ITC explained on 4 August 2005 that the $3,000 deposit that the complainant had already paid was for the patent search-cum-technical assessment, which consisted of patent search, assignee search, ordering the patent documents, patentability advice and writing the assessment report, but not the administration fee, which did not need to be pre-paid but would only be charged by HKPC if the PAG application was eventually approved by the Commission.

585. The above showed that the ITC guidelines, the PAG application form and HKPC's letter to the complainant failed to explain clearly what procedures were involved in a patent search-cum-technical assessment, what costs were classified as out-of-pocket expenses, and that the deposit of $3,000 was actually for conducting an assignee search, ordering the patent documents and writing the assessment report. It was unclear what "processing fees" in the seventh item of the ITC guidelines meant. One

would also find it difficult to understand why ITC had mentioned "patent search" and "patentability advice" as components of the deposit in its letter of 4 August 2005 to the complainant. The Ombudsman considered that the information given to the complainant was ambiguous and messy and therefore, Allegation (5) was substantiated.

Allegation (6) - Failing to seek consent from the complainant before incurring expenses

586. The Ombudsman noted that before conducting a patent search or obtaining third-party advice, HKPC would issue a letter notifying the applicant of the costs for the services and ask him to return a reply slip as agreement. However, similar agreement would not be obtained before the applicant is charged for the costs of conducting the assignee search, ordering the patent documents and writing the assessment report. The initial deposit of $3,000 paid by applicant would be used to cover such expenses. Nowhere in the materials provided by ITC or HKPC to applicants was such usage of the deposit shown.

587. In addition, The Ombudsman discovered that HKPC's monthly and half-yearly summary reports to ITC on applications under processing and those withdrawn did not show the exact dollar amount of each case. Although PAG funding was not involved in unsuccessful applications, applicants of unsuccessful cases had a reasonable expectation that ITC would monitor the fees that they had paid to HKPC for processing their applications. The Ombudsman, therefore, found it unsatisfactory that ITC would only monitor the fees and deposits paid by applicants of successful cases. The Ombudsman considered Allegation (6) partially substantiated.

Allegation (7) - Requesting the complainant to pay for third-party patentability advice when he had already deposited enough money in his account for the service

588. As the deposit was in fact meant for the concluding stage of assessment, covering the charges for conducting the assignee search, ordering the patent documents and writing the assessment report, The Ombudsman considered it inappropriate for HKPC to have offset part of the cost of seeking third-party advice against the deposit paid by the complainant. By so doing, HKPC had confused the complainant. HKPC should have insisted that the complainant paid $3,800 if the latter required third-party advice.

589. As regards the complainant's allegation that HKPC had asked the complainant on 9 March 2006 to pay double for third-party advice, The Ombudsman noted that the letter in question was just for seeking the complainant's confirmation of its agreement to the fee of $3,800. Unlike the letter of 14 October 2005, the letter in question did not ask the complainant to pay the fee. No double-charging was, therefore, involved.

590. The Ombudsman considered Allegation (7) substantiated other than alleged.

Allegation (8) - Delay in seeking third-party patentability advice

591. The Ombudsman considered that HKPC suspended action on account of the complainant's disagreement to HKPC seeking third-party advice with the APO search report as the basis. HKPC was in fact not waiting the result of APO's review of its search report.

592. Nevertheless, HKPC's inaction lasted long (for almost four months). It should have contacted the complainant earlier to break the stalemate. The Ombudsman considered Allegation (8) partially substantiated.

Allegation (9) - Failing to inform the complainant of the assessment criteria in respect of third-party patentability advice

593. The Ombudsman considered it could have helped if ITC had given the complainant further elucidation about the subject when proposing to seek third-party advice, since the complainant was in doubt and objected to the use of the search report as a basis to seek third-party advice. The Ombudsman considered allegation (9) partially substantiated.

Allegation (10) - Impropriety in making an offer to the complainant to waive the search fee charged by the patent office

594. The Ombudsman had scrutinised the records. It was clear that HKPC, when making its offer to waive the search fee of APO, was unaware of APO's agreement to refund the patent search fee. The Ombudsman considered that HKPC's offer was simply out of goodwill and for the purpose of facilitating further processing of the application.

