THE GOVERNMENT MINUTE

IN RESPONSE TO

THE ANNUAL REPORT OF
THE OMBUDSMAN 2015

Government Secretariat
16 December 2015

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THE GOVERNMENT MINUTE IN RESPONSE TO THE ANNUAL REPORT OF THE OMBUDSMAN 2015

Introduction

The Chief Secretary for Administration presented the Annual Report of The Ombudsman 2015 (the Annual Report) to the Legislative Council at its sitting on 24 June 2015. This Government Minute sets out the Government's response to the Annual Report. This Minute comprises three parts – Part I responds generally to issues presented in the section *The Ombudsman's Review* of the Annual Report; Parts II and III respond specifically to those cases with recommendations made through The Ombudsman's full investigation and direct investigation respectively.

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

The Government takes note of The Ombudsman's remarks and appreciates The Ombudsman's continuous efforts in raising the quality of service and standard of governance in the public sector. We welcome the recommendations and improvement measures suggested by The Ombudsman for raising the efficiency and quality of government services.

2. The Ombudsman summarised seven direct investigation and 314 full investigation cases in the Annual Report. This Minute responds to the seven direct investigation and 98 full investigation cases in which recommendations were made by The Ombudsman. Among a total of 218 recommendations made by The Ombudsman, save for a few exceptions, government departments and relevant public bodies have accepted all recommendations from The Ombudsman and taken or are taking various measures to implement those recommendations. The Government will continue to strive for quality public services in a positive, professional and proactive manner.

3. The Ombudsman mentioned in *The Ombudsman's Review* of the Annual Report that her Office (the Office) is proactively promoting the use of mediation as an alternative to the conventional ways of handling complaints, namely, inquiry and full investigation. The Government will continue to support the Office in promoting the use of mediation in resolving problems. All government departments will fully assist the work of the Office in this regard.

Part II
– Responses to recommendations in full investigation cases

Agriculture, Fisheries and Conservation Department, Environmental Protection Department and Lands Department

Case No. 2014-3604A (Agriculture, Fisheries and Conservation Department) – (1) Processing or having processed in a piecemeal manner applications on different works connected with the potential residential development on a lot; and (2) Failing to take enforcement actions under relevant legislation against the cutting of protected species of vegetation within a conservation area

Case No. 2014/3604B (Environmental Protection Department) – (1) Processing or having processed in a piecemeal manner applications on different works connected with the potential residential development on a lot; (2) Not taking actions to ensure that the requirements of relevant legislation were followed by the owner of the lot, despite repeated reports received; (3) Not taking enforcement actions under relevant legislation against the removal of vegetation in a conservation area despite repeated reports received; (4) Not replying to the Complainant's letters; and (5) Failing to take actions to prevent further damage to the conservation area caused by the potential residential development on the lot and its related works

Case No. 2014/3604C (Lands Department) – (1) Processing or having processed in a piecemeal manner applications on different works connected with the potential residential development on a lot; (2) Approving unnecessary removal of vegetation notwithstanding the requirements of relevant legislation; (3) Allowing the erection of steel bars on government land in a conservation area to mark out a potential road notwithstanding the requirements of relevant legislation; (4) Not replying to the complainant's letter (substantiated); and (5) Failing to take actions to prevent further damage to the conservation area caused by the potential residential development on the lot and its related works

Background

4. On 18 August and 5 September 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD), Environmental Protection Department (EPD) and Agriculture, Fisheries and Conservation Department (AFCD).

5. Allegedly, LandsD, EPD and AFCD had failed to effectively protect the Conservation Area (CA) near the complainant's residence and a certain Lot (the Lot). That had resulted in the erection of 88 steel bars on government land in CA leading to the Lot, marking the alignment of an access road (the Access Road) with a view to being widened but yet to be approved, and repeated incidents of excessive removal of vegetation, including protected species, over the past twenty years along the Access Road. The damage to the environment so caused would prejudice any environmental impact assessment study that should have been conducted before the commencement of any works inside CA. The departments' impropriety included –

LandsD, EPD and AFCD

(a) processing or having processed in a piecemeal manner applications on different works connected with the potential residential development at the Lot and the Access Road, thereby circumventing the requirements under the Environmental Impact Assessment Ordinance (EIAO) and contravening the decision of the District Lands Conference that the residential development and the Access Road should be considered in a holistic manner;

EPD

(b) not taking actions to ensure that the requirement of EIAO were followed by the owner of the Lot (the Lot owner), despite the complainant's repeated reports to EPD;

(c) not taking enforcement actions under EIAO against the vegetation removal in CA despite the complainant's repeated reports filed with EPD since 2008;

(d) not replying to the complainant's letters of 13 January 2010, 18 and 27 June 2014;

AFCD

(e) not taking enforcement actions under the relevant legislation against the cutting of protected species of vegetation within CA and not taking actions to prevent further threat or damage to such protected species;

LandsD

(f) approving unnecessary removal of vegetation (consisting of protected species) notwithstanding EIAO requirements;

(g) allowing the erection of steel bars along the Access Road for marking out a potential road notwithstanding EIAO requirements;

(h) not replying to the complainant's letter to the District Lands Office concerned (DLO) dated 4 February 2014; and

LandsD and EPD

(i) failing to taking actions to prevent further damage to CA caused by the potential residential development at the Lot and its related works before the requirements under EIAO had been fulfilled.

The Ombudsman's observations

Allegation (a)

6. The records showed that apart from the application submitted in July 2008 for carrying out ground investigation, DLO had not received any application for carrying out construction works on the Access Road. There is no evidence to suggest that the proposed transplantation works were part of the residential development of the Lot. In processing the transplantation applications, LandsD had obtained advice from AFCD and EPD that the transplantation works did not constitute a designated project (DP) under EIAO, and hence further approvals would not be required. The Office considered the departments concerned to have by and large given due consideration on whether the transplantation works should be subject to more stringent requirements under EIAO.

7. It could be seen that the departments had, all in all, duly handled the Lot owner's applications submitted at different stages as and when the need arose. The crucial point was that the applications thus far submitted did not involve any DP requiring environmental impact assessment. From this angle, The Ombudsman considered allegation (a) against LandsD, EPD and AFCD unsubstantiated.

8. Nevertheless, the Office noted from the relevant correspondence that although AFCD had advised DLO in December 2013 to seek advice from EPD on whether approvals were required for the transplantation works, DLO did not follow up. As a result, EPD was not aware of the matter until it received a copy of DLO's letter of 26 May 2014 to the Lot owner, whereupon EPD took the initiative to enquire about the matter on 6 June 2014. By then, DLO had already issued a "no objection" reply on 30 May 2014 to the Lot owner's transplantation application. It was sheer luck that EPD eventually confirmed that the proposed works were not a DP under EIAO. It was amiss of DLO not to have consulted EPD when processing the transplantation application. The Office considered that there was inadequacy on the part of LandsD in handling the transplantation application of 2013.

9. The Ombudsman, therefore, concluded that while allegation (a) was unsubstantiated, other inadequacies on the part of LandsD had been found.

Allegations (b) and (c)

10. Having examined the relevant records, the Office considered EPD to have taken appropriate actions in response to the complaints. Hence, The Ombudsman found allegations (b) and (c) against EPD unsubstantiated.

Allegation (d)

11. The Office noted that in the complainant's letter of 13 January 2010, he expressly stated that he looked forward to EPD's reply. EPD should not have ignored that. Regarding the complainant's letter of 18 June 2014, while the Office was convinced that EPD staff had talked to him over the telephone, EPD should nevertheless had given him a written reply, if only to briefly recap the content of the telephone conversation. As for the complainant's letter of 27 June 2014, although EPD gave him a written reply on 12 September (which was in fact after the complainant complained to the Office), EPD had not issued him an interim reply while

keeping him waiting.

12. In light of the above, The Ombudsman considered allegation (d) against EPD substantiated.

Allegation (e)

13. It can be seen that AFCD had conducted site inspections and investigation upon receipt of the complainant's complaints. Unfortunately, no suspect had been identified. AFCD had also attempted to deter further illegal cutting of vegetation by erecting warning signs and continued its field monitoring.

14. Clearly, AFCD had made its efforts. Hence, The Ombudsman considered allegation (e) against AFCD unsubstantiated.

Allegation (f)

15. As the transplantation works were not regarded as DP, there was no question of EIAO requirements. Hence, The Ombudsman considered allegation (f) against LandsD unsubstantiated.

Allegation (g)

16. There was no evidence to suggest that LandsD/DLO had given permission for the erection of steel bars along the Access Road for marking out a potential road or that EIAO had not been complied with. The Ombudsman considers allegation (g) against LandsD unsubstantiated.

Allegation (h)

17. It had taken more than seven months for DLO to reply to the complainant's letter of 4 February 2014, and that was after the complainant had complained to the Office. This was far from satisfactory. Hence, The Ombudsman considered allegation (h) against LandsD substantiated.

Allegation (i)

18. The records showed that both LandsD and EPD had taken timely actions in response to the complaints about illegal cutting of vegetation on the Access Road. As the transplantation proposals were not regarded as DP under EIAO, there was no need for the Lot owner to fulfill EIAO requirements. The Ombudsman, therefore, considered allegation (i) against LandsD and EPD unsubstantiated.

19. Overall speaking, The Ombudsman considered the complaints against LandsD partially substantiated with other inadequacies found; while the ones against EPD and AFCD partially substantiated and unsubstantiated respectively.

20. The Ombudsman recommended that –

(a) LandsD, EPD and AFCD step up monitoring to prevent illegal cutting of vegetation and any other unauthorised works on the Access Road;

(b) LandsD ensures in future proper and timely consultation with relevant departments; and

(c) LandsD and EPD remind staff to reply to public complaints/enquiries in a timely manner.

Government's response

21. LandsD accepted The Ombudsman's recommendations and DLO has been instructed to comply with the recommendations. DLO has increased the frequency of regular patrol to prevent unauthorised works on the Access Road.

22. EPD accepted The Ombudsman's recommendations and has followed up on monitoring the site regularly to guard against violation of the environmental legislation. EPD has also reminded the staff concerned to provide replies to public complaints/enquiries in a timely manner.

23. AFCD accepted The Ombudsman's recommendation and has been monitoring the Access Road twice a month since March 2015. No irregularity has been found on the site so far.

Airport Authority

Case No. 2013/4752 – Mishandling the complainant's report of a suspected theft at the Baggage Reclaim Hall of the airport and mishandling his subsequent enquiries

Background

24. The complainant witnessed a suspected theft at the Baggage Reclaim Hall of the airport and alerted the airport staff nearby, who allegedly took no action. The suspect fled and the complainant later reported the matter to the Police.

25. Dissatisfied with the airport staff's inaction, the complainant wrote to the Airport Authority (AA) and enquired whether the Closed Circuit Television (CCTV) cameras at the Baggage Reclaim Hall had recorded the incident. The same question was subsequently raised by a Legislative Council (LegCo) Member on his behalf. While AA staff told him CCTV cameras were for real time surveillance only and that the identity of the staff under complaint could not be confirmed, AA's reply to LegCo Member stated that those cameras were equipped with recording functions. Considering the replies inconsistent, the complainant queried the honesty of the staff concerned and doubted if AA was trying to cover up its staff's inaction.

The Ombudsman's observations

26. The CCTV cameras at the Baggage Reclaim Hall did indeed have recording functions. AA's instruction to staff about the standard response, i.e. "CCTVs are used for real time surveillance only" did not give a true picture. The staff's reply to the complainant's enquiries, in line with AA's standard response, was therefore false. That said, the staff were only following AA's instructions. AA's statement that the staff concerned were not honest was, therefore, grossly unfair.

27. The Office of The Ombudsman (the Office) considered knowingly constructing a standard response which contained false information in staff training materials totally unacceptable. Furthermore, the Office considered it unjust to put the blame on the staff when the dishonesty actually originated from the management. Such gross act of injustice could not be justified on grounds of good customer service. The readiness of AA's management not to tell the exact truth and their misapplication of the concept of customer service was worrying and must be corrected.

28. Lying to the public, whatever the motive, is unacceptable. Asking its staff to accept a charge of dishonesty for the sake of appeasing a complainant is unthinkable. In this connection, the Office considered that AA must revamp its training, both at management level and at front line staff level, to uphold its integrity and credibility.

29. Based on the above, The Ombudsman considered this complaint substantiated.

30. The Ombudsman recommended that AA should –

(a) expedite its review and revision of its CCTV policy and procedures in handling complaints or reports of incidents of irregularities at the airport such that they would enable the viewing and retention of relevant footage of CCTV recordings when warranted; and

(b) provide appropriate training and/or advice to its management on their mindset as well as to frontline staff on proper customer service in order not to compromise the honesty and transparency of AA.

Government's response

31. AA accepted The Ombudsman's recommendations and has taken the following actions –

(a) AA has completed a review of its CCTV policy and relevant procedures. The updated policy and procedures were effective from September 2014. AA has provided guidelines in detail for staff on handling related customer enquiries or reports of incidents of irregularities under different cases, including the need to retain relevant CCTV footage as appropriate to assist investigation by law enforcement agencies; and

(b) AA hired an independent consultant to provide training for staff and managers who are responsible for handling customer enquiries and complaints, covering aspects including effective communication skills, importance of integrity and accuracy in information dissemination. A case study based on the handling of this complaint case was included in the training programme. Three training sessions were conducted in September 2014 for about 70 staff and managers responsible for handling customer enquiries/feedback. Refreshment briefings will be provided to frontline staff on a yearly basis.

Architectural Services Department

Case No. 2014/2596 – Delay in repairing the flush system of a public toilet

Background

32. For almost two months in May and June 2014, the flush system of a public toilet at a public transport interchange was out of order, causing inconvenience to the public. The complainant was dissatisfied that the Architectural Services Department (ArchSD) had delayed repairing the toilet.

The Ombudsman's observations

33. The Office of The Ombudsman found that ArchSD had in fact actively arranged the repairs to the flush system. The system resumed service only towards the end of June, because of its complicated design and the need to involve various departments.

34. The Ombudsman, therefore, considered the complaint unsubstantiated.

35. Nevertheless, the case revealed an inadequacy on the part of ArchSD. Though not responsible for the design and construction of the toilet, ArchSD had approved the design and taken over the toilet on completion. It should have noticed that the flush system was rather complicated and uncommon in its design as well as not being equipped with any filters, such that its plumbing installation could easily be clogged or damaged. Had ArchSD at the outset devised an appropriate maintenance strategy, it might have taken less time on the repairs in this case.

36. The Ombudsman urged ArchSD to take reference from the incident and promptly formulate a proper maintenance strategy for uncommon toilet flush systems (including the system in the complaint) in order to prevent recurrence of similar problems.

37. When approving toilet flush system design, ArchSD should carefully examine the design in order to appreciate the future maintenance requirement.

Government's response

38. ArchSD accepted The Ombudsman's recommendations and has taken the following actions –

(a) ArchSD issued a lesson-learnt memo on 11 May 2015 to remind all officers responsible for maintenance to formulate suitable maintenance strategy for special toilet flush systems as far as possible in order to prevent recurrence of similar problems; and

(b) clarified with The Ombudsman that under entrustment arrangement, basically the entrustee or its employed relevant professionals would be responsible for the design and monitoring of the construction works. The lesson-learnt memo issued by ArchSD on 11 May 2015 has reminded all project officers to consider the maintenance concerns when compiling technical schedules for future entrustment projects for public toilet.

Buildings Department

Case No. 2013/5032 – (1) Failing to inform the complainant of case progress; (2) Failing to request a building management company to stop some building works; and (3) Wrongly identifying unauthorised building works items as minor works items

Background

39. The complainant complained to the Buildings Department (BD) via 1823 about the construction works for some unauthorised flower pots (the subject works) on the ground floor of Building A of his residential estate in early November 2013. (According to the observation of the Office of The Ombudsman (the Office), the "flower pots" were actually planters made of bricks. Hereafter the subject works will be referred to as "the planters"). After that, the complainant phoned BD's Staff A to enquire about the case progress. In response, Staff A told him that the case had been referred to BD's Consultant for follow up.

40. Later on, as no further news had been received from BD's Staff A, the complainant called Staff A again to check the case progress. Staff A replied that, after the investigation of BD's Consultant, BD confirmed that the planters were unauthorised building works (UBWs). As such, BD would take enforcement action.

41. However, the complainant found that the subject works had continued until its completion. Therefore, he contacted BD's Staff A again to ask why BD did not take any enforcement action as regards the subject works. Staff A remarked that the Management Office of the estate had made a submission to BD for the subject works under the "Minor Works Control System". Hence, no enforcement action would be taken by BD.

42. After checking BD's webpage, the complainant noticed that "minor works" were only applicable to "alteration to buildings that have already existed since the construction period". He opined that the subject works were UBWs, but not "minor works".

43. The complainant's allegations against BD were summarised as follows –

(a) Staff A did not take the initiative to report the case progress and failed to provide a written reply to him;

(b) BD seemed to be harbouring the Management Office by not having demanded the suspension of the subject works prior to the submission of an investigation report by BD's Consultant; and

(c) Staff A had mistakenly regarded the subject works as "minor works".

The Ombudsman's observations

44. As regards allegation (a), the Office noticed that, after the complaint was made to BD on 6 November 2013, the complainant called BD's Staff A three times within the same month to enquire about the case progress. The Office understood that the complainant might expect that BD would take immediate enforcement action against the subject works and therefore was eager to know the case progress. Nevertheless, BD had to take follow-up action step by step in accordance with the established procedures. The Office considered that BD's performance pledge of giving replies to complainants within 30 days was not unreasonable. In this case, the complainant called BD's Staff A three times within 30 days of his complaint to enquire about the case progress and Staff A had replied to the complainant. The Office considered that it was understandable why Staff A did not take the initiative to separately contact the complainant to advise him on the case progress during the same period.

45. Furthermore, as the complaint was made over the phone instead of in writing, BD should not be expected to provide a written reply. Nevertheless, after the involvement of the Office, BD had provided a written reply to the complainant in accordance with his request. Based on the above analysis, The Ombudsman considered that allegation (a) was unsubstantiated.

46. As regards allegation (b), BD had provided reasonable explanations. BD would only be able to ascertain the category of the subject works as UBWs, "minor works" or others after scrutinising the Consultant's report following the Consultant's site inspection conducted on 8 November 2013. Unless the subject works constitute obvious hazard or imminent danger to the public, BD was not obliged to take immediate enforcement action against the subject works prior to ascertaining the nature of the works. The Consultant's report dated 12 November 2013 identified the planters as landscape features which did not constitute danger/obstruction to the building structure nor the means of escape. BD accepted the Consultant's recommendation and decided that no further action was required for the subject works. Therefore, The Ombudsman considered that allegation (b) was unsubstantiated.

47. As regards allegation (c), i.e. whether Staff A had advised the complainant that the subject works was "minor works", both parties had different arguments. In the absence of independent evidence, the Office was unable to make a judgement. The Office did not exclude that there might be some misunderstandings between both parties during the communication. The Ombudsman considered allegation (c) inconclusive.

48. Overall speaking, The Ombudsman considered this complaint unsubstantiated.

49. BD had sent staff to carry out inspection on 23 December 2013 and confirmed that the subject works were "five flower pots made of brick" and would be regarded as "movable features".

50. The staff from the Office and BD carried out a joint site inspection on 20 March 2014 and noted that the subject planters were affixed on the ground by concrete which were not movable by hands. In this connection, the Office considered that BD was incorrect to regard the planters as "movable features".

51. The Ombudsman recommended that BD should learn from this case and clarify the facts as well as carefully employ terminology in their future replies.

Government's response

52. BD accepted The Ombudsman's recommendation.

Buildings Department

Case No. 2014/3485 – (1) Failing to inspect the complainant's flat upon her request for an exemption to carry out the prescribed inspection and repair required by a statutory notice issued under the Mandatory Window Inspection Scheme; (2) Unreasonably refusing the complainant's request for the exemption; and (3) Failing to ensure that the repair works proposed by a contractor were necessary

Background

53. The complainant is the owner of a first-floor unit in a building (Building A). In March 2013, the Buildings Department (BD) issued statutory notices (MWI Notices) to all the owners of Building A under the Mandatory Windows Inspection Scheme (MWIS), requiring the owners to carry out the inspection and repair works found necessary in respect of the windows within a specified time frame. After the meeting of the Owners' Corporation of Building A, it appointed an aluminium window works company (Company A) to carry out the inspection. Company A considered that the complainant should have all the windows accessories replaced (including hinges, locking handles and windows sealant) after inspecting the windows of the complainant's unit.

54. The complainant wrote to BD in August 2013 and March 2014 respectively, requesting to be exempted from MWIS (exemption application) with reasons set out below, but was refused –

(a) according to MWIS, domestic buildings not exceeding three storeys in height are exempted from MWIS. Due to the location of the building and the sloping roads nearby, the level of the complainant's unit on first floor is no difference to other units on ground floor. Therefore, the complainant considered that her unit should also be exempted from MWIS;

(b) the complainant's unit was renovated in 2004 (i.e. nine years before the serving of MWI Notice), including replacement of all windows with aluminium windows. As only private buildings aged ten years or above are required to carry out inspection in respect of windows under MWIS and the aluminium windows of her unit had been installed for nine years only, hence no

inspection should be required;

(c) her unit faces the inner side with no one passing by underneath the windows, and therefore the windows of her unit would not affect any pedestrian. Besides, the complainant seldom opened the windows. According to the result of the complainant's "visual inspection", the conditions of her windows were far better than the examples of dilapidated windows illustrated on BD's website;

(d) the Qualified Persons (QP) who are responsible for window inspection are required to sign documents certifying the conditions of the windows inspected by them. The complainant believed that those QP would, for the adherence to absolute safety, recommend the owners to replace windows irrespective of their conditions; and

(e) some QP could gain advantage from being concurrently responsible for both window inspection and repair works.

55. The complainant's dissatisfactions with BD can be summarised as follows. She opined that BD –

(a) failed to send its staff to her unit to inspect and investigate so as to fully understand the situation in the consideration of her "exemption application";

(b) refused her "exemption application" without reasons; and

(c) failed to ensure that QP would only make recommendation to the owners for repair or replacement of windows in truly problematic conditions, rendering the owners unprotected.

The Ombudsman's observations

56. The Director of Buildings would serve MWI Notices to the owners of private buildings aged ten years or above (except domestic buildings with no more than three storeys) to make window inspection compulsory. This is in accordance with the law and policy established after an extensive public consultation and legislative process. Building A is an eight-storey private building aged over ten years. As such, despite the scenarios pointed out by the complainant, it still appears to be

a must for BD to issue MWI Notices to all the owners of Building A, including the complainant, requiring compulsory windows inspection. Moreover, as MWIS is premised on the principle of "prevention is better than cure", building owners should render their collaboration for the sake of public safety. The Office of The Ombudsman also concurred with BD's decisions of refusing the complainant's "exemption application", and not sending its staff to the complainant's unit for inspection and investigation. Based on the above analysis, The Ombudsman considered that the allegations (a) and (b) were unsubstantiated.

57. BD has established measures to regulate the services provided by QP, and has provided consumers with sufficient choices with a view to protecting their interests. Therefore, The Ombudsman considered that allegation (c) was unsubstantiated.

58. Overall speaking, this complaint was unsubstantiated.

59. The Ombudsman recommended BD to make reference to the views received from the complainant and other members of the public and review MWIS from time to time with a view to improving its implementation.

Government's response

60. BD accepted the Ombudsman's recommendation and will review the implementation details of MWIS from time to time in the light of the experiences gained and feedback from the stakeholders. BD has also established a Technical Committee to collect feedback from the stakeholders in the trade and review the Code of Practice for the Mandatory Building Inspection Scheme, as well as making appropriate amendments as necessary, with a view to improving MWIS.

Buildings Department
and Food and Environmental Hygiene Department

Case No. 2014/1505A (Buildings Department) – (1) Delay in conducting re-inspection after ponding test, making referral and following up a complaint; (2) Failure to send the copy of a letter to the complainant; (3) Unreasonably sending the above letter to the owner of the upper flat; (4) Poor staff attitude in response to enquiry and request; (5) Providing untrue information in its written reply; and (6) Failure to ask the staff concerned to respond to a staff complaint

Case No. 2014/1505B (Food and Environmental Hygiene Department) – (1) Delay in following up a complaint; and (2) Providing untrue information in its written reply

Background

61. The complainant reported to the Joint Office (JO) of the Food and Environmental Hygiene Department and Buildings Department (BD) through the estate management office (Management Office) in May 2013 that water seepage was observed in his flat (Flat A). JO and/or the consultant engaged by JO had carried out various investigations in Flat A and the flat above (Flat B). During the period, the owner of Flat B repeatedly refused to let the consultant enter his flat to carry out tests, hence, the investigation progress was very slow.

62. After the investigations, JO informed the complainant in writing on 28 June 2013 that the seepage was caused by the defective water proofing of the floor slab of the master bathroom of Flat B, and that JO was considering issuing a nuisance notice requiring the flat owner to carry out the necessary repair works. From December 2013 to February 2014, staff of JO and the consultant conducted confirmatory tests and review tests in Flat A and Flat B upon the repair works carried out in Flat B, and indicated that they would institute prosecution against the owner of Flat B.

63. In early March 2014, the complainant was informed by the Management Office that the Owners' Corporation of the building received a letter (Letter A) dated 15 January 2014 signed by JO Staff A. The letter stated that the colour water used in the ponding test previously conducted for the floor slab of the master bathroom of Flat B was found on the external walls of the master bathroom of that flat by the consultant, and it was suspected that the external walls of the building were defective. It was indicated in Letter A that a copy of the letter was sent to the owner of Flat B. The Management Office requested to enter Flat A for inspection of the water seepage problem.

64. The complainant consequently phoned JO Staff A to enquire why a copy of Letter A was not sent to him. The complainant criticised Staff A, saying that as a civil servant, he ought to have known the procedures for processing documents. The complainant was discontent with Staff A's response and requested to speak to his supervisor. Staff A hanged up the phone without a word.

65. On 31 March 2014, the complainant and the supervisor of Staff A (Staff B) had a telephone conversation. The latter said that since the water proofing of the floor slab of the master bathroom of Flat B was defective, JO had referred the case to BD for follow-up actions.

66. In April the same year, the complainant lodged a complaint about the above issues to the Office of The Ombudsman (the Office). On 23 May, JO sent a reply letter to the complainant (Letter B).

67. The complainant's complaint against JO and BD could be summarised as follows –

JO

(a) Delay in following up the complainant's report about water seepage, including –

  (i) during the period of May 2012 to January 2013 and September to November 2013, failing to take follow-up actions proactively in response to the uncooperative attitude of the owner of Flat B, but only adopting an ineffective approach repeatedly by sending to that owner letters with largely similar content, requesting to enter the flat for conducting tests;

(ii) delay in reviewing the test results in Flat A until 14 June (five months later) (the colour water used in the ponding test conducted for the floor slab of the master bathroom of Flat B was found appearing on the seepage location on that day) after conducting the tests in Flat B on 13 January 2013, and the subsequent delay in issuing the nuisance notice to the owner of Flat B until 15 July;

(iii) although the drainage pipes on the external walls of the building was found defective in January 2013, not referring the case to BD for follow-up actions until 28 June (five months later);

(b) failing to send a copy of Letter A to the complainant, probably to deliberately withhold the investigation results, or because the consultant's investigation report was faulty;

(c) sending Letter A to the owner of Flat B, with intent to give the owner excuses for not carrying out the necessary repairs by blaming the defects on the external wall of the building for the water seepage problem of Flat A;

(d) staff A behaved badly when responding to the enquiries and requests of the complainant;

(e) some of the contents of Letter B was in contradiction with what had happened, including –

(i) the letter stated that Staff B called the complainant on 31 March 2014, but in fact it was the complainant who called Staff B on that day, and complained to him against Staff A;

(ii) the letter stated that JO staff called the complainant on 9 April 2014 to explain the investigation findings, whereas in fact JO staff called the complainant on 8 April 2014 (and not 9 April) and did not explain the investigation findings to him;

(f) when the complainant called Staff B to complain against Staff A, Staff A had not left the post. JO should have asked Staff A to respond to his complaint; and

BD

(g) delay in following up the complainant's report. For JO's referral on 28 June 2013, BD delayed in making a reply until 4 April 2014.

The Ombudsman's observations

Allegations (a) and (g)

68. For allegations (a) (ii) and (iii), JO admitted that the consultant reviewed the test results and submitted the investigation report more than five months after conducting the tests, and that JO failed to refer the drainage defects on the external wall of the building to BD for follow-up in a timely manner.

69. For allegation (a) (i), the Office opined that JO's delay was seen in the following aspects –

(a) from October to November 2012, failing to follow up on the "Notice of Appointment" issued to the owner of Flat B according to the established procedures laid down in the Manual Instructions of JO in a timely manner ; and

(b) from September to November 2013, failing to issue "Notice of Intention to entry" promptly according to the established procedures laid down in the above Instructions.

70. Regarding allegation (g), BD has admitted its delay in following up the case and has asked its staff to make improvement.

71. In light of the above, The Ombudsman considered allegations (a) and (g) substantiated.

Allegation (b)

72. JO has admitted responsibility and apologised for failing to send a copy of Letter A to the complainant.

73. Records showed that JO had asked BD to carry out an investigation of the external wall which was suspected to be defective, and to reply to the complainant direct. This indicated that JO really had no intention of withholding the findings, and the failure to send the copy of Letter A to the complainant was simply an oversight. Furthermore, both reports (24 June 2013 and 2 January 2014) from the consultant stated that the colour water used in the tests was found on the external wall of the building, and there was no sign that the reports were faulty.

74. In view of the points illustrated above, The Ombudsman considered allegation (b) partially substantiated.

Allegation (c)

75. Letter A would not in any way give the owner of Flat B a justification for not complying with the nuisance notice and carrying out the repair works for the flat. In fact, the owner of Flat B was eventually prosecuted for not complying with the nuisance notice and carrying out the repair works for the flat. The Ombudsman considered allegation (c) unsubstantiated.

Allegations (d) and (f)

76. Since Staff A had left the post, the Office could not verify the behaviour of Staff A on that day. The Ombudsman considered allegation (d) inconclusive.

77. As for Staff B, the Office was satisfied that he had followed up the complaint lodged by the complainant against Staff A, and had sought to understand the matter from Staff A. However, as the supervisor of Staff A, Staff B should have made a proper record and replied to the complainant. It was inappropriate for Staff B for failing to do so. The Ombudsman considered allegation (f) unsubstantiated, but other inadequacies found.

Allegation (e)

78. The versions provided by the complainant and Staff B are different. In the absence of independent corroborative evidence, the Office was unable to verify whether Staff B phoned the complainant on his own initiative on 31 March 2014.

79. Nevertheless, as Staff B could not clearly recall whether he had taken the initiative in calling the complainant, JO's claim in Letter B that Staff B "phoned the complainant" on 31 March 2013 was therefore inaccurate.

80. As to why the complainant claimed that JO staff phoned him on 8 April 2014 (not on 9 April), the Office was unable to verify the claim.

81. In view of the above, The Ombudsman considered allegation (e) inconclusive.

82. Overall speaking, The Ombudsman considered the complainant's complaints against JO partially substantiated and the one against BD substantiated.

83. The Ombudsman recommended that –

(a) JO and BD should remind the staff/consultant concerned to follow up on cases according to the established procedures in a timely manner and inform complainants of the progress and findings of the investigations; and

(b) JO should remind its staff to make a proper record of the case and handle outgoing correspondences with caution to ensure that letters are sent to the people concerned and the diction is correct.

Government's response

84. JO and BD accepted The Ombudsman's recommendations and have taken the following actions –

(a) JO has since September 2014 put in place a new computer monitoring system by phases to record the dates on which cases are received or dates on which internal referrals are made, dates of testing by consultants and dates of submission of investigation reports to JO, so as to remind JO staff in a timely manner of the various kinds of work requiring follow-up action within a time frame. Apart from the progress meetings held every two weeks between professional officers of JO and individual consultants, senior professional officers of JO will also hold meetings with professional officers and inspect the returns in the system regularly, so as to monitor the work of JO staff and the

consultancy staff;

(b) BD has reminded the staff concerned to follow up on cases referred by JO in a timely manner; and

(c) JO has reminded the staff concerned to make a proper record of the various procedures for handling cases according to its internal guidelines, including the record of complaints, contents of conversation with complainants, handling methods and contents of replies to complainants. Moreover, diction used in replies should be accurate.

Buildings Department and Lands Department

Case No. 2014/0827A (Buildings Department) – Failing to properly follow up a complaint about unauthorised building works

Case No. 2014/0827B (Lands Department) – Failing to properly follow up a complaint about illegal occupation of government land

Background

85. On 11 March 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Buildings Department (BD) and Lands Department (LandsD). According to the complainant, he had made repeated complaints to BD and LandsD since 2012 about the unauthorised building works (UBWs), unlawful occupation of government land and the discharge of effluent into the storm water drain at Lot A and Lot B (the lots), which not only obstructed the access of emergency vehicles, but affected environmental hygiene.

86. The District Lands Office (DLO) of LandsD initially said that the structures at the lots might have breached the lease conditions and, if it was confirmed that these structures had no squatter survey number, DLO would issue a warning letter to the landowners requiring that the breaches be purged. Nevertheless, DLO subsequently said that the case had been referred to BD for follow-up action as the structures were covered by the Reporting Scheme for Unauthorised Building Works in New Territories Exempted Houses (commonly known as village houses) (the Reporting Scheme) introduced by BD. No further follow-up action would be taken by DLO.

87. As for the unlawful occupation of government land, DLO affixed a notice at the land requiring that the occupiers cease the occupation of government land. Nonetheless, since the occupier had applied to DLO for renting the site by way of short term tenancy (STT), land control action was withheld.

88. BD advised that since UBWs at the lots did not constitute any immediate danger, no follow-up action would be taken by BD.

89. The complainant criticised the two departments for having failed to duly follow up on his complaint, as a result of which the aforementioned problems remained unresolved.

The Ombudsman's observations

BD

90. The Office found it not unacceptable for BD, taking into account the consultant's inspection findings, not to take further follow-up action on the effluent discharge problem from UBW(s) at Lot B. Nevertheless, UBWs at the lots had to be handled. Although UBWs did not constitute an imminent danger, records showed that BD found that UBWs at the lots had not been reported under the Reporting Scheme when following up on UBW at Lot A as early as in July 2013. Hence, according to the prevailing enforcement policy, they should be regarded as newly erected UBWs against which BD should have taken priority enforcement action. The Office understood that BD had its priority list in dealing with such UBWs. Nonetheless, it was less than satisfactory when no enforcement action had been taken against UBWs at the lots for years.

91. Overall speaking, The Ombudsman considered the complaint against BD partially substantiated.

LandsD

92. DLO's actions in response to the complainant's complaints were generally appropriate.

93. However, DLO claimed that UBWs in the village houses at the lots had been referred to BD for follow-up action pursuant to the guidelines and hence DLO did not take any lease enforcement action. The Office did not concur with such practices. In fact, BD already indicated that no immediate action would be taken since UBWs did not constitute any imminent danger, and that BD had repeatedly informed DLO of this decision. The office did not see any reason why "DLO should withhold lease enforcement action to accommodate BD's enforcement action lest the latter would be jeopardised". It was DLO's responsibility to ensure that the structures complied with the lease conditions. As a matter of fact, DLO was duty-bound to take lease enforcement action (i.e. by issuing warning letters/imposing encumbrances) and should not wait for BD to act on its behalf.

94. Based on the above analysis, The Ombudsman considered the complaint against LandsD partially substantiated.

95. The Ombudsman urged –

BD

(a) to take enforcement action as soon as possible in order to remove UBWs at the lots;

LandsD

(b) to take prompt lease enforcement action against the structures in breach of lease at the lots; and

(c) to be decisive when handling the problem of unlawful occupation of government land so as to prevent the occupiers from continuing their illegal practices under the pretext of repeated applications for renting the land.

Government's response

96. BD and LandsD accepted The Ombudsman's recommendations.

97. BD has formulated a progressive enforcement plan against UBWs in the New Territories exempted houses which have not been reported under the Reporting Scheme. Under the progressive enforcement plan, BD is in the process of taking action against unreported UBWs (which were concurrently complained by the public) identified in 84 target villages surveyed from 2012 to 2014. It will also take action against unreported UBWs identified in other target villages to be surveyed in the coming years. BD will take enforcement action against UBWs at the lots as soon as possible in accordance with the progressive enforcement plan.

98. DLO had issued warning letters to the registered owners of the unauthorised structures on the lots, requiring them to purge the breaches of relevant lease conditions before a deadline. As the breaches had not been purged, DLO sent the warning letters to the Land Registry and registered them against the lots (i.e. imposition of encumbrance).

99. After DLO's land control action, the occupier ceased the occupation of a major portion of the government land concerned. Subsequently, DLO has issued an STT for the remaining occupied portion. The rental payable was backdated to 2013.

Buildings Department and Lands Department

Case No. 2014/3009A&B – Failing to take proper enforcement action against an unauthorised building structure under construction on a private lot

Background

100. On 7 July 2014, the complainants lodged a complaint with the Office of The Ombudsman (the Office) against the District Lands Office concerned (DLO) under the Lands Department (LandsD), as well as the Buildings Department (BD). The complainants wrote to DLO on 27 January 2014 by mail, complaining about the unauthorised building works (UBW) on a piece of agricultural land (the land) and occupation of government land. DLO replied on 17 February 2014 that no occupation of government land was found upon investigation. In June, the complainants complained to DLO about UBW again and were informed that an unauthorised structure was being built on the land. The case had been referred to BD for their follow up. Meanwhile, the construction of UBW continued and the second floor of the structure was completed. The works led to blockage of drains at the roads next to the structure. As a result, the roads were flooded knee-deep on rainy days, affecting the villagers' access.

101. The complainants alleged that LandsD and BD had failed to duly follow up on the issue of UBW.

The Ombudsman's observations

102. During the inspection in January 2014, DLO did not find any construction works in progress on the land. As for the hoardings enclosing the land, DLO viewed that they were for security purpose. The Office was of the view that, under such circumstances, it was not unreasonable of DLO not to take any enforcement action.

103. Having found the structure during the inspection in June the same year, DLO referred the case to BD in a timely manner according to the departmental guidelines. DLO also addressed the breach of lease conditions and the flooding caused by the structure accordingly.

104. The Ombudsman considered the complaint against LandsD unsubstantiated.

105. BD had mishandled the case for having not followed its internal guidelines to carry out inspection within 48 hours after receiving DLO's referral on two occasions. Nevertheless, BD had issued an advisory letter to the owner concerned upon inspection. Therefore, The Ombudsman considered the complaint against BD partially substantiated. The Ombudsman urged BD to remind its staff to follow up on reports from members of the public in a timely manner, with a view to avoiding delay.

106. Although the flooding problem had been resolved and the complaints were no longer affected by the structure concerned, nonetheless, given that the structure was in breach of lease conditions and was a suspected UBW, The Ombudsman urged LandsD and BD to continue following up on the issue proactively and taking action against UBW so that the irregularity would not persist

Government's response

107. LandsD and BD accepted The Ombudsman's recommendations.

108. BD has reminded its staff to follow up on reports from members of the public in a timely manner. BD issued an advisory letter to the landowner on 29 January 2015. As the land owner had not purged the breach (i.e. removed UBW), BD issued a demolition order to the land owner on 6 March. Given that BD has commenced its enforcement action against UBW, DLO would not take any lease enforcement action for the time being. DLO will continue to monitor the development of the case and take appropriate lease enforcement action when necessary, including issuing a warning letter to require the land owner to purge the breach within a specific time limit. Otherwise, the warning letter will be registered against the land at the Land Registry (i.e. imposing an encumbrance).

Customs and Excise Department

Case No. 2014/0860 – Delay and improper handling of a complaint about contravention of the Trade Descriptions Ordinance

Background

109. In early August 2013, a complainant reported to the Customs and Excise Department (C&ED) that, while there were supposed to be two pork chops in a dish of a restaurant as shown in the photo of its menu, only one was actually served to customers. With no acknowledgment or interim reply, C&ED replied to the complainant in late October that there was insufficient evidence to establish any Trade Descriptions Ordinance (TDO) contravention.

110. From November 2013 to March 2014, the complainant issued several emails to C&ED to query its decision. C&ED replied to the complainant on 28 February and 12 March 2014, indicating that it had reviewed the case and no further action would be taken due to insufficient evidence. The complainant considered C&ED to have delayed in responding and also failed to answer his queries.

The Ombudsman's observations

Information provided to the complainant

111. The Office of The Ombudsman (the Office) considered that C&ED should generally not disclose any information obtained in pursuance of TDO. To disclose information "for the sake of transparency of enforcement actions and for the avoidance of adversarial approaches" is not provided for under section 17 of TDO. In the present case, C&ED had in the first instance merely informed the complainant of the outcome. Upon query, C&ED disclosed further information but upon further query, chose to say no more. The Office did not see the rationale for the changes in stance and how the changes had enhanced transparency and avoided adversarial approaches.

112. The Office understood the dilemma C&ED was facing. On the one hand, the law requires non-disclosure while on the other, the discerning public expect transparency. It was difficult. C&ED must not leave this to its officers' judgment, but must spell out its stance clearly and provide guidelines on the issue, seeking legal advice where necessary.

Processing time

113. The published pledges on handling complaints did not distinguish between staff and TDO complaints. Nor did they distinguish between written and verbal complaints. The Office considered it undesirable. In the present case, C&ED officers had failed to acknowledge receipt of the complaint. Although acknowledgment is not required by its Work Manual, the complainant's expectation of an acknowledgment was not unjustified given the published pledges.

114. C&ED should formally acknowledge complaints for follow-up, suitably revise the pledges and consider publishing a separate set of pledges for TDO complaints.

Conclusion

115. This case revealed C&ED's lack of guidelines on disclosure of information concerning alleged contravention of TDO. The lack of a mechanism to acknowledge TDO complaints and the lack of publication of the pledges for handling TDO complaints were also unsatisfactory. That said, C&ED had not failed to follow up on the complaint or failed to inform the complainant of the outcome. The Ombudsman, therefore, considered this complaint partially substantiated.

116. The Ombudsman recommended C&ED to –

(a) make known its stance on disclosure of information under TDO and draw up guidelines accordingly; and

(b) suitably revise the pledges, incorporating an acknowledgment mechanism, and consider publishing a separate set of pledges for TDO complaints.

Government's response

117. C&ED accepted The Ombudsman's recommendations and has taken the following actions –

(a) put in place an acknowledgement mechanism for complaints received;

(b) made known to the public that the law forbids disclosure of any information obtained during the course of an investigation via C&ED's homepage and the written acknowledgements to the complainants;

(c) strengthened the capability of staff in handling TDO related matters, including devising detailed guidelines and providing appropriate training such as courses on communication skills; and

(d) revised the performance pledges to distinguish "complaints against customs staff or service" to avoid ambiguity or misunderstanding.