595. Nevertheless, it did seem improper, accounting-wise, of HKPC to offer waiving of the search fee on what appeared to be a purely

discretionary basis, without reference to any guidelines or criteria. The Ombudsman considered Allegation (10) partially substantiated.

Allegation (11) - Disallowing the complainant to choose the attorney for third-party patentability advice

596. The Ombudsman had no reason to doubt HKPC's neutrality in its selection of an attorney for third-party advice. However, as the complainant would eventually have to foot the bill, it was only appropriate that the complainant be consulted on the selection. The Ombudsman noted that starting from June 2009, HKPC had asked applicants to indicate their preferred patent attorneys/agents for providing third-party advice. If the attorneys/agents possessed the necessary qualifications, HKPC would include them in the quotation exercise. The Ombudsman considered that a right step. The Ombudsman considered Allegation (11) partially substantiated.

Allegation (12) - Lack of measures to control the validity and quality of patent search reports

597. The Ombudsman considered it reasonable of the complainant, a PAG applicant, to query the validity and quality of the APO's commercial search report in particular and ITC's and HKPC's quality control measures in general. While seeking third-party advice might be an effective quality control measure, it had to be paid for by the applicant. The Ombudsman considered Allegation (12) partially substantiated.

Allegation (13) - Choosing a patent office which was disadvantageous to the complainant's application

598. Without independent evidence, The Ombudsman was unable to ascertain the details of the conversation between the complainant and the HKPC staff on 15 July 2005. In any event, the complainant did indicate in its PAG application form that its first preference was to file its patent registration application with "China", followed by "Worldwide". HKPC, however, proposed to obtain a patent search report from APO instead of Mainland's State Intellectual Property Office (SIPO). Engaging SIPO for the patent search with Chinese translation provided by the complainant would actually cost less to the complainant, and SIPO's records of patent registrations in China were in fact more up-to-date, and therefore more accurate, than those in an international database which other patent offices like APO would search. Hence, it would be more advantageous for the complainant's case to engage SIPO for the service. The Ombudsman

considered Allegation (13) substantiated.

Allegation (14) - Lack of the necessary professional qualifications to handle matters relating to patent applications and the patent law

599. It could be seen that the Administration had consulted the industry and examined the background and services of HKPC before appointing it as one of the implementation agents of PAG scheme. The Ombudsman considered Allegation (14) unsubstantiated.

Administration's response

600. ITC has accepted The Ombudsman's nine recommendations and taken actions as reported below.

Allegation (3)

601. HKPC has, since October 2011, beefed up its standard letters to PAG applicants with additional information on patent registration matters and PAG scheme procedures. It has also updated Q&As on its website accordingly.

Allegation (4)

602. HKPC has in July 2011 requested SIPO of the Mainland, the patent office nominated by most PAG applicants, to include any important observations in their search report. Since then, all the search reports provided by SIPO contain their detailed comments.

603. On the nomination by a PAG applicant, HKPC has also requested the Swedish Patent and Registration Office (PRV) to provide a sample of its search report for the applicant's reference. It was noted that "explanation and comments on cited documents" were provided in the sample. The Search was, however, eventually not carried out because the PAG applicant considered the fee charged by PRV to be too high.

604. HKPC will continue to request other patent offices to provide detailed comments in the search report when they are nominated by a PAG applicant for providing search reports in the future.

Allegation (5)

605. The ITC Guidelines and PAG application form have been updated since October 2011.

606. HKPC has also updated its standard quotation letter to PAG applicants accordingly. The fees and charges under PAG Scheme have been promulgated (including explanation on the purpose of the deposit charged) and uploaded to HKPC's website and incorporated into PAG application form and related documents since June 2011. HKPC will continue to seek PAG applicants' consent in writing before incurring expenses.

Allegation (6)

607. Starting from June 2011, HKPC's monthly report to ITC has been expanded to provide updates on the deposits and fees paid by all PAG applicants, both applications under processing and the unsuccessful ones (including those withdrawn voluntarily).