Environmental Protection Department

Case No. 2014/1989(I) – Unreasonably refusing to provide asbestos related investigation and test reports prepared by a public utility company

Background

118. The complainant was hired by an out-sourced contractor of a power company (Company A) and had worked at substations for more than 15 years. In May 2012, he lodged a complaint to the Environmental Protection Department (EPD) reporting that four substations of Company A (substations concerned) contained significant amount of asbestos, causing adverse impact to workers' health. He then made a request to EPD for the release of the environmental assessment reports of the substations concerned. However, EPD declined the request due to privacy reasons. The complainant alleged EPD for unreasonably refusing to provide him with the above environmental assessment reports.

119. EPD clarified that in June 2013 (not May 2012), the complainant, through a trade union (Union B), actually requested EPD to release the asbestos investigation reports and laboratory test reports (information concerned) (but not environmental assessment reports) of the substations concerned. Having considered Union B's request for releasing the information, EPD replied to Union B in July 2013 that the information concerned was owned by Company A and Union B should approach Company A direct for the disclosure.

The Ombudsman's observations

120. EPD had not consulted Company A before they refused the request for disclosure of the information concerned to Union B. However, the Office of The Ombudsman (the Office) noted a statement shown on some of the cover pages of the information concerned, "Except with the consent of Company A, no disclosure is permitted". In other words, Company A would not refuse the disclosure of the information concerned under all circumstances. Therefore, EPD should first enquire Company A about its consent for the release of the information concerned

to Union B.

121. Even if eventually Company A did not grant the consent to release the information concerned, EPD still needed to assess the merits of disclosure to Union B for the sake of public interest. The Office considered that since EPD had not made any assessment prior to declining Union B's request for the information, there was some inadequacy and failure to fully comply with the requirements of the Code on Access to Information (the Code). Besides, when refusing to disclose the information concerned, EPD did not follow its Guidelines on Interpretation and Application (the Guidelines) in advising Union B about the possibility of raising a review request or the complaint procedure.

122. The Ombudsman considered that regardless of whether or not EPD could ultimately provide adequate justifications for not disclosing the information concerned to Union B or the complainant, EPD had not fully follow the requirements as stipulated by the Code and the Guidelines to properly handle the request for information made by Union B. In this connection, the complaint was considered substantiated.

123. The Ombudsman recommended that –

(a) EPD to enhance the training for the staff, reminding them about the strict compliance with the Code and the Guidelines in handling the requests for information from the public; and

(b) to analyse in conjunction with the Department of Justice (DoJ) to confirm that there is indeed no reason of overwhelming public interest to support the disclosure of the information concerned.

Government's response

124. EPD accepted The Ombudsman's recommendations.

125. As regards recommendation (a), EPD has followed up and conducted an in-house seminar in May 2015 to enhance staff understanding on the requirements of the Code and the Guidelines in handling requests for information by the public.

126. Regarding recommendation (b), EPD sought further advice from DoJ in November 2014 and re-examined the request in accordance with DoJ's advice. The conclusion was that there was no overwhelming public interest in the disclosure of the information sought. EPD had reported the conclusion to the Office on 3 February 2015.

Environmental Protection Department
and Water Supplies Department

Case No. 2014/1685A (Environmental Protection Department) – Imprudent approval of night-time works, resulting in noise nuisance to nearby residents

Case No. 2014/1685B (Water Supplies Department) – Inefficient night-time works, resulting in noise nuisance to nearby residents

Background

127. According to the complainant, the Water Supplies Department (WSD) had carried out water main replacement works (the works) in the area near his residence since April 2013. The works were approved by the Environmental Protection Department (EPD) to be carried out from evening to early morning. The complainant alleged that WSD's working procedure was inefficient. Excavation started at night, but the excavated trench was temporarily backfilled in the ensuing morning. The works continued in that cycle for months without completion, continually causing nuisance to neighbouring residents (allegation (a)). The complainant also alleged EPD for imprudent approval of the works concerned and that the noise emanating from them disturbed residents' sleep (allegation (b)).

The Ombudsman's observations

Allegation (a)

128. WSD had already explained why the works were carried out at night, as well as why the excavated trench was backfilled in the morning. The Office of The Ombudsman (the Office) considered that such working procedure was dictated by the decisions of the Traffic Management Liaison Group (the Liaison Group) and EPD. Therefore, The Ombudsman considered allegation (a) unsubstantiated.

129. Nonetheless, carrying out works at night would inevitably create some degree of noise disturbance for the residents. WSD should consult the residents on this issue and provide them with a chance to raise their opinions and demands. In this event, the Liaison Group and EPD might

arrive at a different decision if they had taken reference to the residents' views.

130. Information indicates that WSD and/or other relevant departments had never consulted the concerned District Council (DC) or District Management Committee (DMC) about carrying out the works in restricted hours. WSD had only introduced the entire works project and reported the progress of works to DC, and responded to the enquiries of DC members. In addition, WSD had entrusted the task of briefing the DC members on the replacement and rehabilitation of water mains programme to the consultants. There were no written records of the relevant meetings. WSD could not confirm the details of the meetings and the Office was unable to make further enquiries.

131. Moreover, WSD claimed that the contractor and consultants of the works had consulted neighbouring shop operators and residents. However, upon reviewing the relevant notice of consultation, the Office found that the key message of the notice was merely to inform the shop operators and residents of the temporary traffic diversion. While it was stated in the notice that the works would be carried out from 9 p.m. to 6 a.m., there was no mention that noise might be generated by the works at night, which would affect the residents. Furthermore, it was stated in the notice that the construction period would be from March to May 2012 (three months in total) and thus it would be difficult for the residents to realise that the works actually started from March 2013 and would last for more than one year. After all, the written notice given by the contractor to neighbouring commercial and residential buildings before the commencement of each stage of works could not be regarded as prior consultation.

132. All in all, it is apparent that WSD had not carried out sufficient local consultation to gather and consider the views of the residents. Therefore, The Ombudsman considered the allegation (a) against WSD unsubstantiated but other inadequacies found.

Allegation (b)

133. One of EPD's main duties is to protect the public from noise nuisance. Compared with the day-time construction works, works conducted during small hours/early morning are particularly annoying. Therefore, the Office considered that EPD must be very cautious in issuing Construction Noise Permits (CNPs).

134. Regarding the works concerned, although EPD claimed to have conducted the assessment, the decision of granting CNP was primarily based only on the concerns from the Liaison Group formed by the Transport Department (TD) and the Police representatives about the impact on the road users. As a result, the works were allowed to be carried out in the small hours/early morning, disturbing residents' sleep as a result. The Office considered that since EPD had the main duties as stated above, it should strive to protect the residents' interests. It should at least express its concern about the noise problem to TD and the Police and negotiate with them for an alternative approach. For example, during the construction period of over one year, parts of the works should be arranged during day-time in order to strike a balance of the impacts of the works between the road users and residents. Though EPD could not be considered as imprudent in issuing CNP, there were indeed inadequacies.

135. In addition, the Office noted that among the seven complaints received by EPD, the vast majority of the complainants were actually dissatisfied with the noise nuisance caused by the works even after 11 p.m. (e.g. "10 p.m. to about 5 a.m. on the following day", "midnight"). However, EPD only conducted inspections before midnight without first ascertaining the period of noise nuisance with the complainants. EPD's inspection results were one of the important factors to be considered for further granting CNPs. EPD was not prudent enough in assuming that excessive noise could only be caused before midnight and hence conducting inspections only in that period of time.

136. Based on the above analysis, The Ombudsman considered allegation (b) against EPD partially substantiated.

137. The Ombudsman recommended that –

(a) WSD should learn a lesson from the case. For any works that might cause nuisance to the neighbouring residents and shop operators, WSD should conduct local consultation in a serious manner. This included explaining clearly the details and impacts of works to the relevant DCs/DMC and recording the details of consultation in writing, as well as closely monitoring the process of consultation conducted by consultants and contractors (including reviewing the contents of consultation letters), so as to ensure that the views of the residents and shop operators were adequately considered and followed up; and

(b) in processing CNP applications, EPD should carefully consider the impact of the construction noise on residents and discuss with other departments whenever necessary to determine whether it is absolutely not practicable to carry out the works outside restricted hours, and conduct investigations seriously upon receipt of complaints to fulfil its responsibility of protecting the public from noise nuisance.

Government's response

138. WSD accepted The Ombudsman's recommendation and reminded its staff members, consultants and contractors that when conducting local consultation (including consulting neighbouring residents and shop operators, DC members and DMCs) for the works projects, they should explain in detail the impacts of works on different aspects (e.g. the environment, traffic, etc.), and record the details of consultation in writing. WSD will also closely monitor the process of consultation conducted by the consultants and contractors, as well as review the contents of the consultation letters, so as to ensure that the views of the residents and shop operators are adequately considered and followed up. In addition, WSD has prepared a proforma letter for the consultants and contractors to use when conducting consultation. It will also strengthen the monitoring of the process of consultation by using a checklist.

139. EPD accepted The Ombudsman's recommendation and has enhanced communication with departments and parties concerned in processing CNP applications, including closer examination of alternatives and works periods to avoid or minimise the carrying out of works within restricted hours to reduce the impact of construction noise. In handling noise complaints, EPD will also seek to ascertain the time period of concern with the complainants for planning follow-up investigations.

Food and Environmental Hygiene Department

Case No. 2014/0636 – (1) Requesting to enter the complainant's premises more than once with the same warrant of entry; (2) Failing to explore other possible sources of water seepage; and (3) Failing to explain to the owner of the suspected premises the procedures for investigating water seepage

Background

140. On 23 February 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Joint Office for Investigation of Water Seepage Complaints (JO) made up of staff from the Food and Environmental Hygiene Department (FEHD) and the Buildings Department.

141. According to the complainant, on 10 June 2013, in response to the water seepage complaint from the premises one floor below his premises (the premises concerned), JO issued him with a "Notice of Intention to Execute Warrant to Effect Entry into Premises" (Notice), requesting him to contact JO by 19 June 2013 so as to arrange for JO staff to conduct investigation into his residential premises. Subsequently, with the complainant's agreement, JO staff conducted a colour water test at the drainage outlets in his residential premises. However, it was unable to confirm the source of water seepage. On 14 January 2014, JO issued him with another Notice, requesting to enter his residential premises again for investigation. Attached to the above two Notices was the same Warrant to Effect Entry into Premises (warrant of entry).

142. The complainant alleged that JO had –

(a) unreasonably requested to enter his residential premises more than once with the same warrant of entry for conducting investigation and tests;

(b) ignored his view that the premises one floor above his premises might actually be the source of water seepage (the ground he had was that his residential premises also suffered water seepage); and

(c) not explained to him its procedures for investigating water seepage problems, particularly the time it would take to complete the various tests.

The Ombudsman's observations

Allegation (a)

143. JO indeed had legal basis to request to enter the premises concerned with the same valid warrant of entry for investigation in June 2013 and January 2014. There was no impropriety.

144. Hence, The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

145. The development of the incident revealed that JO indeed had not ignored the water seepage problem affecting the premises concerned. There was information indicating that JO had called the complainant six times to arrange for a visit to the premises concerned to review the result of the colour water test. It was just that JO could not reach him. Hence, The Ombudsman considered allegation (b) unsubstantiated.

146. As for the wrong address on the letter, JO had apologised to the complainant and reminded its staff to make improvement. The Office considered that JO had properly followed up on the problem.

Allegation (c)

147. The Office agreed that it was indeed difficult for JO to accurately estimate the time it would take to complete the various tests. In fact, JO's investigation procedures consisted of only three stages. Hence, the complainant did not have to worry too much that JO would conduct the tests for an indefinite period of time. The Ombudsman considered allegation (c) unsubstantiated.

148. Overall speaking, The Ombudsman considered this complaint unsubstantiated.

149. There was still room for improvement in the way JO explained its investigation procedures to the owner of the premises concerned. JO's usual practice was that at the start of a water seepage investigation, it would give the complainant a pamphlet titled "Do-it-yourself Water Seepage Test" to explain the procedures for investigating water seepage. However, JO would not give the same to the owner or occupier of the premises alleged to have caused the water seepage. The Office considered that providing the same information to all relevant parties would help foster understanding and mutual trust, speed up the investigation process and enhance the effectiveness. The Ombudsman recommended that in the early stage of an investigation, JO should provide the information leaflet about the procedures for handling water seepage complaints not only to the complainant, but also to the owner or occupier of the suspected premises for seepage.

Government's response

150. JO accepted The Ombudsman's recommendation and has reminded its staff that they should strictly adhere to the established procedures and guidelines. Before conducting an investigation into a complainant's premises, JO staff will post a leaflet titled "General Procedures for Investigating Water Seepage – Notes to Owners/Occupiers" to the complainant to explain the procedures for investigating water seepage. When conducting investigations in the premises of the complainant and the suspected premises, JO staff will give the same leaflet to both the complainant and the owner/occupier of the suspected premises for seepage and explain to them the procedures for handling water seepage complaints.

Food and Environmental Hygiene Department

Case No. 2014/0644 – Failing to tackle the environmental nuisance problem caused by refuse dumped in an open space

Background

151. People had long been using an open space right in front of a Food and Environmental Hygiene Department (FEHD) district cleansing office for illegal disposal of refuse, causing a serious environmental nuisance. The complainant had lodged a complaint with FEHD, but the problem persisted. The complainant then lodged a complaint to the Office of The Ombudsman against FEHD for failing to take effective measures to resolve the problem.

The Ombudsman's observations

152. It was ironical that the open space, right in front of an FEHD office, had been used continually for illegal refuse disposal.

153. FEHD records showed that about three to four inspections at the open space were conducted per week but most of them were conducted either after 7:00 am or in the evening before midnight, while the illegal refuse disposal activities in fact usually took place in the small hours. As the enforcement actions were not taken at the right time, they were naturally ineffective.

154. In view of the above, The Ombudsman considered the complaint substantiate.

155. The Ombudsman recommended FEHD to –

(a) fence off the open space as soon as possible;

(b) continue to closely monitor the "refuse problem" in the small hours and strengthen prosecution against offenders; and

(c) consider extending the opening hours of the other refuse collection points in the vicinity if warranted.

Government's response

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

(a) fenced off the open space on 31 March 2015;

(b) continued to closely monitor the "refuse problem" in the small hours, and conducted blitz operations at the site during the refuse dumping hours as alleged by the complainant (i.e. from 10:30 p.m. to 6:00 a.m. the next day). Between September and December 2014, a total of 20 blitz operations were conducted. During the operations, FEHD did not find any person dumping refuse in the open space; and

(c) extended the opening hours of Heung Che Street Refuse Collection Point in the vicinity of the open space to 24 hours a day for public use since 25 August 2014.

Food and Environmental Hygiene Department

Case No. 2014/0736 – (1) Letting out stalls in Cheung Chau Market without public tendering; and (2) Failing to take action against the stall tenants who used their stalls as storerooms rather than for retail purposes

Background

157. On 3 March 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD).

158. According to the complainant, she was a tenant of a stall in a market under FEHD. She alleged that there was maladministration on the part of FEHD in the following areas –

(a) In recent years, FEHD had let out a number of stalls (the stalls concerned) in a market without going through the open auction process. That was unfair to other persons interested in leasing the stalls in the market; and

(b) FEHD allowed the stalls concerned to use their stalls as storerooms or cease trading for a long period of time.

The Ombudsman's observations

Allegation (a)

159. Under the existing policy, vacant stalls in public markets under FEHD are let out by open or restricted auctions. As regards open auctions, FEHD will announce in advance of an auction the relevant information, including names of the markets where the vacant stalls are located, stall numbers, commodities permitted for sale, monthly upset rents, time and venue of the auction, etc. Persons interested in bidding for the market stalls should attend the auction in person. As for restricted auctions, they will only be held under special circumstances, such as to re-site hawkers affected by hawkers re-siting exercises.

160. Successful bidders will enter into a tenancy agreement with FEHD. Tenants should deliver vacant possession of their stalls to FEHD upon termination of tenancy. The stalls will be put up for open auction with upset prices set at the open market rent reassessed by the Rating and Valuation Department.

161. FEHD submitted the following information to The Ombudsman –

(a) A copy of the tenancy agreements signed by the current tenants of the stalls concerned; and

(b) Auction dates, auction type, tenancy periods and monthly rentals of the stalls concerned.

162. The Office considered that as shown by the information above, FEHD had let out the stalls concerned in accordance with the tendering procedures.

163. In the light of the above, The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

164. The Office was of the view that except for the case that FEHD had pursued, there was not enough evidence to prove that tenants of the rest of the stalls concerned had breached the tenancy terms. As such, it was not unreasonable that FEHD took no enforcement action against the tenants of those stalls.

165. In view of the above, The Ombudsman considered allegation (b) unsubstantiated.

166. This complaint showed the loopholes of FEHD for supervising the tenants of the market stalls. Tenants were allowed to rent two or more stalls at the same time. They may trade (or pretend to be in operation) at one/some of the stalls they rented for only a very short period of time every day. Since there was no requirement on the minimum trading hours of a stall every day, no enforcement action could be taken. The result could be enormous Government resources being wasted. The Office considered this in contravention with the Government's purpose of setting up markets, which was to let members of the public shop at different competitive stalls selling same/diverse

categories of goods.

167. The Ombudsman thus urged that FEHD should review the problem of idle market stalls with a view to plugging the loopholes and optimising the use of public resources.

Government's response

168. FEHD accepted The Ombudsman's recommendation. FEHD is seeking legal advice from the Department of Justice (DoJ) on the proposed amendment to the relevant market tenancy terms to stipulate the minimum daily trading hours of a stall. As the proposed amendment involves various aspects of market management including future enforcement, more time is needed for FEHD to study and consult with DoJ. If DoJ confirms that the proposed amendment is feasible, FEHD will consult market stall tenants and consider amending the tenancy agreements.

169. FEHD emphasises that the Government has to take into account various considerations in the management of public markets. In the past, many public markets were used to accommodate on-street hawkers. As many of these stalls are small in size, stall operators need extra space for storage to ensure sufficient supply of goods for market patrons during trading hours. To cater for the actual needs of the operation of market stalls, FEHD will consider designating long-standing vacant stalls and stalls in less attractive locations for storage purposes for lease by stall operators running their business in the same market. This is also in line with public interest.

170. Having said that, if stall operators fail to operate as required under the terms of tenancy or wilfully use their stalls for storage without permission, FEHD will take appropriate actions against them for breaches of tenancy agreements. FEHD staff inspects markets on a daily basis to ensure compliance with tenancy terms. In 2014, FEHD issued a total of 78 warning letters and terminated the tenancy agreements of 11 stalls due to their breaches of the relevant tenancy term, i.e. cessation or suspension of business at the stall for seven days or more in any one calendar month.

Food and Environmental Hygiene Department

Case No. 2014/1678 – Unfairly refusing to make available the remaining niches at Cheung Chau Columbarium for application by residents of other districts

Background

171. In early 2014, the Food and Environmental Hygiene Department (FEHD) made available 1000 new niches at Cheung Chau Columbarium exclusively for indigenous villagers of Islands District or persons who had resided in Cheung Chau continuously for not less than ten years (the eligibility criteria). After the first round of sale by ballot, only 167 niches were taken up. The remaining niches were then offered for sale on a first-come, first-served basis starting from April the same year, but the same eligibility criteria applied.

172. To the complainant, the result of the first round of sale was an indication that Islands District residents' need for columbarium niches had been fully met. It was unfair and wasteful on the part of FEHD to deny residents of other districts use of the remaining niches.

The Ombudsman's observations

173. As the eligibility criteria adopted by FEHD were supported by an established policy, The Ombudsman, from an administrative point of view, considered the complaint unsubstantiated.

174. Nevertheless, the Regional Council had been dissolved years ago while the population structure and way of life in Islands District had since undergone significant changes. It was a moot point whether that policy established long ago was in keeping with the times.

175. As the supply of columbarium niches would continue to fall short of demand in the foreseeable future, the Government should allocate niches more flexibly so as to balance the demand and supply of niches among districts. Accordingly, The Ombudsman recommended FEHD, together with the other departments concerned, to review in due course the policy governing columbarium niches in Islands District.

Government's response

176. FEHD noted the recommendation of The Ombudsman. FEHD considers that it is necessary to provide an appropriate number of niches in Islands District to facilitate convenience for the residents of Islands District due to geographical reasons, a policy that has been adopted since the ex-Regional Council era. If these niches are made available to residents of other districts as well, the niches available to residents of Islands District will be reduced, thus inevitably affecting the Islands District residents' chance of being allocated a niche. FEHD will reconsider the issue with the other departments concerned as and when the circumstances render the geographical consideration no longer valid.

177. FEHD has informed the Office of The Ombudsman of the position.

Food and Environmental Hygiene Department

Case No. 2014/1827 – Failing to tackle the environmental hygiene problem caused by the trade waste of shops and restaurants left on both sides of two streets

Background

178. On 24 April 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD).

179. According to the complainant, miscellaneous articles, refuse and handcarts used for carrying cardboard and empty food cans were often placed on both sides of two streets in a district, thus adversely affecting environmental hygiene (hygiene problem). Since July 2013, the complainant had repeatedly lodged complaints with FEHD about the hygiene problem. However, the situation did not improve.

The Ombudsman's observations

180. FEHD had indeed followed up the hygiene problem within its statutory purview and the hygiene problem seemed to have improved. From this point of view, The Ombudsman considered the complaint lodged by the complainant unsubstantiated.

181. Regarding trade waste which is not disposable at refuse collection points, the Office noted that shops (including restaurants) had to hire contractors to deliver the waste to landfills or refuse transfer stations. Shop operators may only place trade waste outside their shops whilst awaiting waste collection by the contractors. Prolonged waiting time will give rise to the hygiene problem. In fact, such a problem should by no means be overlooked as it exists in other districts as well. The Office will follow up on the issue separately with FEHD.

Government's response

182. FEHD accepted The Ombudsman's recommendation. FEHD does not provide collection service for waste generated from commercial activities (except for trade/commercial waste not exceeding 100 litres in quantity). Shops (including restaurants) which generate a large amount of waste every day usually hire contractors to deliver the waste to landfills or refuse transfer stations. In some districts (especially the old districts), most buildings do not provide a suitable area for waste storage and parking of refuse collection vehicles. As a result, refuse collection has to be carried out on roadsides. If shops place their refuse on roadsides too early in advance whilst awaiting the arrival of a refuse collection vehicle, environmental hygiene problems will arise.

183. According to Section 20 of the Public Cleansing and Prevention of Nuisances Regulation (Cap. 132BK), no person shall, without reasonable excuse, permit a dustbin or receptacle containing waste of any kind to remain in a street or public place for a period exceeding ten minutes whilst awaiting the arrival of a public refuse collection vehicle or any other refuse collection vehicle. In the light of the problem concerned, FEHD has sought legal advice to clarify certain points of the law pertaining to the aforesaid legislative provision, and subsequently drafted the course of enforcement actions and operational guidelines for compliance by frontline management staff with a view to addressing the environmental hygiene problem. At present, FEHD is seeking legal advice on the proposed enforcement actions and draft operational guidelines.

Food and Environmental Hygiene Department

Case No. 2014/2085 – Improper arrangements for allocation of columbarium niches

Background

184. In 2012, the Food and Environmental Hygiene Department (FEHD) completed the construction of 45250 new niches at the Wo Hop Shek and Diamond Hill columbaria, and started allocating those niches in phases over three years by computer ballot.

185. The complainant had applied to FEHD for a niche for his deceased relative in September 2012, but was unsuccessful in the ballots of the first two years. As FEHD did not have a waitlisting mechanism for the niches not taken up by successful applicants, he had to participate in the ballot for the third time in 2014. The complainant considered FEHD's allocation arrangements grossly unfair and improper.

The Ombudsman's observations

186. FEHD explained that the phased allocation arrangement over three years was for ensuring a continuous and steady supply of niches to cater for people dying each year.

187. The Office of The Ombudsman (the Office), however, noted that as the applicants whose relatives had passed away in the year might not be among the lucky ones who succeeded in the ballot of that year, FEHD in fact could not possibly "cater for people dying each year" with its arrangement of phased allocation of niches by ballot.

188. Even more unreasonable was that FEHD allocated the niches in phases over three years and hence left many of the niches vacant for too long. "A continuous and steady supply of niches over the years" as claimed by FEHD was merely an illusion created by its phased allocation. In fact, the niches had long been available, only that FEHD did not promptly allocate them all. FEHD was not only turning a blind eye to the anxiety of the waiting public, but in essence was also acting against the Government's policy objective of increasing the supply of niches as soon as practicable.

189. FEHD adopted the approach of allocating niches by computer ballot, as suggested by the Independent Commission Against Corruption (ICAC), in order to prevent corruption and thus to ensure fairness.

190. The Office agreed that all applicants stand an equal chance of securing a niche under the allocation by ballot approach, and so it is fair in that sense. Nevertheless, random allocation of niches by ballot also means that some applicants may be unsuccessful in the ballot time and again and have to wait endlessly for a niche. Given the current shortage of supply, it is conceivable how distressed applicants would feel if their relatives have passed away long ago and they still cannot secure a niche. They may resort to private columbaria, but then the legality of such columbaria and associated risks are causes for concern.

191. In the Office's view, provision of public niches is a basic Government service for the community. Similar to public housing or medical care, it will be more reasonable to adopt a registration system to allocate niches on a first-come, first-served basis. Surely, any possible loopholes of corruption could be prevented through careful formulation of procedures.

192. In the first two years of this allocation exercise, a total of 5607 successful applicants did not take up a niche. In the absence of a waitlisting mechanism, the leftover niches were left vacant and carried forward to the third year for re-allocation. FEHD argued that a waitlisting mechanism, if set up, would have prolonged the entire allocation process.

193. The Office considered that while a waitlisting mechanism might have prolonged the allocation process in the first two years, it would have shortened the allocation procedure and hence the time required in the third year. FEHD's concern about processing time can be alleviated by putting a cap on the waiting list. The point is that a waitlisting mechanism will enable applicants' demand for niches to be met sooner, thus minimising the number of vacant niches in each year and avoiding wastage of resources. Therefore, the Office found it more desirable to have a waitlisting mechanism. FEHD should not have put its own administrative convenience above public interests.

194. In view of the above, The Ombudsman considered this complaint substantiated.

195. It was expected that with a growing and aging population, there would only be a rising public demand for niches. In view of this, The Ombudsman urged FEHD to quickly conduct a comprehensive review of its allocation arrangements in the following directions so as to provide niches to the public in an efficient and orderly manner –

(a) to consider allocating niches on a first-come, first-served basis and strive to resolve the problem of the long wait of applicants for niches for the deceased;

(b) even if the existing approach of allocation by ballot is to remain, to enhance the arrangements, such as giving higher priorities to applicants who have been repeatedly unsuccessful in the ballot, and establishing a waitlisting mechanism for speedier allocation of niches in future exercises; and

(c) to explore ways of further streamlining the allocation procedures.

Government's response

196. FEHD accepted The Ombudsman's recommendation (c) and noted the remaining two recommendations.

197. Different allocation arrangements for columbarium niches have their own merits. However, there is no one single allocation mechanism which could satisfy and cater for the needs of everyone. FEHD will conduct a review of the existing allocation arrangements after the completion of the allocation exercise for all the niches at the Kiu Tau Road Columbarium Phase V. FEHD will consult ICAC when devising the future allocation arrangements for niches in new public columbarium. FEHD considers that at present, the most important task is to resolve the problem of inadequate supply of public columbarium niches, and hence it spares no effort to speed up the work in this regard and to solicit support from local communities and the public to expedite the building of new public columbaria.

198. For the sake of fairness and to avoid confusion, it is incumbent upon FEHD to complete the allocation exercise for the niches at the Kiu Tau Road Columbarium Phase V according to the procedures and arrangements that have been publicly announced. FEHD will conduct a review of the allocation arrangements for niches in new public columbarium after the whole exercise is completed.

199. To expedite the allocation process, FEHD increased the number of applicants invited to select niches from 110 to 125 per day on 6 October 2014 during the third phase of the allocation exercise for the niches at the Kiu Tau Road Columbarium Phase V. The number was further increased to 140 and 160 on 15 December 2014 and 26 January 2015 respectively. All of the 31342 eligible applicants in the third phase have been invited to select niches by the end of August, four months ahead of the original schedule.

200. The Office has noted FEHD's reasons and invited FEHD to submit a progress report by the end of December 2015.

Food and Environmental Hygiene Department

Case No. 2014/2249 – Failing to tackle the problem of illegal parking in a loading and unloading bay area in a market

Background

201. In January 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD). The complainant alleged that the loading and unloading bay area in a market had been persistently occupied by two lorries since September 2013, and as a result, other vehicles were forced to load and unload their goods on public streets, affecting passers-by (the Problem). He called 1823 to complain. However, FEHD replied that no lorry was found occupying the loading and unloading bay area. He alleged that FEHD had been negligent by not taking enforcement action, thus allowing the Problem to persist.

202. The Office completed investigation and informed the complainant of the result in March 2014. FEHD had indeed handled the Problem, including arranging for security guards to record information about vehicles entering the loading and unloading bay area and planning for installation of fences to prevent vehicles from parking thereat at night.

203. In late April 2014, after finding that the Problem still persisted, the complainant provided information to the Office again to complain against FEHD.

204. FEHD had handed most of the management services in the loading and unloading bay area to a security company, and the local District Environmental Hygiene Office (DEHO) was responsible for supervising the security company.

The Ombudsman's observations

205. Outsourcing of public services did not mean outsourcing of Government departments' responsibilities. Both the information provided by the complainant and the inspections conducted by FEHD showed that the Problem still existed. The security company providing outsourced management services to the market should certainly be

blamed for its negligence, but FEHD, as the supervisory authority, should also bear a part of the responsibilities. In the light of the above, The Ombudsman considered the complaint partially substantiated.

206. Fortunately, FEHD had penalised the security company and instructed it to make improvements.

207. The Ombudsman urged FEHD to –

(a) step up inspections to closely monitor the work of the security company; and

(b) take stringent enforcement action to prosecute drivers who fail to comply with the notices issued to them to achieve deterrent effect.

Government's response

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

(a) arranged for DEHO staff to inspect the loading and unloading bay area and check the records of security guards every day to ensure that the loading and unloading bay area is properly managed. The loading and unloading bay area is cordoned off every night to prevent vehicles from parking thereat without authorisation; and

(b) sternly instructed the security company to report to DEHO staff stationed at the market any vehicles found not complying with the notices. Upon receipt of such reports, DEHO staff should, through the public announcement system in the market, inform the drivers concerned to drive their vehicles away from the loading and unloading bay area. If the drivers fail to do so, security guards should impound the vehicles and notify DEHO staff to take enforcement action as well as prosecute the drivers. The inspections conducted by DEHO between November 2014 and March 2015 and the records of the security company showed that the loading and unloading bay area was no longer illegally occupied by any vehicle.

Food and Environmental Hygiene Department

Case No. 2014/3788 – Failing to handle properly a report about a bird's nest in a market, resulting in the illegal removal of the nest

Background

209. On 10 September 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD).

210. According to the complainant, he called the Markets Section of a District Environmental Hygiene Office of FEHD on 14 May 2014 to report that there was a nest of barn swallows (the bird's nest) at the entrance of a market, which worried him as he was afraid someone might remove it illegally (the report). The next day, the complainant called the Markets Section again to repeat the report. Staff of the Markets Section replied by stating that the bird's nest will not be removed. On the night of 13 June, however, the complainant found that the bird's nest together with the chicks inside were gone. On 16 June, the complainant called the Markets Section to request for follow-up actions on the disappearance of the bird's nest. The next day, staff of the Markets Section replied, saying that its investigation did not reveal that the management contractor of the market had removed the bird's nest.

211. The complainant alleged that FEHD failed to properly follow up on the report, resulting in the illegal removal of the bird's nest.

The Ombudsman's observations

212. The Office considered that as shown in the detailed account of events and explanation provided by FEHD, staff of the Markets Section and the contractor had properly followed up on the report by repeatedly reminding the cleansing staff not to touch the bird's nest in the market.

213. While there was no definite and objective evidence to fully substantiate the account of events provided by FEHD, the crux was that it was not impossible for the bird's nest located in a public place to have been removed by members of the public or to have disappeared due to non-human factors.

214. Based on the above, The Ombudsman considered the allegation unsubstantiated.

215. That said, as there are laws protecting wild birds in Hong Kong, The Ombudsman made the following recommendations to FEHD –

(a) enhance the understanding of its staff, contractors and contractors' staff on the Wild Animals Protection Ordinance; and

(b) consult the Agriculture, Fisheries and Conservation Department, which is responsible for the enforcement of the Wild Animals Protection Ordinance, on ways to better protect wild birds' nests found at FEHD's venues (such as posting warning notices for public attention).

Government's response

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

(a) issued procedures in April 2015 for protection of wild birds to all its staff, contractors and contractors' staff and briefed them on the content and statutory requirements under the Wild Animals Protection Ordinance. They were reminded to remain vigilant and comply with the statutory requirements for the protection of wild birds, as well as their eggs and nests. FEHD has posted warning notices near birds' nests found at its venues to advise the public that all wild birds including their nests and eggs are protected under the Wild Animals Protection Ordinance and no person shall, without permission, take, remove, injure, destroy or wilfully disturb the wild birds, their nest(s) and egg(s); and

(b) formulated guidelines on the proper ways to handle works which may affect nearby birds and their nests or eggs, birds found injured, trapped or dropped on the ground, as well as environmental nuisances caused by bird droppings.

Food and Environmental Hygiene Department

Case No. 2014/3797 – Failing to take effective measures to tackle the problem of passageway obstruction caused by some stalls in a market

Background

217. On 29 August 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD).

218. The complainant alleged that in a market managed by FEHD, a vegetable stall and a fruit stall facing each other along a passageway had persistently placed some articles outside their stall areas, causing obstruction in the passageway. The complainant had complained to the market management staff and FEHD, but no improvement was made. The complainant suspected that the market management staff had tipped off the stall operators concerned on impending inspections conducted by FEHD, thus impeding FEHD's enforcement actions.

The Ombudsman's observations

219. Regarding the allegation that the market management staff had tipped off the stall operators concerned and thus impeding FEHD's enforcement actions, FEHD denied the allegation. There was no way for the Office to verify the allegation.

220. Having said that, the objective fact was that the stalls concerned, as well as other stalls, had persistently placed some articles outside their stall areas, causing obstruction in passageways. While repeated warnings had been issued by the District Environmental Hygiene Office (DEHO) of FEHD to the stalls concerned, the prosecution rate was very low. It would not be surprising that the actions taken were ineffective.

221. In addition, although DEHO had issued more than 300 verbal warnings to the contractor who had neglected its duties, it did not take any more stringent actions against the latter, such as the issuance of warning letters or default notices, or deduction of monthly payment. This showed FEHD's ineffective monitoring of contractors.

222. In view of the above, The Ombudsman considered this complaint partially substantiated.

223. The Ombudsman urged FEHD to strictly enforce the terms governing the contractor's provision of services and the operational guidelines for greater effectiveness in the management of the market concerned to tackle the problem of passageway obstruction.

Government's response

224. FEHD accepted The Ombudsman's recommendation. It has informed the market management staff of the Office's report and reminded them to strictly enforce the terms governing the contractor's provision of services and adhere to the operational guidelines for greater effectiveness in the management of the market concerned. FEHD has also ordered the contractor to step up inspections in the market and take appropriate actions to prevent stalls from placing any articles outside their stall areas, causing obstruction.

225. Between January and May 2015, FEHD instituted a total of six prosecutions against stall operators in the market concerned for placing articles outside their stalls. One of which was made against the fruit stall under complaint.

Food and Environmental Hygiene Department

Case No. 2014/3905 & 2014/3924 – Failing to take effective enforcement action against the street obstruction problem caused by photography stalls

Background

226. Two public complaints had been lodged with the Food and Environmental Hygiene Department (FEHD) about the problem of serious obstruction frequently caused to pedestrians by photography stalls along a certain street. FEHD, however, did not regard photographers as hawkers and did not institute any prosecution against the stall operators for "unlicensed hawking" or "street obstruction". The complainants complained to the Office of The Ombudsman (the Office) that FEHD had failed to take effective enforcement action, thus allowing the obstruction problem to continue.

The Ombudsman's observations

227. On the problem of street obstruction by photography stalls at the subject location, FEHD had verbally advised the stall operators not to cause obstruction. FEHD had also conducted joint operations with the Police to drive away the stalls. Yet, the situation showed no improvement. During the Office's site inspection, it found those stalls extending their operations even beyond the opening hours of the pedestrian precinct. Obviously, the enforcement strategy of FEHD had not been effective.

228. Although "photographer" is not included in the definition of "hawker" under the Public Health and Municipal Services Ordinance, the stalls were in fact providing more than just photography service. There was clearly sale and purchase of photographs, similar in nature to ordinary hawking activities. Even if FEHD could not institute any prosecution against operators of photography stalls for "unlicensed hawking" at the moment, it should have strengthened its enforcement action by invoking the "street obstruction" provisions to initiate prosecutions.

229. In view of the above, The Ombudsman considered the two complaints against FEHD partially substantiated.

230. The Ombudsman recommended FEHD to –

(a) step up inspections at the location (especially beyond the opening hours of the pedestrian precinct). If photography stalls are found to have caused obstruction to pedestrians persistently, the "street obstruction" provisions should be invoked more frequently in appropriate circumstances for prosecuting the stall operators; and

(b) continue to monitor the situation of street photography stalls closely and consider reviewing the relevant legislation so as to plug the loopholes in the regulation of this type of stalls.

Government's response

231. FEHD has reservations on The Ombudsman's recommendations and informed the Office of the position on 5 June 2015.

232. The core duties of FEHD are to maintain environmental hygiene and control on-street hawking activities. Owing to resource constraints, FEHD could ill afford to place high priority on handling probable street obstruction caused by commercial activities that do not involve environmental hygiene and illegal hawking. Legal advice clearly points out that photographers' activities, whether or not monetary transaction of photographs is involved, do not fall within the legal definition of "hawker". Taking into account the legal advice and the decreasing number of complaints about the said problem, FEHD considers that there are currently inadequate justifications to amend the legal definition of "hawker" for the inclusion of street photographers. Street obstruction problems caused by photographers' activities in pedestrian precincts fall within the purview of a number of departments and cannot be dealt with by FEHD alone. Relevant departments may take appropriate actions jointly to address street management problems caused by such type of activities which neither affect environmental hygiene nor fall within the definition of "hawker".

233. In the light of The Ombudsman's two recommendations, FEHD has taken the following actions –

(a) During the period from 16 February 2015 to 31 May 2015, FEHD received four complaints about street obstruction caused by photography stalls at the location. FEHD's primary duties are to maintain environmental hygiene and control hawkers on the streets, and during the investigation period no on-street photography activities involving illegal hawking or giving rise to environmental hygiene problems were found. As such, FEHD did not accord priority to handling street obstruction caused by the said activities and there were no new cases of prosecution; and

(b) on-street commercial activities are diverse, involving not only photography stalls but also street performances, parallel trader activities, etc.. As mentioned above, there were only a few complaints about street obstruction caused by photography stalls. For the above reasons, FEHD considers that there are currently inadequate justifications to propose an amendment to the relevant legislation for incorporating on-street photographers into the legal definition of "hawker". Nevertheless, FEHD will continue to support and participate in the inter-departmental joint operations coordinated by the District Office concerned in order to improve street order and management at the location.

234. The Office has noted FEHD's position and requested FEHD to report again on 28 December 2015 regarding the latest development.

Food and Environmental Hygiene Department

Case No. 2014/4330 – (1) Refusing to view the evidence for water dripping from an air-conditioner produced by the complainant; (2) Conducting inspections only during office hours; and (3) Delay in gaining access to inspect the flat under complaint

Background

235. According to the complainant, she lived in Flat D on the 5th floor of a building (Flat 5D). Water dripping from the air-conditioner(s) at Flat D on the 7th floor (Flat 7D) had caused nuisance (water dripping problem) to her. Although the Food and Environmental Hygiene Department (FEHD) did follow up on the case, the water dripping problem persisted. The complainant had informed Staff A of FEHD that the water dripping problem only occurred in mornings and evenings, and during weekends, and that she could provide video clips and photos as evidence. However, FEHD staff refused to view the evidence (allegation (a)), and replied that they would conduct inspections only during office hours (allegation (b)). Moreover, FEHD had delayed in gaining access to Flat 7D for investigation (allegation (c)). Hence, the water dripping problem remained unresolved.

The Ombudsman's observations

Allegation (a)

236. Regarding whether Staff A had refused to view the complainant's video clips, the statements made by the complainant and FEHD differed. In the absence of independent corroborative evidence, the Office of The Ombudsman (the Office) was unable to ascertain the facts of the case. As such, The Ombudsman considered allegation (a) inconclusive.

Allegation (b)

237. FEHD admitted that at the initial stage of investigation, Staff A had failed to conduct on-site investigations at the alleged time of water dripping in accordance with the relevant guidelines. As such, The Ombudsman considered allegation (b) substantiated.

Allegation (c)

238. Regarding the failure of the District Environmental Hygiene Office (DEHO) to issue to Flat 7D a "Notice of Intention to Apply for Warrant of Entry" for investigation therein, the Office did not accept the explanations given by FEHD for the following reasons –

(a) the most direct and effective way for investigating the problem of dripping air-conditioners is to enter the unit concerned and switch on the air-conditioner(s) which may be the source of nuisance and then observe whether there is water dripping. In this case, FEHD had used other means which failed to prove water dripping from the air-conditioner(s) at Flat 7D. Entering the unit to investigate was the only way out;

(b) it was basically unnecessary for DEHO to first ascertain whether a unit was the source of water dripping if it needed to gain entry to the unit for investigation. If the unit was confirmed to be the source of water dripping, DEHO could immediately issue a "Nuisance Notice" without the need of issuing a "Notice of Intention to Apply for Warrant of Entry" or applying for a court warrant. Issuance of a "Notice of Intention to Apply for Warrant of Entry" and application for a court warrant were the steps required to be taken by DEHO to ascertain if Flat 7D was indeed the source of water dripping. It was therefore dereliction of duty on the part of DEHO for failing to issue a "Notice of Intention to Apply for Warrant of Entry" to Flat 7D in accordance with the guidelines;

(c) even though FEHD considered that there were no sufficient grounds to apply for a court warrant, it did not mean that FEHD could not issue a "Notice of Intention to Apply for Warrant of Entry" to the occupier of Flat 7D, who had ignored the "Notice of Intended Entry", in order to gain access to the unit for investigation in accordance with the guidelines;

(d) "Notice of Intention to Apply for Warrant of Entry" serves as a warning to occupiers/owners of units suspected to have dripping air-conditioners. Upon receiving such a notice, they would usually be cooperative in allowing DEHO staff to enter their units for investigation. FEHD might review if there were sufficient grounds to apply for court warrants when they refused to cooperate again;

(e) law enforcement departments should not refrain from taking strict enforcement actions and conducting investigation if the alleged offenders were uncooperative and insisted that they committed no offence; and

(f) DEHO could visit Flat 7D at a time convenient to its occupier. The Office did not see how it would jeopardise the rights of the occupier or affect his/her "job and livelihood".

239. The occupier of Flat 7D failed to respond positively to the "Notice of Appointment" and the "Notice of Intended Entry" served on him/her as early as between July and August 2013. The water dripping problem persisted. The occupier of Flat 7D had refused to allow DEHO staff to enter his/her unit for investigation, but DEHO still did not issue a "Notice of Intention to Apply for Warrant of Entry" to the occupier in accordance with the guidelines, causing a delay in gaining access to the unit for conducting tests to see if water dripped from its air-conditioner(s). Obviously, DEHO had failed to closely monitor staff's compliance with the guidelines when following up on the water dripping problem.