Allegation (7)

608. HKPC has reviewed the procedures and decided that the deposit paid by PAG applicants will not be used to offset the costs of seeking third-party advice in future. Q&As on HKPC's website and the standard letter to PAG applicants have been beefed up to provide more information on the purpose of the deposit charged and the fees required in the application process.

Allegation (8)

609. HKPC has reminded the concerned staff of the need to be more proactive in maintaining effective communications with PAG applicants and has put in place a "bring up" system to monitor applications being processed. Reminders will be re-circulated to staff on a half-yearly basis.

Allegation (10)

610. HKPC has conducted a review and decided that fee waivers would not be offered to PAG applicants in future. Hence there is no need for HKPC and ITC to draw up guidelines and procedures in this regard.

Allegation (11)

611. HKPC has revised Q&As on its website and the standard quotation letter to PAG applicants to provide, *inter alia*, explanation on the purpose and procedures of seeking third-party advice vis-à-vis unfavourable findings in patent search reports.

Allegation (12)

612. HKPC will continue to record the key issues raised in meetings and communications with PAG applicants (e.g. with follow-ups required), in both project files and its information system for PAG Scheme. Half-yearly reminders will be re-circulated to the concerned staff.

Food and Environmental Hygiene Department

Case No. 2009/1981 - Failing to take stringent enforcement actions against obstruction of pavement by the illegal extension of a newsstand

Background

Details of Complaint

613. The complainant, owner of a commercial building in a busy street, had repeatedly complained to the Food and Environmental Hygiene Department (FEHD) since December 2008 that the newspaper stall facing the street-level shop of the building had been persistently operating beyond the pitch area stipulated in its licence, thus seriously obstructing the pedestrian passageway. The complainant was dissatisfied that FEHD had failed to take effective enforcement actions to rectify the situation.

Outcome of First Inquiry

614. On completion of the first inquiry in November 2009, The Ombudsman found FEHD's actions insufficient to deter the newspaper vendor from repeated violations of the licence condition. The Ombudsman urged FEHD to take stricter enforcement actions against the recalcitrant operator.

Complainant's Request for Review

615. In April 2010, the complainant alleged that FEHD had failed to take thorough enforcement actions against the extension of fixed structures of the newsstand, including its canopy, tolerating its persistent unlawful expansion of operating area. The complainant sought a review of the case.

The Ombudsman's observations

616. The Ombudsman reviewed this case by full investigation and found that between 2008 and February 2011, FEHD had instituted over 30 prosecutions against the newsstand for hawking outside its authorised area and causing obstruction in a public place. However, before the review, FEHD indeed had never instituted prosecutions against the illegal extension of the canopy and other installations of the newsstand, nor had it

ordered the licensee to remove them. Moreover, FEHD indicated that under its current hawker policy and licence conditions, it would not cancel the licence of a newsstand on the grounds that its fixed structures or hawking area extended beyond the specified boundaries. The Ombudsman considered FEHD's enforcement actions clearly inadequate.

617. In this light, The Ombudsman considered the complaint substantiated.

Administration's response

618. FEHD has accepted The Ombudsman's recommendations and taken the following actions –

(a) FEHD staff have stepped up inspections and enforcement actions against the newspaper stall. On 8 April, 27 April, 20 May, 31 May and 24 June 2011, FEHD staff inspected the newspaper stall and found some goods and equipment being placed outside the stall. Prosecutions were instituted against the licensee of the newspaper stall under section 48 of the Hawker Regulation (Cap. 132AI). There was improvement concerning the extension of the canopy and the area of the newspaper stall afterwards. FEHD staff will continue the inspections. Immediate follow up action would be taken upon detection of irregularities; and

(b) FEHD would review the policy and seriously consider amending the policy concerned to the effect that if the unauthorised extension of the fixed structures of a newspaper stall persists or the operator continues to hawk outside the authorised area despite multiple warnings or prosecutions, FEHD will cancel the licence, wherever appropriate, as deterrence to the others. Relevant internal guidelines would also be established to this effect.