240. In view of the above, The Ombudsman considered allegation (c) substantiated.

241. Overall speaking, The Ombudsman considered the complaint partially substantiated.

242. The Ombudsman urged FEHD to enhance training for its staff and remind them to handle complaints about dripping air-conditioners in accordance with the guidelines so as to eliminate water dripping nuisances as soon as possible.

Government's response

243. FEHD accepted The Ombudsman's recommendation and its training section will enhance training for newly-recruited health inspectors on the handling and investigation of cases of dripping air-conditioners. Investigating officers will be reminded that inspections should be conducted at the alleged time of water dripping as far as circumstances permit. Moreover, its training section will organise experience-sharing sessions, during which health inspectors can share their experiences in investigating different cases of dripping air-conditioners and will be reminded to conduct investigation in accordance with the departmental guidelines.

Food and Environmental Hygiene Department

Case No. 2014/4999 – (1) Failing to take action against the street obstruction problem caused by a shop; and (2) Failing to keep the complainant informed of the case progress and outcome

Background

244. On 25 November 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD).

245. As alleged by the complainant, he had lodged a complaint with FEHD and via 1823 during the period from August to September 2014 about the street obstruction and danger caused by a recycling company (the shop) in a certain district for conducting business operations (including iron bar cutting and recycling activities) on the pavement and the road outside the shop every day, allowing spillage of wastewater and leakage of engine oil on the road. However, FEHD did not take any action and the problem persisted (allegation (a)).

246. Moreover, FEHD failed to keep the complainant informed of the case progress/outcome of the investigation (allegation (b)).

The Ombudsman's observations

Allegation (a)

247. In this incident, FEHD had taken enforcement actions against the shop for street obstruction by only invoking the "provision on obstructions to scavenging operations", including issuing "notices" and instituting prosecutions, instead of invoking the "street obstruction provision". In this regard, FEHD explained that as its core function is to maintain environmental hygiene, it will accord priority to cases involving obstruction to scavenging operations or nuisances caused by illegal hawking by shops in streets. Given that this case was handled and followed up by staff of FEHD's Cleansing Section, who normally enforce the law under the "provision on obstructions to scavenging operations", and that this case did not involve obstruction caused by illegal on-street hawking by shops, FEHD did not take enforcement actions against the

shop by invoking the "street obstruction provision".

248. The Office was doubtful about FEHD's way of handling the case, its explanation as well as the effectiveness of its enforcement actions. The justifications are as follows –

(a) during the inspections conducted by FEHD, it was found repeatedly that obstruction had been caused by articles placed on the pavement by the shop operator, and the situation tallied with the information and photo(s) provided by the complainant. It was obvious that the problem of street obstruction caused by the shop had persisted. The issuance of "notices" by invoking the "provision on obstructions to scavenging operations" by FEHD time and again had limited effect. The shop operator could evade FEHD's further enforcement actions simply by following what was stated in the "notice" and removing the articles temporarily;

(b) it would be more effective and direct if the "street obstruction provision" was invoked. According to the interpretation of the "street obstruction provision", it is an offence for any person to set out or leave any matter which causes obstruction to the public. It is not necessary for FEHD to issue a prior "notice" enabling the persons involved to evade the charges brought against them. Furthermore, the provision does not stipulate that the obstruction caused shall be related to illegal hawking activities. The fact that the articles placed on the pavement by the shop had caused obstruction was indeed a breach of the "street obstruction provision", under which FEHD was empowered to institute immediate prosecution. FEHD's explanation that it did not invoke the "street obstruction provision" as the shop had not carried out illegal hawking activities on the street was unacceptable; and

(c) although street obstruction caused by illegal occupation of public places by shops fell within the purview of various government departments, FEHD, which played an important role in this incident, should not shirk its responsibility. While understanding that it was FEHD's enforcement strategy to accord priority to problems involving obstruction to scavenging operations, the Office considered that FEHD should take enforcement actions against recalcitrant offenders, just like the shop in this case, by invoking the "street obstruction provision"

so as to achieve a stronger deterrent effect. It would not be too difficult for FEHD to deploy staff from another section who could take enforcement actions against the shop by invoking the provision.

249. Based on the above analysis, The Ombudsman considered that FEHD had failed to make an all-out effort to tackle the problem although it did take enforcement actions against the street obstruction caused by the shop. The actions were ineffective, and hence the problem persisted. allegation (a) was thus partially substantiated.

Allegation (b)

250. FEHD admitted its delay in replying. The Ombudsman considered allegation (b) substantiated.

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

252. The Ombudsman urged FEHD to continue to keep close watch over the shop. If any street obstruction is found, enforcement actions should be taken decisively and strictly, and the "street obstruction provision" should be invoked more frequently in appropriate circumstances to arrest and prosecute the shop operator with a view to enhancing enforcement and achieving a stronger deterrent effect. This could help stop the continued obstruction of the pavement and resolve the problem.

Government's response

253. FEHD has reservation over The Ombudsman's recommendation and the considerations are set out below. In addition, FEHD explained to the Office by way of a letter on 3 June 2015.

254. The problems, which fall within the purview of a number of departments, involve criminal offences including unlawful occupation of government land, illegal use of public places for storing recyclables or as workshops, traffic obstruction, obstruction to pedestrian flow, and disrupting order at streets. The nature of these offences is definitely no less serious than that of obstruction to scavenging operations. Under the circumstances, FEHD cannot agree with the Office's observation which seems to suggest that the FEHD has shirked its responsibility in this

incident. According to the current mechanism and consensus, problems in relation to street management have all along been tackled by all relevant departments with actions taken under their respective purview instead of by FEHD alone. In handling the complaint lodged by the complainant, therefore, FEHD not only took actions under its purview but also referred the case to all relevant departments for follow-up, with a view to achieving the best result through concerted efforts. However, how the other departments handled the case and the intensity of their efforts were matters beyond the control of FEHD.

255. As to the "street obstruction provision" mentioned by The Ombudsman, it is in fact a provision of section 4A under the Summary Offences Ordinance (Cap. 228). A number of government departments can take enforcement actions by invoking the provision according to actual circumstances and their functions. As this case involved the placing of articles in a public place by a recycling shop and there was no involvement of street obstruction caused by any illegal hawking activities, in the light of FEHD's policy objectives, it did not necessitate invoking the "street obstruction provision" by FEHD.

256. FEHD has taken the follow-up actions below in accordance with its functions and powers –

(a) FEHD has been keeping close watch over the area around the shop, and has occasionally come across the situation as mentioned above. FEHD will conduct joint operations with other government departments or, where necessary, defer the matters to the local District Office under the Home Affairs Department (HAD) for coordination and conduct of inter-departmental joint operations according to the current mechanism with a view to achieving better results. FEHD had referred to the Police for following up on the shop which placed recyclables on the road awaiting loading and unloading as well as a small amount of miscellaneous articles on the pavement. The miscellaneous articles had not caused obstruction to FEHD's scavenging operations and the cleanliness of the walkway was generally satisfactory;

(b) to enhance the effectiveness of its actions, FEHD also took the initiative to liaise with a number of relevant government departments to conduct joint operations. Both the Police and the Environmental Protection Department took part in a joint operation conducted on 17 April 2014. During the operation, only a small hand pallet truck was found on the road. Upon the Police's verbal advice, the shop operator removed it immediately and no obstruction could be found on the pavement; and

(c) FEHD has been taking actions in a proactive and positive manner, by handling matters within its purview in accordance with legislation and taking appropriate actions. If the situation so warrants, FEHD will conduct joint operations with other government departments or, where necessary, leave the matters to the local District Office under HAD for coordination and conducting of inter-departmental joint operations according to the current mechanism with a view to achieving better results.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2013/5194A (Food and Environmental Hygiene Department) – Shirking responsibility in handling a water seepage complaint

Case No. 2013/5194B (Buildings Department) – (1) Shirking responsibility in handling a water seepage complaint; (2) Mishandling the seepage complaint; (3) Poor handling of the seepage complaint by its staff; (4) Failing to contact the complainant through different means; (5) Improper handling of the issuance of an advisory letter; and (6) Unreasonably issuing a repair order to the complainant while seepage persisted in his premises

Background

257. At the end of 2012, the complainant reported to the Joint Offices for Investigation of Water Seepage Complaints (JO) of the Food and Environmental Hygiene Department and Buildings Department (BD) that water seepage occurred in his flat (Flat A), causing concrete spalling at the ceiling of bathroom and living room. After inspection by JO, JO stated that no follow-up action would be taken as no water dripping could be observed at the ceiling of Flat A. However, it would refer the case to BD for follow-up actions.

258. On 18 February 2013, BD sent consultant staff to Flat A for inspection. Due to the deterioration of water seepage in Flat A, the complainant complained to JO again. Upon repeated request, JO carried out tests in the flat above (Flat B) in March 2013. Thereafter, JO engaged a consultant to conduct professional investigation. After investigation and testing, no water seepage was found in Flat A, but a drainage pipe on the external wall of Flat B was observed to be defective. JO informed the complainant that the case would be referred to BD, which was responsible for dealing with defective and leakage drains/pipes at the external walls.

259. During the period of early February to early June, since there was no response from BD, the complainant repeatedly asked JO to assist in requesting BD for a reply. On 18 June, Staff A of BD (Staff A) inspected Flat A and pointed out on the spot that the external drainage pipe of Flat B was defective. A letter would be issued requiring the

owner of Flat B to carry out repair works. The complainant requested a copy of the letter and was refused by Staff A on privacy grounds. Upon inspection, the complainant also asked Staff A to follow up on other building-related problems, including crack on external wall, defective drain, corrosive drainage/gas pipe of Flat B and the structural safety of the ceiling of the bathroom and the living room in Flat A, etc.. Nevertheless, Staff A stated that his inspection would be confined to the suspected defective drainage pipe only since other matters were outside the scope and responsibility of his work.

260. More than a month later, as water seepage in Flat A persisted and no repair works had been commenced in Flat B, the complainant called Staff A. Staff A denied saying that he would issue a letter to the owner of Flat B requiring the owner to carry out repair works. He even said that the information provided by JO did not show any sign of defective external drainage pipe at Flat A.

261. In October the same year, Staff A inspected Flat A again. The complainant repeatedly mentioned about the abovementioned building problems. Staff A restated that he would only inspect the suspected drainage pipe and such pipe was found in order. During the inspection, the complainant questioned if Staff A had properly handled his report. Yet Staff A just repeatedly expressed that a letter would be sent to the owner of Flat B for conducting tests and would contact the management office for further follow up.

262. BD, in accordance with JO's investigation result, issued an advisory letter on 19 November to the owner of Flat B requiring the repair of the defective drainage pipe on the external wall. On 9 December, the complainant called Staff A and noted that there was no progress since the last inspection in October. Regarding other problems mentioned above, Staff A avoided to talk.

263. The next day, BD carried out tests in Flat B. After that, colour water used in the test was found on various locations of the external walls, thereby indicating that there were cracks on the external wall. However, JO and BD both refused to follow up. BD insisted that there was no structural crack at the external wall and the so-called cracks appeared on the external wall were traces of formwork during the construction of concrete wall.

264. On 21 January 2014, BD issued a repair order to the complainant requiring the prompt repair with a view to resolving the problems of concrete spalling as well as corrosion and exposure of reinforcement bars at the ceiling of Flat A.

265. The complainant's complaints against JO and BD could be summarised as follows –

(a) lack of communication between and shirking of responsibility by JO and BD;

(b) BD had not followed up the report properly, including mishandling the seepage complaint referred by JO and failing to reply to the complainant, and the consultant of BD failed to state that he represented BD when he conducted inspection in Flat A on 18 February 2013;

(c) staff A had the following underperformance –

    (i) contradictory replies: Staff A claimed that he would issue a letter requesting the owner of Flat B to carry out repair. He later denied having said that;

    (ii) unreasonable refusal to follow up on other problems;

    (iii) delay in handling the case;

(d) BD claimed that its staff had phoned the complainant several times between April and May 2013, but the complainant had never received the calls or voice messages. The complainant queried why BD did not use other means to contact him;

(e) BD informed the complainant that "the drainage pipe could not be assumed to be defective without any solid evidence", but on the other hand issued an advisory letter on 19 November 2013 (i.e. before conducting inspection to Flat B on 10 December 2013) requiring the owner of Flat B to carry out repair. The arrangement was contradictory. Furthermore, the owner of Flat B received the advisory letter on 19 January 2014 (i.e. two months later). The complainant hence suspected that BD issued the letter thereafter and dated the letter back to 19 November 2013 to hide the fault; and

(f) BD served a "repair order" to the complainant on 21 January 2014, however, the repair works for concrete spalling as well as corrosion and exposure of reinforcement bars were unable to be carried out as water seepage persisted in Flat A.

The Ombudsman's observations

Allegations (a), (b), (d) and (f)

266. After scrutinising the relevant records, the Office of The Ombudsman (the Office) considered that JO and BD had followed up on the complaints under their respective ambits, and there was no evidence showing that they lacked communication or shirked responsibility in handling the case. Also, there was no evidence showing that BD had not followed up on the case. Whether there was structural crack at the external wall of Flat B should fall within BD's professional judgement, the Office had no comment on this matter. Based on the above, The Ombudsman considered that allegation (a) unsubstantiated.

267. As regards whether BD's consultant had stated his identity when visiting Flat A, the Office decided not to investigate further. However, the Office took the opportunity to request BD to remind their consultants to follow the relevant guidelines.

268. As regards whether the complainant was informed of the investigation result during inspection on 28 February 2013 and whether the BD staff had contacted the complainant three times during April and May 2013, the complainant and BD's accounts of the incidents were different. In the absence of independent corroborative evidence, the Office was unable to investigate further.

269. Nevertheless, even if the description provided by BD was true, the complainant had sought JO's assistance several times in requesting BD for reply. This indicated that the complainant did not know BD's inspection result. The Office considered that if BD could follow the established guidelines and reply to the complainant by writing, the associated disputes could be avoided later. Besides, upon the receipt of referral from JO by BD on 11 March 2013, it was no doubt that the most direct means of contact for arranging inspection in Flat A was by phone. However, even though the complainant could not be reached by phone for over two months, BD insisted to contact the complainant by phone only without leaving voice messages, and did not try other methods to reach

the complainant or inspected the drainage pipes of the bathroom first, indicating that BD was not flexible in handling the case and did not follow the established guidelines. As a result, the first inspection was only conducted on 18 June 2013 (i.e. more than three months) from the date of receipt of the report and this was not in line with BD's established arrangement.

270. In light of the above, The Ombudsman considered allegation (b) partially substantiated and allegation (d) substantiated.

271. Regarding the discontent of the complainant that BD had issued a repair order to him, BD explained that the letter was an advisory letter. The Office considered that such advisory letter was issued from the perspective of building safety and no administrative fault was found. As such, The Ombudsman considered that allegation (f) unsubstantiated.

272. Nonetheless, JO had commenced the investigation of water seepage in Flat A since the end of 2012, the cause of water seepage was still undetermined after one and a half years. The concrete spalling as well as corrosion and exposure of reinforcement bars at the ceiling of Flat A could possibly be caused by the long persistence of water seepage which was outside the control of the complainant. BD later issued an advisory letter to the complainant requiring the prompt repair of the defective ceiling. This approach may inevitably make the complainant feel aggrieved. The Office considered that it would be more desirable if BD could focus on the situation of the case and take the initiative, along with JO, to discuss how to resolve the problems pragmatically with the complainant.

Allegation (c)

273. As regards whether Staff A had, during the site inspection, confirmed the existence of defective drainage pipe at the external wall of Flat B and said that he would issue an advisory letter to the owner of Flat B requiring him to carry out the repair, as well as refused to handle the complainant's reports of cracks on external wall, defective drain, corrosive gas pipe and structural problems at ceiling, etc., the explanations provided by the complainant and BD were different. In the absence of independent corroborative evidence (e.g. audio record), the Office was unable to investigate further, and thus, The Ombudsman considered allegation (c) inconclusive.

274. That said, according to BD's relevant record, Staff A had followed up on the complaints about the cracks on the external wall, defective drains and structural problem in Flat A during the inspections conducted on 18 June and 18 October 2013. The Office thus could not exclude the possibility that there might be miscommunication between Staff A and the complainant. The Office would like to take the opportunity to request BD to remind Staff A to be alert of the communication techniques and the need to provide clear and accurate information when reaching out to members of the public, with a view to avoiding confusion.

Allegation (e)

275. Without conducting inspection, BD, based on the inspection result provided by JO, issued an advisory letter to the owner of Flat B. This arrangement deviated from the normal practice, but was considered acceptable since the report from JO clearly showed the defects of the drainage in Flat B and the nature of the letter issued was of advisory nature only.

276. The Office confirmed that BD issued the advisory letter to the owner of Flat B on 20 November 2013. The Office was unable to check why the owner of Flat B only received the letter two months later, as he alleged. The Ombudsman considered allegation (e) unsubstantiated.

277. Overall speaking, the Office considered that the complainant's complaint against JO unsubstantiated, whilst the one against BD partially substantiated.

278. The Ombudsman recommended that –

(a) when handling public reports, both JO and BD shall not only follow their established procedures to follow up on the cases, but should also liaise with each other and with the complainants proactively, when necessary, with a view to resolving the matters concerned promptly;

(b) BD shall remind their staff to adopt a flexible approach in making contact with the complainants and to reply to the complainants the progress and result of the inspection according to the internal guidelines;

(c) BD shall repeatedly remind staff of the consultants that, when carrying out operations, they should state clearly to the public their identity and the purpose of the visit as well as show them the proof of staff identity with BD's name printed thereon when discharging duties; and

(d) In view of the Office's understanding of the latest situation of the case, JO should closely follow up on it. If the source of water seepage affecting Flat A could still not be confirmed, JO should explore the possibility of other sources (including the external wall, the flat two floors above and other flats one floor above) and inform the complainant of the investigation findings in a timely manner. In addition, JO should monitor the water seepage at the external wall. If it is confirmed that water seepage from flats to the external wall has caused sanitary nuisance, JO shall follow up in accordance with the established procedures.

Government's response

279. JO and BD accepted The Ombudsman's recommendations.

280. The Office's report had been circulated among all JO staff and they were asked to –

(a) adhere strictly to the procedural guidelines laid down in the "Operational Manual on Handling Water Seepage Complaint"; and

(b) take the initiative to communicate and work with complainants or other government departments, when necessary, with a view to helping the complainants resolve their problems as soon as possible.

281. JO's investigation revealed that the readings of moisture content at Flat A were very high even on sunny days, and thus, the possibility of penetration of rainwater through the external wall was ruled out. In addition, Flat B did not show signs of water seepage, and JO did not receive any report of water seepage from Flat B. The central part of Flat B was above the water seepage area at Flat A and was some distance away from the flat adjacent to Flat B. Based on the above observation and professional judgement, the possibility of water seepage from the flat

two floors above or from the flat adjacent to Flat B was ruled out. JO had conducted all feasible non-destructive tests under the circumstances of the case but was unable to confirm the source of the water seepage. Hence, JO temporarily ceased to follow up on the case in accordance with the established procedures and gave a written reply to the complainant to inform the complainant of the result on 25 August 2014.

282. Subsequently, JO learned that the ownership of Flat B had changed and the planning for renovation works was underway. Hence, on 1 September 2014, JO sent a letter to inform the new owner of the water seepage problem and suggest arranging for professionals to conduct an inspection and carrying out repairs as appropriate. On the next day, JO staff called to inform the complainant of the progress. On 6 March 2015, JO staff contacted the complainant and was informed that the water seepage had stopped and required no further follow-up action by JO. On 9 March 2015, JO issued a written reply to inform the complainant that investigation of the case had been ceased.

283. BD had reminded its staff and staff of the consultants to act in accordance with The Ombudsman's recommendations when handling similar cases in future.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2014/2094A&B – (1) Delay in handling a seepage complaint; (2) Having errors in the course of seepage investigation; and (3) Failing to provide timely replies to the complainants

Background

284. On 7 May 2014, the complainants lodged a complaint with the Office of The Ombudsman (the Office) against the Joint Office for Investigation of Water Seepage Complaints (JO) formed by the Food and Environmental Hygiene Department (FEHD) and Buildings Department (BD).

285. Allegedly, the complainants lodged a complaint with JO in 2013 about the seepage in their flat. Subsequently, staff of JO and the consultant company appointed by JO conducted an on-site investigation. On 19 February 2014, JO wrote to the complainants informing that the source of seepage was the flat one floor above (the flat above) and that JO had issued a Nuisance Notice to request the owner concerned to complete the necessary repairs by the prescribed deadline. Since then, JO had not informed the complainants of how the case was followed up.

286. The complainants' allegations against JO are summarised as follows –

(a) JO delayed following up on the complainants' seepage complaint, including –

  (i) it was unnecessary for JO to have conducted colour water tests at the drainage outlets in the guest bathroom and master bathroom of the flat above on two separate days (1 and 9 August 2013);

  (ii) JO did not promptly inspect the building's external wall and the guest bathroom's window frame, nor did it promptly refer the issue of the defective pipe on the building's external wall to BD for follow-up action;

(iii) the letters sent by JO to the complainants on 5 and 19 February 2014 respectively did not reach the complainants until 16 February and 3 March 2014 respectively;

(b) JO or the consultant company had errors in the course of the investigation, including –

(i) JO staff did not conduct the colour water tests at the drainage outlets in accordance with the established procedures and requirements (including the amount of colour water and the duration of ponding water). In its reply to the complainants on 26 November 2013, JO staff wrongly indicated the area where JO collected the seepage sample;

(ii) on 16 November 2013, the moisture content (MC) measured by staff of the consultant company at the seepage area in the complainants' flat was about 20% (indicating no seepage). But after the complainants raised an objection, MC measured by the staff of the consultant company had a significant change (about 47%, indicating seepage). This showed the negligence of the staff of the consultant company. Although MC measured by the staff of the consultant company exceeded JO's standard, they still thought that the seepage was not serious and refused to collect seepage sample for laboratory testing;

(iii) regarding the referral of the issue of the defective pipe on the building's external wall to BD for follow-up action, FEHD staff of JO stated that the case had been referred by BD staff of JO, while staff of the consultant company stated that it had been referred by FEHD staff of JO;

(c) JO failed to provide timely replies to the complainants, including –

(i) JO did not provide timely replies to the enquiries made by the complainants on 16 and 17 November and 12 December 2013; and

(ii) since giving them a written reply on 19 February 2014, JO had not informed the complainants of the case progress (including the arrangements for conducting the colour water

tests again at the drainage outlets).

The Ombudsman's observations

Allegation (a)

Point (i)

287. The Office considered that JO staff had neglected the master bathroom and thus its failure to conduct the test in both bathrooms of the flat above on 1 August 2013 was indeed unsatisfactory. In any event, eight days later (9 August the same year), JO staff conducted the supplementary test and hence caused no serious delay in the entire seepage investigation.

Point (ii)

288. Since the pipe on the external wall and the window frame in the guest bathroom were not the seepage areas mentioned by the complainants, the Office considered that if those areas showed no signs of seepage, it would be understandable for JO staff not to take the initiative to check the areas. In any event, after learning that the complainants suspected and confirmed that the pipe on the external wall had seepage, JO did promptly refer the case to BD for follow-up action.

Point (iii)

289. The Office considered that it was indeed improper for JO to have delayed in sending out its letter dated 19 February 2014 for nine days.

290. In view of the above analysis, The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

Point (i)

291. The Office considered that the failure of JO staff to conduct the colour water tests at the drainage outlets of bathroom using the amount of colour water and the method of dilution set out in training materials were indeed unsatisfactory. Such an error might have affected the investigation result. Nonetheless, it was important that as far as this

case was concerned, JO subsequently identified the source of seepage, and the seepage affecting the complainants' flat stopped after the flat above had completed the necessary repairs. It showed that although there were indeed errors in the colour water tests conducted by JO at the drainage outlets, the errors did not have a substantial impact on the entire seepage investigation.

292. In addition, it was indeed improper for JO staff to wrongly indicate the area where the sample was collected on 2 September 2013. The Office considered that if JO staff could not confirm the sample collection area because the sample was collected long time ago, JO should have made it clear in its written reply. Apart from that, JO staff should have correctly recorded the sample collection area for future reference when they collected the sample. Fortunately, on 12 December 2013, in the presence and with the agreement of the complainants, JO staff and staff of the consultant company eventually collected sample again in the complainants' flat for laboratory testing.

Point (ii)

293. The Office was unable to ascertain the reasons for the inconsistency between MCs measured by staff of the consultant company and the complainants on 14 and 16 November respectively. In addition, JO had explained why the staff of the consultant company did not collect the sample immediately. According to the video footage provided by the complainants, they indeed eventually agreed on the day that JO staff or the staff of consultant company would not collect sample until the review of the ponding tests and the water spray tests yielded results. In any event, the staff of the consultant company continued to conduct investigation and further tests after confirming the persistence of the seepage in the complainants' flat, where they subsequently collected sample from the flat for laboratory testing.

Point (iii)

294. After reviewing the relevant records, the Office confirmed that on 21 November 2013, JO referred the seepage of the pipe on the external wall to BD for follow-up action. It did not matter which section of JO made the referral.

295. In view of the above analysis, The Ombudsman considered allegation (b) partially substantiated.

Allegation (c)

Point (i)

296. After reviewing the relevant records, the Office considered that JO had indeed provided timely replies to the complainants. In response to JO's replies, the complainants kept writing to JO requesting further replies and JO did respond to every letter from the complainants.

Point (ii)

297. After reviewing the relevant records, the Office considered that JO had informed the complainants of the case progress in a timely manner. According to the complainants, the reason they called JO staff in March 2014 was that they actually wanted to inform JO staff that the address on JO's letter of 19 February was wrong. When talking to JO staff on the phone that day, they did not mention issues such as the colour water tests conducted at the drainage outlets. The Office was unable to comment on that because it could not verify the conversation between JO staff and the complainants on that day.

298. In view of the above analysis, The Ombudsman considered allegation (c) unsubstantiated.

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

300. The Ombudsman made the following recommendations to JO –

(a) JO should strengthen training for its staff and remind them that they should follow up on seepage cases and conduct tests in accordance with the established procedures and guidelines (including training materials) and that they should make proper records (including recording sample collection areas); and

(b) JO should remind its staff that they should carefully check the information contained in letters to be issued to ensure their accuracy as well as send out signed letters as soon as possible.

Government's response

301. JO accepted The Ombudsman's recommendations and has taken the ensuing follow-up actions –

(a) reminded colleagues concerned that they should follow up on seepage cases and conduct tests in accordance with the established procedures and guidelines as well as make proper records (including recording sample collection areas);

(b) reminded its staff that they should carefully check the information contained in letters to be issued to ensure their accuracy as well as send out signed letters as soon as possible; and

(c) reminded its training section to incorporate (a) and (b) above in its staff training.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2014/3615A&B – Delay in following up a water seepage complaint

Background

302. The complainant had lodged a seepage complaint with the Joint Office for Investigation of Water Seepage Complaints (JO), comprising staff from the Food and Environmental Hygiene Department and the Buildings Department (BD). After more than two years, the seepage problem remained unresolved. He complained against JO for delay in handling his case.

The Ombudsman's observations

303. JO had allowed the consultant company to delay taking the moisture content readings, which was in fact a simple task. Neither had it taken alternative action such as deploying its own staff to do the measurement. As a result, the investigation was seriously hampered. Even with the shortage of manpower, JO should have deployed its own staff to do the measurement with priority. It was unreasonable of JO to have laid back and dawdled.

304. Furthermore, after receiving the second complaint, JO did not inform the complainant of the progress of his case until after more than one year, which also constituted a serious delay.

305. In view of the above, The Ombudsman considered the complaint substantiated.

306. The Ombudsman urged JO to remind its staff/consultant firms to follow established procedures in handling complaints and notify complainants of the progress and findings of investigations in a timely manner; as well as apologise for its mistake.

Government's response

307. JO accepted the recommendations and has urged its staff and consultant firms to follow established procedures in handling cases, as well as apologised to the complainant for the delay in the case.

Food and Environmental Hygiene Department, Buildings Department and Housing Department

Case No. 2014/0029A&B (Food and Environmental Hygiene Department and Buildings Department) – Mishandling a water seepage complaint

Case No. 2014/0029C (Housing Department) – Failing to take enforcement actions against unauthorised building works in a Tenants Purchase Scheme flat

Background

308. On 3 January 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Joint Office for Investigation of Water Seepage Complaints (JO) formed with personnel from the Food and Environmental Hygiene Department and Buildings Department (BD) as well as against the Housing Department (HD). The complainant lived in a Tenants Purchase Scheme (TPS) estate. She reported to JO stating that there was water seepage at the balcony ceiling of her flat (Flat A). After investigation, JO confirmed that the source of seepage was the flat above (Flat B) and subsequently issued a nuisance notice (Notice) in March 2012 requiring the owner of Flat B to carry out the necessary repair. The seepage in Flat A ceased at one time after Flat B had undergone some repair works.

309. In February 2013, the complainant reported about the recurrence of seepage in Flat A to JO through the Estate Management Office. In March the same year, the complainant's family member reported to BD that there were suspected unauthorised building works (UBW) in Flat B which caused the seepage. BD referred the case to HD which was authorised to enforce the Buildings Ordinance on TPS estates.

310. After investigation, JO confirmed that defects were found on the floor slab and the peripheral walls of the bathroom of Flat B, and subsequently issued a Notice requiring the flat owner to complete the necessary repair within the specified time limit.

311. JO wrote to the complainant by mail on 18 December the same year. The re-investigation by JO showed that water seepage persisted in Flat A, but seepage was no longer found at the floor slab and the peripheral walls of the bathroom of Flat B. Since no other seepage sources could be identified after the established "non-destructive" tests had been carried out, JO had to stop following up on the case.

312. As regards the UBW problem of Flat B, HD wrote to the complainant by mail on 27 March 2013. The inspection of HD revealed that UBW (the original balcony was converted into a bathroom) had indeed been found in Flat B. However, according to the current enforcement policy, the works under that category required no immediate enforcement action. HD, therefore, would not take any action at that stage.

313. In the light of the above, the complainant complained against JO for failing to follow up on the seepage report properly, leading to failure to identify the source of seepage (allegation (a)); the complainant also complained against HD's failure to take action even after it confirmed the existence of UBW in Flat B, thus causing water seepage at the complainant's flat to persist (allegation (b)).

The Ombudsman's observations

Allegation (a)

314. The Office agreed in principle with JO's procedure for handling water seepage reports, which included employing only "non-destructive" tests, and if the sources of water seepage could not be identified at the end, JO had to cease its follow up even if water seepage continued.

315. However, with regard to one of the possible sources of water seepage (the kitchen and bathroom floor slabs/peripheral walls of the bathroom of Flat B), the consultant did not perform a ponding test for the floor slab of the kitchen of Flat B during the second investigation. In fact, the kitchen of Flat B (with a total construction floor area of only about $50m^2$) was connected to its bathroom (below which was the location of water seepage in Flat A), and the location of water seepage in Flat A remained the same all the years, whereas JO had conducted a ponding test for the floor slab of the said kitchen during the first investigation. In view of this, the Office considered that the consultant had no reason for not conducting the test in the kitchen of Flat B during

the second investigation.

316. It showed that the investigation conducted by the consultant was not comprehensive enough and that its conclusion of "unable to identify the source of water seepage" was not solid enough. It was rather rash for JO to accept such a conclusion and hence stop following up on the complainant's report. As such, The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

317. The UBW carried out by the owner of Flat B was to connect the bathroom to the kitchen and was not the cause of water seepage at Flat A. Even if HD urged the owner to take immediate action to rectify UBW, it might not necessarily alleviate the seepage problem at Flat A. Hence, The Ombudsman considered that while HD had deferred to take enforcement action against UBW, it was not the cause of the persistent water seepage at Flat A. Therefore, allegation (b) was unsubstantiated.

318. That said, the Office noticed that HD's inaction concerning the UBW at Flat B went against BD's relevant guidelines. Even if UBW at Flat B did not come under the list of actionable items, HD could have issued a warning notice to the owner of Flat B, and registered the warning notice in the Land Registry's record when necessary. HD's failure to take any action against such kind of UBWs would be suspected of condoning the works. In view of this, The Ombudsman considered allegation (b) against HD unsubstantiated but other inadequacies found.

319. The Ombudsman recommended that –

(a) JO to conduct professional investigations, including a ponding test for the floor slab of the kitchen in Flat B again, to allay the doubts of the complainant; and

(b) HD should issue a warning notice regarding UBW at Flat B to its owner and if necessary, and register the warning notice in the Land Registry's record.

Government's response

320. BD accepted The Ombudsman's recommendation and conducted a ponding test for the floor slab of the kitchen of Flat B on 7 May 2014. The colour water used in the ponding test for the floor slab of the kitchen did not appear in Flat A. JO informed the complainant of the findings by mail on 18 August 2014.

321. HD did not accept The Ombudsman's recommendation and has responded to the Office that in accordance with BD's relevant guidelines, it was not required to issue a warning notice to the owner of Flat B. HD had specifically consulted BD on this case and BD concurred with HD's approach and justification in handling the case. Yet, BD also suggested that HD might consider issuing an advisory letter to remind the owner that it was his/her responsibility to voluntarily remove any unauthorised building works. Subsequently, HD issued an advisory letter to the owner.

322. The Office decided to close the case after considering HD's follow-up actions mentioned above.

Food and Environmental Hygiene Department, Buildings Department and Housing Department

Case No. 2014/3791A&B (Food and Environmental Hygiene Department and Buildings Department) – (1) Shirking responsibility in handling a seepage complaint; (2) Delay in handling a seepage complaint; (3) Failing to send a substantive reply to the complainant; and (4) Unable to identify the source of seepage

Case No. 2014/3791C (Housing Department) – (1) Shirking responsibility in handling a seepage complaint; and (2) Refusing to send a substantive reply to the complainant and poor staff attitude

Background

323. The complainant lodged a complaint with the Joint Office for Investigation of Water Seepage Complaints (JO) of the Food and Environmental Hygiene Department and Building Department (BD) about water seepage on the ceiling in the kitchen of her "Home Ownership Scheme (HOS)" flat (Flat A) in August 2012. JO conducted colour water tests at the drainage outlets in the flat above Flat A (Flat B). In September, JO notified the complainant by mail that a consultant would be appointed to carry out investigation. The consultant went to Flat A for investigation in October the same year and January 2013. After that, JO had not contacted her again.

324. In May 2013, the complainant noticed large amounts of colour water in the kitchen ceiling of Flat A and contacted JO immediately. Subsequently, JO and the consultant sent their staff to Flat A for investigation. On 23 May, the complainant received a reply from JO and learned that JO was waiting for the investigation report of the consultant. In addition, JO told the complainant that there were signs of defect in a drainage pipe belonging to Flat B but located on the kitchen ceiling of Flat A (the drainage pipe concerned), and that JO had referred the case to the Housing Department (HD), which was responsible for such problems in HOS estates.

325. In June 2013, the complainant received a letter from the Independent Checking Unit (ICU) of HD. She was informed that ICU discovered leakage in the drainage pipe concerned and had requested the owner of Flat B to carry out repairs. On 6 August the same year, ICU

phoned the complainant to enquire about the situation of Flat A. The complainant indicated that ICU would not have to inspect again at Flat A given that repairs had been arranged for Flat B. On 8 August, ICU wrote back to the complainant by mail confirming the content of the conversation dated 6 August. The complaint had not received any response from ICU since.

326. In April 2014, the staff of JO's consultant went to Flat A for investigation and found that the water marks on the kitchen ceiling were dried. The complainant immediately requested the consultant to issue a written confirmation, but had not received any response ever since.

327. On 27 August, the complainant called ICU and JO respectively to enquire about the progress of her case. Staff A of ICU initially suggested her to contact JO. Staff A responded to the complaint again afterwards, indicating that the letter dated 8 August 2013 from ICU had implied the conclusion of her case. That said, staff A and his supervisor staff B both refused to confirm the circumstances in writing.

328. JO replied to the complainant indicating that the case should be handled by HD. After repeated enquiries, JO finally replied to the complainant that JO had sent her a written reply on 21 August 2014 informing her of the inability to confirm the seepage source and as a result, the cessation to follow up on her the case. However, the complainant had not received this letter.

329. The complainant criticised JO for the following –

(a) JO and HD shirked their responsibility and did not follow up on the water seepage complaint properly;

(b) JO repeatedly delayed in handling her case –

    (i) JO did not inform her of the results of the investigation conducted in January 2013. She could only receive a reply after contacting JO in May the same year;

    (ii) JO claimed in May 2013 that it was waiting for the investigation report from the consultant, but only arranged for the consultant to follow up on the case again in April 2014, without taking any action in between the period;

(c) JO claimed that it had informed the complainant of the investigation results by mail in August 2014, but in fact the complainant had not received such letter. This casted doubt on the integrity of JO;

(d) JO claimed that the source of seepage could not be identified after conducting the tests, but ICU had in fact discovered leakage in the drainage pipe of Flat B in June 2013, and the seepage on the kitchen ceiling of Flat A stopped after the drainage pipe had been repaired. It demonstrated that the source of seepage could actually be found; and

(e) the attitude of staff A of ICU was poor when responding to the enquiry of the complainant on August 2014. Staff A and his supervisor staff B refused to confirm in writing that her case had been concluded.

The Ombudsman's observations

Allegation (a)

330. The Ombudsman considered that JO and HD did follow up on the complainant's report on water seepage according to the established procedures and division of duties among departments, and did not shirk their responsibility. Therefore, allegation (a) was unsubstantiated.

Allegation (b)

331. The consultant carried out Stage III investigation in November 2012, but it was not until August 2014 that it submitted the investigation report to JO. It was unreasonable for it to take more than 20 months. During the period, JO neither pressed the consultant nor informed the complainant of the progress and findings of the investigation. Therefore, JO should be held responsible for the delay. In this connection, The Ombudsman considered allegation (b) substantiated.

Allegation (c)

332. The Office of The Ombudsman (the Office) was satisfied that JO had sent out the letter to the complainant on 22 August 2014. The Office was in no way able to find out why the complainant did not receive it. The Ombudsman considered allegation (c) unsubstantiated.

Allegation (d)

333. When JO claimed that it was unable to identify the source of seepage, it actually meant that no other sources of seepage could be identified from the findings of its tests. As for the leaking drainage pipes, JO had already referred the case to ICU for follow-up action according to the established division of duties. Since water seepage in Flat A had stopped after the repairs of the drainage pipes, the problem could be regarded as having been resolved. The Ombudsman considered allegation (d) unsubstantiated.

Allegation (e)

334. As regards whether staff A exhibited a poor attitude during his conversation with the complainant, the Office would be unable to determine who was right and wrong due to the lack of independent corroborative evidence.

335. The complainant claimed that his request for a written reply was turned down. HD explained that its staff did not turn down the request of the complainant. It might be just communication misunderstandings between the two sides.

336. As ICU had already apologised to the complainant in the reply letter dated 17 October and had issued a further reply letter dated 20 October confirming the conclusion of the case, the issue had come to an end.

337. The Ombudsman considered allegation (e) unsubstantiated.

338. Overall speaking, The Ombudsman considered the complainant's complaints against JO partially substantiated and the one against HD unsubstantiated.

339. The Ombudsman urged JO to –

(a) strictly monitor the work of the consultants to ensure that all water seepage cases are followed up in a timely manner so as to avoid delay; and

(b) remind its staff to handle each complaint in a timely manner and inform the complainant of the progress and findings of investigation.

Government's response

340. JO accepted The Ombudsman's recommendations and has introduced the following measures –

(a) since September 2014, JO has put in place a new computer monitoring system by phases to record the dates on which cases are received or dates on which internal referrals are made, dates of testing by consultants and dates of submission of investigation reports to JO, so as to remind JO staff in a timely manner of the various kinds of work requiring follow-up action within a time frame. Apart from the progress meetings held every two weeks between professional officers of JO and individual consultants, senior professional officers of JO will also hold meetings with professional officers and inspect the returns in the system regularly, so as to monitor the work of JO staff and the consultancy staff; and

(b) JO has reminded its entire staff to inform complainants of the latest progress of investigation by phone or by mail in a timely manner.

Food and Environmental Hygiene Department and Fire Services Department

Case No. 2014/3288A (Food and Environmental Hygiene Department) – Failing to take effective enforcement actions against an unlicensed cooked food stall

Case No. 2014/3288B (Fire Services Department) – Failing to take effective enforcement actions to tackle the problem of obstruction of the means of escape in an industrial building

Background

341. The complainant alleged that someone was running a stall to produce and sell cooked food every morning at the means of escape on the G/F of an industrial building (Industrial Building A). Before 8am, there were even tables and chairs set up for customers on the pedestrian walkway adjacent to Industrial Building A. Food debris and sewage produced from the operation of the stall concerned scattered over/ran onto the pedestrian walkway. Starting from 2008, the complainant had repeatedly made complaints to the Food and Environmental Hygiene Department (FEHD) and the Fire Services Department (FSD) regarding the obstructions to the pedestrian walkway and the means of escape of Industrial Building A, and the environmental hygiene nuisances caused by the operation of the stall concerned. Both departments replied that they would follow up on the subject complaint. However, the problem persisted.

342. The complainant alleged FEHD and FSD of dereliction of duty and failure to follow up on his complaint properly and prohibit the operation of the stall concerned.

The Ombudsman's observations

343. The stall concerned had been in operation without a licence and caused obstruction of the means of escape for years. Such unlawful act not only caused inconvenience to the building users but also posed serious potential danger to the public. It was unbelievable that the stall concerned had sustained its unlawful operation for over 15 years despite the persistent follow-up and law enforcement actions taken by FEHD and

FSD against the irregularities associated with its operation.

344. According to FEHD records, FEHD's inspections were mainly conducted between 9 a.m. and 11 a.m.. However, as observed by the Office of The Ombudsman (the Office), the stall had its busy hours only before 8 a.m.. Not surprisingly, FEHD had repeatedly found that the stall was not in operation. The Office considered that FEHD's inspections should be conducted before 8 a.m. to render enforcement more effective.

345. Moreover, the Office had witnessed workers of the stall and their customers engaging in transactions on a cash-against-delivery basis on the pavement, which indeed amounted to "unlicensed hawking". However, FEHD had never charged the stall with this offence when instituting prosecutions. In the view of the Office, FEHD should not only charge the stall with "operation of an unlicensed food business", but also actively collect evidence to support prosecuting the person-in-charge of the stall for "unlicensed hawking". FEHD should also exercise the power conferred under the provision for this offence to seize the business equipment of the stall placed on the pavement, so as to enhance the deterrent effect and crack down the irregularities.

346. Based on the above analysis, The Ombudsman considered the complainant's allegation against FEHD partially substantiated.

347. The Office believed that the means of escape had indeed been obstructed by articles (including a cooking stove). However, no prosecution action could be taken because FSD had not been able to identify the responsible person of the stall during most of the inspections. Furthermore, it was beyond FSD's control that there was insufficient evidence for the Department to initiate prosecution action against the owners' corporation by invoking the relevant regulations pertaining to "obstruction of means of escape". In view of the above, The Ombudsman considered the complaint against FSD unsubstantiated.