Annex

Preparation of Development Permission Area Plans for Country Park Enclaves after the Sai Wan Incident

(As at 25 September 2012)

No	Location	Development Permission Area Plan				
		Name	**Draft Plan No.**	**Gazetted Date**	**Approved Plan No.**	**Gazetted Date**
1	Sai Wan	Tai Long Sai Wan Development Permission Area Plan	DPA/SK-TLSW/1	6/8/2010	DPA/SK-TLSW/2	18/11/2011
2	Hoi Ha	Hoi Ha Development Permission Area Plan	DPA/NE-HH/1	30/9/2010	DPA/NE-HH/2	14/10/2011
3	So Lo Pun	So Lo Pun Development Permission Area Plan	DPA/NE-SLP/1	30/9/2010	DPA/NE-SLP/2	18/11/2011
4	Pak Lap	Pak Lap Development Permission Area Plan	DPA/SK-PL/1	30/9/2010	DPA/SK-PL/2	14/10/2011
5	Pak Tam Au	To Kwa Peng and Pak Tam Au Development Permission Area Plan	DPA/NE-TKP/1	7/1/2011	DPA/NE-TKP/2	17/2/2012
6	To Kwa Peng	To Kwa Peng and Pak Tam Au Development Permission Area Plan	DPA/NE-TKP/1	7/1/2011	DPA/NE-TKP/2	17/2/2012
7	Tin Fu Tsai	Tin Fu Tsai Development Permission Area Plan	DPA/TM-TFT/1	7/1/2011	DPA/TM-TFT/2	16/12/2011
8	Pak A	Tung A and Pak A Development Permission Area Plan	DPA/SK-TA/1	19/8/2011	DPA/SK-TA/2	13/7/2012

No	Location	Development Permission Area Plan				
		Name	Draft Plan No.	Gazetted Date	Approved Plan No.	Gazetted Date
9	Tung A	Tung A and Pak A Development Permission Area Plan	DPA/SK-TA/1	19/8/2011	DPA/SK-TA/2	13/7/2012
10	Ko Lau Wan, Mo Uk, Lam Uk, Lau Uk and Tse Uk	Ko Lau Wan Development Permission Area Plan	DPA/NE-KLW/1	26/8/2011	DPA/NE-KLW/2	13/7/2012
11	Sam A Tsuen	Lai Chi Wo, Siu Tan and Sam A Tsuen Development Permission Area Plan	DPA/NE-LCW/1	26/8/2011	DPA/NE-LCW/2	13/7/2012
12	Siu Tan	Lai Chi Wo, Siu Tan and Sam A Tsuen Development Permission Area Plan	DPA/NE-LCW/1	26/8/2011	DPA/NE-LCW/2	13/7/2012
13	Kop Tong, Mui Tsz Lam and Lai Chi Wo	Lai Chi Wo, Siu Tan and Sam A Tsuen Development Permission Area Plan	DPA/NE-LCW/1	26/8/2011	DPA/NE-LCW/2	13/7/2012
14	Mau Ping, Mau Ping Lo Uk, Mau Ping San Uk and Wong Chuk Shan	Mau Ping Development Permission Area Plan	DPA/ST-MP/1	26/8/2011	DPA/ST-MP/2	13/7/2012
15	Luk Wu, Upper Keung Shan, Lower Keung Shan, Cheung Ting and Hang Pui	Luk Wu and Keung Shan Development Permission Area Plan	DPA/I-LWKS/1	2/9/2011	DPA/I-LWKS/2	15/6/2012
16	Ngau Kwo Tin	Luk Wu and Keung Shan Development Permission Area Plan	DPA/I-LWKS/1	2/9/2011	DPA/I-LWKS/2	15/6/2012

No	Location	Development Permission Area Plan				
		Name	**Draft Plan No.**	**Gazetted Date**	**Approved Plan No.**	**Gazetted Date**
17	Shui Mong Tin	Yim Tin Tsai and Ma Shi Chau Development Permission Area Plan	DPA/NE-YTT/1	2/9/2011	DPA/NE-YTT/2	14/9/2012
18	Chek Keng	Chek Keng Development Permission Area Plan	DPA/NE-CK/1	4/5/2012	To be determined	To be determined
19	Yung Shue O	Yung Shue O Development Permission Area Plan	DPA/NE-YSO/1	4/5/2012	To be determined	To be determined