348. Fortunately, the stall concerned ceased to operate at last and the problem appeared to have been solved.

349. The Ombudsman recommended that –

(a) FEHD and FSD should continue monitoring the situation (especially before 8 a.m.) and if the stall concerned is found to resume business, and take enforcement actions in a decisive and strict manner against these unlawful acts that may affect public safety; and

(b) FSD should institute prosecution against the owners' corporation of Industrial Building A pursuant to relevant regulations if obstruction recurs within 12 months after the 3rd "Fire Hazard Abatement Notice" was issued in August 2014.

Government's response

350. FEHD and FSD accepted Recommendations and have taken the following actions.

351. FEHD has continued to monitor the situation and arranged to conduct inspections during the busy hours of the unlicensed cooked food stall (particularly before 8 a.m.). However, no sign of operation was spotted during the inspections. FEHD will continue to closely monitor the situation and take stringent enforcement actions as and when necessary.

352. From February to August 2015, fire personnel of the Fire Station concerned of FSD conducted eight surprise inspections to Industrial Building A at various hours in the morning. The dates and times of the eight inspections are as follows:

(a) 13 February 2015 at 9:05 a.m.;

(b) 31 March 2015 at 12:00 noon;

(c) 26 April 2015 at 7:25 a.m.;

(d) 23 May 2015 at 8:25 a.m.;

(e) 23 June 2015 at 11:15 a.m.;

(f) 9 July 2015 at 7:40 a.m.;

(g) 10 August 2015 at 7:30 a.m.; and

(h) 20 August 2015 at 7:30 a.m..

353. During the eight inspections, no obstruction was found. FSD will continue monitoring the situation and will take enforcement actions in a decisive and strict manner if the stall concerned is found to resume business.

Food and Environmental Hygiene Department and Lands Department

Case No. 2014/1987A&B – Failing to take enforcement action against a fruit shop which occupied part of the pavement for an extended period

Background

354. In September 2013, the complainant lodged a complaint with the Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD), alleging that a fruit shop had been occupying the pavement in front for an extended period for display and sale of its goods, causing obstruction. The situation, however, did not improve.

355. To tackle problems of this nature, FEHD can invoke the Summary Offences Ordinance to prosecute the shop for "street obstruction", or the Public Health and Municipal Services Ordinance for prosecution of "illegal hawking" and seize the goods. FEHD's usual strategy is "warning before enforcement". In case of recalcitrant offender, FEHD may institute prosecution right away.

The Ombudsman's observations

356. During the site visits, staff of the Office of The Ombudsman (the Office) found that the fruit shop had placed huge quantities of goods on the pavement in front for sale. The shop had in effect extended its business area by more than three metres. That was a serious breach of the law.

357. FEHD officers had patrolled the shop almost every day since May 2013, and had found its goods obstructing the street on all occasions, resulting in warnings issued to the shop operator. However, the shop often relapsed and put its goods back onto the pavement. Obviously, FEHD's strategy of "warning before enforcement" was totally ineffective.

358. Prior to the Office's intervention, FEHD mainly prosecuted the fruit shop for "street obstruction", which carried a lighter penalty and hence weaker deterrent effects. There was no wonder that the shop did not fear FEHD's enforcement actions. In addition, the Office considered

that FEHD could have, through close surveillance, collected sufficient evidence of transaction activities to prosecute the fruit shop for "illegal hawking" and seized its goods to achieve stronger deterrent effects. There was indeed room for improvement in FEHD's enforcement.

359. In view of the above, The Ombudsman considered that the complaint against FEHD partially substantiated. The Ombudsman urged that FEHD should continue to keep a close watch on the shop, and be strict and decisive in its enforcement actions against the irregularities, including instituting prosecutions by invoking the "illegal hawking provision" more frequently, in order to uphold law and order.

360. As regards the complaint against LandsD, the Office agreed that the fruit shop caused obstruction by placing goods in front of the shop, and hence FEHD was the responsible department. Having regard to the division of responsibilities amongst the departments, it was not unacceptable for the District Lands Office (DLO) not to take follow-up action against the street obstruction caused by the fruit shop. In the light of the above, The Ombudsman considered the complaint against LandsD unsubstantiated.

361. Notwithstanding this, it was an undisputed fact that the fruit shop had long been unlawfully occupying the government land in front of the shop premises. The Office was of the view that, if the problem was to remain unresolved after FEHD's endeavour to take enforcement action, LandsD should assist by taking enforcement action. The Ombudsman urged LandsD to monitor the irregularities of the fruit shop and assist FEHD where necessary.

Government's response

362. FEHD accepted The Ombudsman's recommendation and has taken the follow-up actions below –

(a) FEHD has been monitoring the situation at the shop closely and stringent enforcement actions will be taken as necessary. The district staff members have also been reminded to maintain vigilance and institute prosecutions for the offence of "illegal hawking" without prior warning whenever sufficient evidence on illegal hawking can be established; and

(b) between November 2014 and May 2015, FEHD instituted 43 and 12 prosecutions against the shop for "street obstruction" and "illegal hawking" respectively.

363. LandsD accepted The Ombudsman's recommendation and DLO has monitored the irregularities of the fruit shop and, having regard to actual circumstances, assisted FEHD in taking enforcement action through joint operations. Between November 2014 and the end of June 2015, DLO and FEHD completed four joint operations in total against the obstruction caused by shop-front extension in the area (including the fruit shop). DLO will continue to assist FEHD in taking enforcement action against the fruit shop through joint operations.

Food and Environmental Hygiene Department and Lands Department

Case No. 2014/2660A&B – Failing to take enforcement action against some shops for illegal extension of business areas with platforms

Background

364. On 5 May 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

365. As alleged by the complainant, he had lodged complaints repeatedly with FEHD since March 2014 against two shops (the shops) in a certain district for placing large metal platforms outside the shops over a long period of time, occupying government land for extension of business areas. Nevertheless, the problem still persisted.

The Ombudsman's observations

366. Given the fact that the platforms did not cause obstruction to scavenging operations, FEHD had not invoked the related provision in its enforcement action. The Office considered it understandable. Moreover, the Office noted that FEHD had actually taken some actions by invoking the "street obstruction provision", instead of entirely turning a blind eye to the situation. Nevertheless, merchandises had obviously been placed on the platforms for sale by the shops, which should be an alleged act of "illegal hawking". FEHD had never taken any action to address this issue, and there were indeed inadequacies. As such, The Ombudsman considered the complaint lodged by the complainant against FEHD partially substantiated.

367. The Ombudsman urged that FEHD should continue to closely monitor the situation of the shops and engage in active collection of evidence with a view to instituting prosecutions for the offence of "illegal hawking" so as to deter the shops from illegally extending their business areas.

368. As regards the issue of the platforms concerned occupying the government land, the District Lands Office concerned (DLO) of LandsD had two justifications for taking no action –

(a) The platforms were removable and movable. Thus, DLO did not have to take enforcement action under the established division of labour among departments; and

(b) there was a certain degree of difficulty in enforcement.

369. Concerning point (a), the Office was of the view that even if the platforms were removable and movable, it would still undoubtedly amount to long-term occupation of government land if they were placed in the same location outside the shops for a long period of time and were never moved away by the shops. DLO ought to exercise its power to enforce the laws and not to be confined on the issue of whether the platforms were structurally affixed to the ground.

370. The Office could not be agreeable to point (b). The Office considered that the spirit and original intent of the provision regarding occupying government land was to instruct the occupiers to cease occupying government upon the receipt of the relevant authority's notice, while not only temporarily remove the objects placed in the occupied land. After the relevant authority had issued the notice, prosecution should be instituted if the objects occupying the land were discovered to re-appear in the same location.

371. The Office had relayed the views in the preceding paragraph to LandsD in the direct investigation report on illegal extension of business area by restaurants of May 2013. LandsD was undertaking a review in light of the recommendations of The Ombudsman. It had established a working group, comprising representatives from the Department of Justice, to study the legal feasibility of instituting prosecution without serving notices again for cases of repeated occupation of government land. The Office would continue to liaise with LandsD.

372. The Office was of the view that in this case, DLO should not refrain from following up actively on the issue of the platforms illegally occupying government land just because it was difficult to enforce. As such, The Ombudsman considered the complainant's complaint against LandsD substantiated, nonetheless with no recommendation.

Government's response

373. FEHD accepted The Ombudsman's recommendation. FEHD has been monitoring the shops closely and will take stringent enforcement action as necessary. Its district staff members have been reminded to engage in active collection of evidence with a view to instituting prosecutions for the offence of "illegal hawking" so as to deter the shops from illegally extending their business areas.

Food and Environmental Hygiene Department
and Lands Department

Case No. 2014/2894A (Food and Environmental Hygiene Department) – Failing to take enforcement action against a recycling company for causing pavement obstruction

Case No. 2014/2894B (Lands Department) – Failing to take enforcement action against illegal occupation of government land by a recycling company

Background

374. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD) and Food and Environmental Hygiene Department (FEHD) on 27 June 2014.

375. According to the complainant, in May 2014, he complained to FEHD and LandsD via 1823 about Company A's prolonged occupation of the pavement in front of an external wall of the complainant's shop for business operation. A metal plate and a metal platform were laid on the pavement for loading and unloading of waste paper; this had an adverse impact on environmental hygiene. However, FEHD only said in its reply to the complainant that the metal plate and the metal platform, being fixed on the pavement, were beyond FEHD's enforcement purview. LandsD also claimed that the laying of metal plates and erection of metal platforms on pavements amounted to street obstruction, which was beyond its enforcement purview.

376. While the metal plate was removed later, Company A continued to place the metal platform on the pavement. The complainant alleged that dereliction of duty was involved on the parts of FEHD and LandsD, as they had failed to take enforcement action against Company A's illegal occupation of the pavement.

The Ombudsman's observations

LandsD

377. According to LandsD, its District Lands Office (DLO) received a referral of the complainant's case from 1823 in early June 2014. On 17 the same month, DLO called the person-in-charge of Company A and requested him to remove the metal plate and the metal platform from the pavement and cease occupying government land. On 25 June, DLO conducted a site inspection and found that the metal plate and the metal platform had been removed, but the surface of the pavement had been damaged. Hence, DLO suggested that repairs could be carried out by the Highways Department (HyD).

378. On 27 June, DLO was informed by HyD that the pavement was again unlawfully occupied by a metal platform. On the same day, DLO contacted the person-in-charge of Company A to request that the metal platform be removed immediately. DLO also suggested that the Transport Department and HyD install some metal railings/poles along the pavement to prevent it from being unlawfully occupied again. During DLO's site inspections on 3 July, 16 July and 22 September, no unlawful occupation of the pavement was found.

379. Having examined relevant records, The Ombudsman was satisfied with LandsD's representation on how the complainant's case had been followed up, and considered DLO's actions generally appropriate. Therefore, the complaint against LandsD was unsubstantiated.

FEHD

380. According to FEHD, since receiving a referral of the case from 1823 on 10 June 2014, it had noted during a number of inspections that a metal platform was laid on the pavement. Nevertheless, given that the section of the pavement under the metal platform could still be cleansed through the gap of its supporting frame, the metal platform did not cause obstruction to FEHD's scavenging operations. FEHD thus did not have sufficient justifications to take enforcement action under the "provision on obstruction to scavenging operations". Notwithstanding this, FEHD asked 1823 to refer the unlawful occupation of the pavement to other relevant government departments for follow-up action. Subsequently, FEHD inspected the site again and found no metal platform or metal plate.

381. The Office reluctantly accepted FEHD's explanation for not invoking the "provision on obstruction to scavenging operations" to prosecute the owner of the metal platform. But it was shown in the photos taken during FEHD's inspection that the company, while operating on the pavement, left behind loads of paper scraps around the metal platform. The Office took the view that there was still the need for FEHD to closely monitor the situation to ensure street cleanliness at the site.

382. It was also clear that the metal platform caused obstruction to the pedestrians. FEHD should have invoked the "street obstruction provision" to prosecute the owner of the platform so as to deter the prolonged obstruction of the pavement.

383. Based on the above analysis, The Ombudsman considered the complaint against FEHD partially substantiated.

384. The Ombudsman urged –

(a) FEHD to keep conducting frequent inspections at the site. If Company A is found to have laid the metal platform on the pavement again, the "street obstruction provision" should be invoked for enforcement. If paper scraps or other rubbish are found to have been left during Company A's operation, appropriate actions should be taken; and

(b) LandsD to keep conducting frequent inspections at the site. If Company A is found to have unlawfully occupied the government land again, stringent enforcement action should be taken resolutely.

Government's response

385. FEHD accepted The Ombudsman's recommendation and has been keeping close watch over the location. FEHD staff found that Company A had been closed down since October 2014 with the removal of the metal platform and non-existence of the hygiene problem caused by paper scraps. However, during a number of inspections conducted by FEHD staff, several goods vehicles displaying the logo of the complainant's company and private cars believed to be from the complainant's company were found to have been parked on the pavement at the location. FEHD has referred the illegal parking issue to the Police

for follow-up.

386. LandsD accepted The Ombudsman's recommendation and has taken the following actions –

(a) regular patrols have been carried out and no illegal occupation of government land has been detected on site; and

(b) upon LandsD's referral, HyD has erected bollards along the side of the pavement to prevent illegal occupation of government land.

Food and Environmental Hygiene Department, Lands Department and Buildings Department

Case No. 2014/0844A (Food and Environmental Hygiene Department) – Failing to take effective enforcement action against the unauthorised extension, street obstruction and illegal hawking activities of a shop

Case No. 2014/0844B (Lands Department) – (1) Delay in taking enforcement action against illegal occupation of Government land by a shop; and (2) Delay in replying to a complaint

Case No. 2014/0844C (Buildings Department) – (1) Inconsistent replies to the complainant about the criteria of taking enforcement action against unauthorised building works (UBWs); and (2) Delay in taking enforcement action against the UBW of a shop

Background

387. During the period from 12 March 2014 to 28 March 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food & Environmental Hygiene Department (FEHD), Lands Department (LandsD) and Buildings Department (BD).

388. According to the complainant, a shop (the concerned shop) was erected on the public pavement involving the following irregularities –

(a) Erection of an unauthorised structure on and over the government land;

(b) installation of an extensive retractable canopy; and

(c) hawking blatantly on the pavement which caused obstruction to pedestrians.

389. Since November 2013, the complainant lodged several complaints to FEHD, LandsD and BD via 1823. Yet, the irregularities for the concerned shop remained.

390. The complainant's complaint could be summarised as follows –

FEHD

(a) failing to discharge its duty and take effective enforcement action, resulting in the persistence of illegal hawking activities and street obstruction caused by the concerned shop;

LandsD

(b) delay in taking land control action regarding the occupation of government land by the concerned shop;

(c) delay in reply to the complainant's complaints;

BD

(d) BD's replies to the complainant regarding the enforcement policies on the retractable canopy of the concerned shop were inconsistent. (BD's reply on 10 January 2014 mentioned that the retractable canopy fell into the category warranting immediate enforcement action, however the reply on 19 March 2014 mentioned that the canopy was considered as amenity feature and did not warrant enforcement action); and

(e) delay in taking enforcement action on UBWs of the concerned shop.

The Ombudsman's observations

Allegation (a)

391. Although FEHD did take enforcement action against the concerned shop, the problem of street obstruction and illegal hawking caused by the concerned shop persisted. This reflected that FEHD's enforcement action had no deterrent effect on the concerned shop. The Office considered that it was due to the following reasons –

(a) prior to the Office's intervention, even though the shop operator had violated the legislation repeatedly, FEHD still conducted inspection to the concerned shop twice a month on average only and seldom took enforcement action. As a result, the

concerned shop operator occupied the pavement in front of the shop for illegal hawking in a flagrant and blatant manner. After the Office's intervention, FEHD stepped up its inspections. The problem of street obstruction caused by the concerned shop then slightly receded and the area of public road occupied for illegal hawking became smaller; and

(b) although FEHD continued to institute prosecutions against the concerned shop by invoking the "illegal hawking provision", FEHD had never exercised the power conferred by the provision to seize the merchandise. Furthermore, the level of fine imposed by the court was relatively low (ranging from a few hundred dollars to one thousand-odd dollars each time). The concerned shop had not suffered significant financial loss arising from the prosecutions and therefore did not fear FEHD's prosecution actions.

392. The Ombudsman considered allegation (a) against FEHD partially substantiated.

393. The Ombudsman recommended FEHD to take the following measures in order to enhance the effectiveness of its enforcement actions –

(a) Frequent inspections of the concerned shop should continue to be conducted and FEHD staff should institute prosecutions immediately without warning once they notice any street obstruction and/or illegal hawking activities; and

(b) when invoking the "illegal hawking provision" to institute prosecutions, the merchandise should be seized decisively with a view to raising the concerned shop operator's cost of violating the legislation.

Allegations (b) and (c)

394. After examining the relevant documents and records, the Office accepted the statement of the District Lands Office concerned (DLO) of LandsD for their follow up of the complainant's complaint. As regards allegation (b), DLO had yet to take enforcement action against the concerned ground platform. Nevertheless, DLO did follow up in accordance with the relevant guidelines. DLO had a timetable for enforcement. As such, The Ombudsman considered allegation (b)

unsubstantiated.

395. Concerning allegation (c), the way DLO replied to the complainant did not entirely comply with LandsD's internal guidelines. Hence, The Ombudsman considered allegation (c) partially substantiated.

396. Overall speaking, The Ombudsman considered the complaint against LandsD partially substantiated but did not have any recommendation.

Allegations (d) and (e)

397. After examining the two replies from BD to the complainant, the Office accepted BD's explanation that the replies to the complainant issued at different times concerned different UBWs which involved different enforcement actions. The Office concurred with BD's view that BD had not provided inconsistent replies to the complainant regarding the enforcement policy against UBWs of the concerned shop. The Ombudsman considered that complaint (d) was unsubstantiated.

398. Nevertheless, in BD's reply of 19 March 2014, the concrete ground platform and shop-front signboard of the concerned shop were described as "a structure on the ground" and "a shop-front structure" respectively. As the complainant had no knowledge on which "structures" of the concerned shop were being referred to by BD, it was difficult for the complainant to understand why BD could not or would not take enforcement action on UBWs and the complainant might also be confused about UBWs mentioned in BD's two replies. In view of the above, The Ombudsman urged BD to learn from this case and provide clear and specific explanation on its inspection findings, enforcement policy and follow-up actions in future replies to complaints relating to UBWs so as to avoid misunderstanding.

399. As for UBWs of the concerned shop, BD had followed the established enforcement policy and relevant guidelines in handling the case. The follow-up action was considered largely appropriate without delaying enforcement. As such, allegation (e) was unsubstantiated.

400. The Ombudsman considered, overall speaking, the complaint against BD unsubstantiated.

401. The Office noted that a new retractable canopy was installed at the concerned shop and the shop-front extension was still yet to be removed. Therefore, The Ombudsman urged BD to closely follow up on the compliance of the removal order with a view to removing the concerned retractable canopy as soon as possible. As regards the shop-front extension, it was connected with the concrete ground platform on the pedestrian pavement. DLO had fixed the schedule for enforcement action against the concerned ground platform, The Ombudsman recommended BD to cooperate with DLO for removal of the two concerned UBW items.

Government's response

402. FEHD and BD accepted The Ombudsman's recommendations.

403. During the period from August to December 2014, FEHD continued to deploy staff to the concerned location for inspection every day, and neither street obstruction nor illegal hawking by the concerned shop was found. FEHD will continue to monitor the situation at the location closely and take appropriate actions.

404. BD issued a removal order on 10 September 2014 for removing the new retractable canopy at the concerned shop. Inspection carried out by BD staff on 10 October 2014 revealed that the retractable canopy had been removed. Compliance letter for the order was issued by BD on 31 October 2014. BD and DLO had taken a joint action on 27 May 2015 against the concerned shop-front extension and concrete ground platform erected on the pedestrian pavement. BD issued a removal order to the owner of the concerned shop on the same date, requiring the removal of the shop-front extension. The owner is currently arranging for the removal works and BD will continue to follow up on the compliance of the order.

Food and Environmental Hygiene Department and Social Welfare Department

Case No. 2014/5151A&B – Failing to handle effectively a complaint about illegal occupation of a subway by street sleepers

Background

405. During the period from 26 November 2014 to 6 December 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD) and Social Welfare Department (SWD). According to the complainant, a number of street sleepers occupied the subway in a district (the concerned subway), blocking the passages with bulky furniture and miscellaneous items. Also, they always disposed of garbage in the subway, causing serious impacts on environmental hygiene and nuisance to passers-by.

406. On 19 November 2014, the complainant lodged a complaint against the above problems with FEHD via 1823. FEHD staff later replied to the complainant indicating that the street sleeper problem was related to a number of government departments. When the complainant enquired when FEHD and other government departments would conduct joint clearance operations and requested FEHD to promptly clean up the concerned subway, the staff failed to give the complainant a substantive reply and only said that FEHD was mainly responsible for environmental hygiene. The complainant considered that FEHD had no intention to solve the problem.

407. Subsequently, the complainant received replies respectively from the Home Affairs Department (HAD) and SWD, and was informed that social workers of a social welfare organisation (organisation A) commissioned by SWD had been providing outreaching services for the street sleepers for several months but the latter refused to move to live elsewhere. The complainant considered that persuading the street sleepers to give up street sleeping had only limited effect.

408. The complainant alleged FEHD and SWD of taking no effective measures to resolve the problem of the subway being occupied by the street sleepers.

The Ombudsman's observations

409. After perusing relevant records, the Office considered that FEHD and SWD had, within its scope of authority, made conscientious efforts to tackle the street sleeper problem in the concerned subway. FEHD had properly followed up on the environmental hygiene conditions of the location. SWD had also provided support for the street sleepers through organisation A, with the aim of assisting them to live off street. In addition, FEHD and SWD had been handling the issue through inter-departmental collaboration. The Ombudsman considered the complaint against FEHD and SWD unsubstantiated from the angle of administration.

410. Nevertheless, the street sleeper problem in the concerned subway continued to exist even after the government departments and the organisations had fulfilled their duties. It reflected that the existing government policies formulated to tackle this problem were not fully effective.

411. The Ombudsman recommended that –

(a) FEHD should step up its cleansing work and participate in inter-departmental joint clearance operations to maintain environmental hygiene in the subway;

(b) SWD should continue to work with organisation A to provide appropriate assistance for the street sleepers in the concerned subway and to actively persuade them to accept alternative living arrangement and leave the site as soon as possible; and

(c) SWD should reflect the concerned issues to senior government officials, appealing to the Government for a review on the policy in relation to the street sleeper problem.

Government's response

412. FEHD accepted The Ombudsman's recommendation. FEHD had all along actively participated in inter-departmental joint operations coordinated by HAD to tackle the street sleeper problem in the concerned subway. From 6 January to 8 April 2015, FEHD worked in collaboration with HAD, the Highways Department, the Police and the Lands Department to conduct eleven joint operations in the subway, removing refuse discarded by street sleepers and hosing down the subway as well as the road surface in the vicinity with a view to maintaining environmental hygiene.

413. At the meeting of the District Management Committee (DMC) in the district concerned on 11 March 2015, members present discussed again the street sleeper problem at the location. DMC considered that the inter-departmental joint operations had achieved their effectiveness and there had been a significant drop in the number of street sleepers. Pursuant to DMC's resolution, the frequency of joint clearance operations to be conducted by the departments concerned would be adjusted to once every two weeks in future. FEHD will continue to take part in the inter-departmental joint operations coordinated by the District Office of HAD in order to maintain environmental hygiene in the concerned subway.

414. SWD accepted The Ombudsman's recommendations. Since early 2015, SWD has continued to work closely with organisation A's Integrated Services Team (IST) for street sleepers. During January to April 2015, organisation A kept on visiting the street sleepers in the concerned subway about four times per month, rendering counselling and introducing related hostel service and information as well as persuading them to quit street sleeping as soon as possible. There were seven street sleepers living in the concerned subway in November 2014 and five of them had left as at April 2015 under the assistance of IST. During the outreaching visits conducted by social workers in April 2015, no street sleepers were spotted, though some personal belongings, including clothing and bedding, etc. were found. Social workers had repeatedly left service pamphlets there, and will continue to visit the place with a view to engaging the street sleepers found thereat and ensuring that appropriate services will be rendered to them if they are willing to accept.

415. The Office's report has been widely circulated within the relevant Bureaux and Departments. In response to an oral question raised by a Legislative Council (LegCo) member, the Secretary for Labour and Welfare and Secretary for Home Affairs jointly presented the implementation progress of the "Watchers Project" (the Project) at the LegCo meeting on 18 March 2015. The Project aims at providing vocational training, organising programmes and cleansing the locations where street sleepers gathered with a view to helping them live off street. In addition to reporting to LegCo members on the progress of the Project and the characteristics of the target street sleepers, both Directors of Bureaux also introduced the concerted work undertaken by the relevant government departments, including HAD, FEHD and SWD.

Food and Environmental Hygiene Department and Water Supplies Department

Case No. 2014/2929A (Food and Environmental Hygiene Department) – Shifting responsibility to the Water Supplies Department in handling a water seepage complaint

Case No. 2014/2929B (Water Supplies Department) – Shifting responsibility to the Food and Environmental Hygiene Department in handling a water seepage complaint

Background

416. There was serious seepage at the ceiling of the bathroom of the complainant's flat and the complainant suspected that it was caused by a defective fresh water pipe of the flat above (the pipe in question was installed at the bathroom ceiling of the complainant's flat and it was part of the fresh water supply system of the flat above). In September 2013, he complained to the Water Supplies Department (WSD). WSD conducted an investigation and referred the case to the Joint Office for Investigation of Water Seepage Complaints (JO), which was made up of staff from the Food and Environmental Hygiene Department (FEHD) and Buildings Department, for follow-up action. However, in the ensuing year, WSD and JO just kept shifting responsibility to each other and referring the case back and forth among themselves. As a result, the seepage problem persisted.

The Ombudsman's observations

WSD

417. The Office of The Ombudsman considered that WSD's inaction on the case did not have sufficient grounds. Its attitude amounted to evasion of responsibility. Indeed, JO's Memo to WSD dated December 2013 (Memo A) had stated that JO staff had visibly noticed that water was dripping from the defective and exposed section of the pipe. A floor plan and some photographs were also attached as evidence. According to the relevant guidelines, under such circumstances, JO needs not perform a reversible pressure test (RPT) and can simply refer the case to WSD for follow up. Therefore, in repeatedly asking JO to perform an

RPT first, WSD was close to being unreasonable.

JO

418. JO did not assert its stance to WSD in the face of WSD's unreasonable demand. It did not bother to point out to WSD that an RPT was unnecessary. Instead, it issued Memo A to WSD again and again. Besides, JO staff failed to report the issue promptly to their supervisors for resolution at a higher level. In the end, JO even went with WSD's demand and tried to arrange an RPT. The problem dragged on and on.

419. There were inadequacies in both WSD's and JO's handling of the seepage case. They failed to cooperate with each other sincerely and took no concrete action until seven months after the pipe was first found defective. The Ombudsman, therefore, considered the complaint against WSD and JO substantiated.

420. The Ombudsman recommended –

(a) WSD to remind its staff to strictly follow the operational guidelines, and adopt a positive and cooperative attitude when handling complaints on leakage of water supply pipes referred by JO, so as to prevent recurrence of similar incidents;

(b) WSD and JO to learn a lesson from the case. In case of doubt or disagreement in the process of case referral, both sides should discuss promptly, or escalate the case to a senior level for seeking solutions; and

(c) WSD and JO to apologise to the complainant for the impropriety in handling the case.

Government's response

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

(a) issued a reminder to its staff members, advising them to strictly follow the relevant operational guidelines and adopt a positive attitude when handling the complaints on leakage of water supply pipes referred by JO;

(b) discussed with JO and both agreed that in case of doubt or disagreement in the process of referring the seepage complaints, they would discuss promptly to resolve the doubt or differences. If necessary, joint site inspections would be carried out, or the cases would be escalated to the senior level for seeking solutions, so as to avoid unnecessary delay; and

(c) issued a letter to the complainant on 23 January 2015, apologising for the impropriety in handling the case.

422. JO accepted The Ombudsman's recommendations and has taken the following actions –

(a) reminded its staff that in case of doubt or disagreement with other departments in the process of case referral, they should report the case promptly to their supervisors and bring it to the senior level for discussion with a view to finding a solution; and

(b) issued a letter to the complainant to apologise for the inadequacies in its handling of the case.

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

Case No. 2013/4614A (Efficiency Unit) – Failing to properly handle a complaint about unauthorised construction works on government land

Case No. 2013/4614B (Lands Department) – Delay in following up a complaint about unauthorised construction works on government land

Background

423. According to the complainant, on two occasions in September 2013, he sent anonymous emails to the Efficiency Unit (EU)'s 1823 to complain about the alleged occupation of government land arising from unauthorised construction works at the site concerned, as well as the danger posed to residents (children in particular) by large construction vehicles passing by. However, no government department had since visited the site to follow up on the case or given any reply to the complainant.

424. The complainant alleged –

(a) 1823 for failing to properly handle his complaint; and

(b) the Lands Department (LandsD) for the delay in following up on the said unlawful occupation of government land.

The Ombudsman's observations

Allegation (a)

425. After receiving the complainant's complaint, 1823 referred the case to LandsD on the next working day. Subsequently, reminders were sent in a timely manner to remind LandsD to give a reply. In the continued absence of a reply, 1823 pressed LandsD further for follow-up action and a reply. Upon the response of the District Lands Office concerned (DLO), 1823 informed the complainant immediately. In view of this, 1823 had discharged its responsibilities dutifully.

426. The Ombudsman considered the complainant's complaint against EU unsubstantiated.

Allegation (b)

427. DLO conducted a site inspection 17 days (on 3 October 2013) after receiving the complainant's complaint. Nevertheless, DLO took no further action. Despite repeated reminders and urges from 1823, DLO did not inform 1823 of the progress. It was not until 6 December the same year, i.e. more than two months later, that DLO conducted another inspection and informed 1823 of the findings. There was indeed delay in DLO's action.

428. The Office of The Ombudsman accepted LandsD's explanation with regards to the decision not to erect metal bollards at the government land portion of the site concerned.

429. The Ombudsman considered the complainant's complaint against LandsD substantiated.

430. The Ombudsman urged LandsD to remind its staff to take early follow-up action on complaints from members of the public and inform the latter of the progress within the established timeframe, so as to avoid delays and so that members of the public would be spared from having to wait for a long time for a reply.

Government's response

431. LandsD accepted The Ombudsman's recommendation and DLO has already reminded the case officer(s) to take early follow-up action on complaints from members of the public and inform the latter of the progress within the established timeframe.

Government Secretariat – Education Bureau

Case No. 2013/5278(I) – (1) Failing to properly investigate a complaint about an unlicensed tutorial centre; and (2) Unreasonably refusing to provide the complainant with its inspection dates

Background

432. The complainant stated that he had lodged a complaint to the Education Bureau (EDB) against an unregistered tutorial school operating at a unit (Unit A) of an industrial building (the Building). On Saturdays and Sundays, there was a flock of students and parents gathering in the public area, causing inconvenience to the other occupants of the Building. EDB replied the complainant respectively in October and December 2013 that EDB had conducted investigations of the case, but no pupils and activities providing educational courses were detected in Unit A. The complainant called an EDB officer upon receipt of the reply letter in October, and requested information of the date of the inspections (the "requested information"). However, the EDB officer replied that EDB could not disclose the details of the investigation and the "requested information" to the complainant.

433. The complainant alleged EDB of –

(a) not investigating the complaint seriously; and

(b) unreasonably refusing to provide the complainant with the "requested information".

The Ombudsman's observations

<u>*Allegation (a): not investigating the complaint seriously*</u>

434. The Office of The Ombudsman (the Office) considered that EDB had conducted the investigations properly. Hence, The Ombudsman considered allegation (a) unsubstantiated.

435. However, the Office noted that, in the second reply dated 4 December 2013 from EDB, it only stated that the EDB officers did not find any activities providing educational courses during the inspection visits to Unit A, but did not explain that the abacus activity detected during the inspection was not regulated by the Education Ordinance (EO). That might arouse doubts and cause unnecessary misunderstanding.

436. Therefore, The Ombudsman considered allegation (a) unsubstantiated but other inadequacies found.

Allegation (b): unreasonably refusing to provide the complainant with "requested information"

437. EDB considered that providing the "requested information" to the complainant would affect subsequent inspection or investigation work. This was over-worried. The Office believed that disclosing the "requested information" to the complainant would not harm the inspection or investigation work of EDB.

438. The Ombudsman considered that EDB had misquoted paragraph 2.6(e) of the Code on Access to Information when refusing to provide the "requested information" to the complainant. Therefore, allegation (b) was substantiated.

439. Overall speaking, The Ombudsman considered that this complaint partially substantiated.

440. The Ombudsman recommended EDB to –

(a) provide the complainant with the "requested information"; and

(b) state clearly whether the relevant activities are regulated by EO or not, with a view to resolving any doubt and avoiding any unnecessary misunderstandings of the complainants/reporters when giving replies to similar complaints/reports in the future.

Government's response

441. EDB accepted The Ombudsman's recommendations in principle and provided the complainant with the "requested information" on 15 April 2014.

Government Secretariat – Education Bureau and Social Welfare Department

Case No. 2014/3570A&B – Unreasonably refusing the complainant's application for registration as child care worker and poor staff attitude

Background

442. According to the complainant, in May 2014, she completed the course for Postgraduate Diploma in Early Childhood Education (the Diploma Course) in a university (the university). The graduation certificate of the course was scheduled for award in November. Before the award date, the university issued a letter of approval for graduation (the Letter of Approval for Graduation) to graduates of the Diploma Course. Nevertheless, the complainant lost the letter.

443. In July 2014, she submitted two applications to the Education Bureau (EDB) –

(a) application for the Certificate of Registration as a Teacher (application (a)); and

(b) application for registration as a child care worker (application (b)).

444. The Teacher Registration Team (TRT) of EDB was responsible for the processing and approval of the Certificate of Registration as a Teacher.

445. Application for registration as a child care worker was processed by the seconded staff from the Social Welfare Department (SWD) stationing in the Joint Office for Kindergartens and Child Care Centres (JOKC) of EDB. The staff had been authorised by the Director of Social Welfare to process and approve the relevant applications.

446. Regarding application (a), since the complainant had lost the Letter of Approval for Graduation, and upon TRT's suggestion, she applied for a testimonial of the Postgraduate Diploma in Early Childhood Education (the testimonial) from the university and submitted it to TRT. On 13 August 2014, TRT approved application (a).

447. However, JOKC staff refused to approve application (b) on the grounds that the testimonial could not prove that she was approved for graduation in respect of the Diploma Course (graduation status). The complainant followed the suggestion of JOKC staff and called the university to request for re-issuance of the Letter of Approval for Graduation. The university replied that the university would only issue the Letter of Approval for Graduation once. In the event that the letter was lost or damaged, the student may apply for the testimonial, which could serve as a proof of the student's status of studies. The complainant informed JOKC staff of the reply of the university and requested JOKC to verify her graduation status with the university, but to no avail. The complainant thus turned to her elder brother for help and requested JOKC staff to talk to her brother. Nonetheless, the staff member said that he had no obligation to discuss the issue with person(s) other than the applicant. The staff member instead asked if the complainant "had come of age and graduated".

448. In the light of the above, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against EDB and SWD. The complainant alleged that JOKC unreasonably refused application (b) and the staff's attitude was poor.

The Ombudsman's observations

449. The Office accepted SWD's explanations. The daily operation of JOKC and daily work of the staff concerned were under EDB's direct supervision and monitoring. SWD had never instructed the staff concerned not to verify the qualification of the application with other departments/units or the institution concerned. In other words, the incident had nothing to do with SWD. In view of this, The Ombudsman considered the complainant's complaint against SWD unsubstantiated.

450. Regarding the complaint against EDB, the core questions are –

(a) was it reasonable for JOKC not taking the initiative to call the university to enquire about the complainant's graduation status; and

(b) was it reasonable for JOKC not approaching TRT for details so as to consider whether application (b) should be approved, even with the knowledge that TRT had already approved application (a).

451. As regards question (a), it was the applicant's responsibility to submit adequate documents to prove her successful completion of the recognised training course. It was not unreasonable for JOKC staff to advise the complainant on 14 August 2014 to request the university re-issuing the Letter of Approval for Graduation or issuing other document(s) to prove that she had obtained the graduation status. Therefore, JOKC staff should not be blamed for not taking the initiative to call the university to enquire about the complainant's graduation status.

452. For question (b), JOKC staff was queried by the complainant's elder brother on 15 August 2014 about the reason of not approving application (b) given that TRT had approved application (a). However, the staff did not approach TRT immediately for details so as to consider whether application (b) should also be approved. This reflected the following problems in the system and work culture of EDB –

(a) though the operations of TRT and JOKC were governed by different ordinances, both are units under EDB responsible for processing and approving qualifications. EDB allowed them to decide at their own discretion whether to approach other departments/units or the institution concerned to verify the applicant's qualification. As a result, members of the public would be confused or even discontented when they submitted the same document(s) to different units within the same department but were treated differently; and

(b) JOKC staff did not "take one step further" to approach TRT for details after noting the applicant's problem and that TRT might have a solution. Yet, EDB totally agreed to the act of the staff concerned, which was hidebound and went against the mission of government departments to provide assistance to members of the public as far as possible.

453. As a matter of fact, after the involvement of the Office, the seniors of JOKC communicated with their counterparts at TRT. This had then easily solved the complainant's problem and her application (b) was approved. It could be seen that EDB should improve the coordination of these two units with a view to providing greater convenience to members of the public.

454. Regarding the complaint of the staff's poor attitude, due to the absence of independent corroborative evidence such as telephone recording, the Office was unable to ascertain the real situation and thus no comment could be offered in this regard.

455. In view of the above, The Ombudsman considered the complainant's complaint against EDB partially substantiated.

456. The Ombudsman urged EDB to review the practices of TRT and JOKC in processing applications, and remind the staff that when handling applications from members of the public, they should act appropriately with regard to actual circumstances, provide assistance as far as possible, and avoid sticking to the established practice indiscriminately.

Government's response

457. EDB accepted The Ombudsman's recommendation and has reviewed the practices of TRT and JOKC in processing applications for registration as a teacher/child care worker, and made appropriate coordinated adjustments. Specifically, TRT and JOKC have enhanced their workflow and the staff would, depending on the circumstances of each case, provide assistance for the applicants, including approaching the institutions concerned direct with a view to obtaining the required supporting documents as soon as possible. EDB has implemented the enhanced workflow with immediate effect.

Government Secretariat – Food and Health Bureau

Case No. 2013/2561(I) – (1) Failing to reply to the complainant's enquiries on whether a particular brand of milk powder was under export restriction; and (2) Refusing to release the list of milk powder under export restriction for public reference

Background

458. During her visit to Hong Kong in April 2013 as a visitor, the complainant bought whole-milk powder of a brand. When she took it back to the Mainland, she was detained by the Customs and Excise Department (C&ED) upon customs inspection and informed that the milk powder was among the controlled milk powder on a list provided to C&ED by the Food and Health Bureau (FHB) (the List), meaning it was subject to export control regulation. However, the List was only shown to her after she was arrested.

459. The complainant then emailed FHB to enquire whether the milk powder was subject to export control regulation but received no reply. She was also dissatisfied with FHB's refusal to release the List and alleged that this would make it difficult for the public to comply with the regulation.

The Ombudsman's observations

460. FHB did not issue a reply to the complainant until some five months later. Moreover, it had not acknowledged receipt of it or issued any interim reply. There was delay on the part of FHB.

461. The Office of The Ombudsman (the Office) did not accept the various reasons given by FHB for not releasing the List. The Office believed that the List could provide information about the types of milk powder subject to export control regulation. This would avoid members of the public breaking the law inadvertently or being misled by dishonest shop operators. The Office did not see any justifications in FHB's argument that enforcement authority and effectiveness would be undermined by releasing the List.

462. The Office took the view that as long as the List would include notes to explain clearly that it would be updated from time to time and that brands of milk powder not on the list might also be subject to export control regulation, misunderstanding could be avoided and people could not use it to disclaim responsibility. In fact, paragraph 2.13.2 of the Guidelines on Interpretation and Application of the Code on Access to Information (the Code) reads, "The provision in paragraph 2.13(a) of the Code recognises that departments may withhold information relating to incomplete analysis, research or statistics where the incompleteness could produce a misleading impression. Departments may however decide to release this type of information if it is possible for the information to be accompanied by an explanatory note explaining the ways in which it is defective." Although the List would not be exhaustive, it could at least provide the public with information on those types of products subject to export control regulation and thus should not be carried in contravention with the regulation. As such, unnecessary disputes could be avoided.

463. FHB argued that the List only served as internal reference for law enforcement agencies. However, FHB also pointed out that the Government leaflet already provided clear information. The Office found these two statements contradictory. If the enforcement criteria were clear enough, law enforcement officers would not need any reference list at all. If FHB believed that even ordinary people could understand the enforcement criteria without a list, then why law enforcement officers would find it more difficult to understand the legislation and require a list to facilitate enforcement action?

464. The Office considered it a responsibility of law enforcement agencies to provide clear information and guidelines on the coverage of relevant legislation to avoid members of the public breaking the law inadvertently. Whatever reasons the accused would provide as defence and whether the court would accept them was beyond the control of those agencies.

465. Release of the List might not be the solution to all problems, but it could at least help to clarify the coverage of the legislation and provide a channel for updates without the need to wait until after judicial proceedings had started. This is particularly important, as the maximum penalty were two years' imprisonment. In view of the above, the argument for releasing the List would, on balance, far outweigh the inconvenience and problems that the List might cause.

466. As such, The Ombudsman considered this complaint substantiated.

467. The Ombudsman recommended that FHB should–

(a) comply with the Code and release the List for public reference. Should FHB consider the List to be containing "incomplete analysis, research or statistics where the incompleteness could produce a misleading impression", it could include explanatory notes as supplementary information in accordance with paragraph 2.13.2 of the Guidelines on Interpretation and Application; and

(b) provide accurate and detailed replies to public enquiries to avoid confusion.

Government's response

468. FHB accepted The Ombudsman's recommendation (b) to explain clearly whether or not the activity in question is governed by the export control regulation when replying to public enquiries. FHB has, since 21 May 2014, adopted a new reply format which categorically provides the clearest, up-to-date and accurate information to every enquirer.

469. As for recommendation (a), having consulted the Department of Justice, FHB considers that releasing the List to the public may trigger unnecessary legal disputes (for example, the respondent may disclaim responsibility by claiming that he or she had been misled) which may make it more difficult to institute prosecution and thus compromise the effectiveness of enforcement. As mentioned above, FHB has improved its replies to public enquiries having regard to The Ombudsman's recommendation. FHB considers that this approach should be able to provide members of the public effectively and clearly with the most up to date information on whether the milk products in question are under regulation. This also fulfils one of the important objectives of setting up the Code, i.e. enhancing the openness and transparency of the Government. On the contrary, releasing the List will cause confusion and misunderstanding and its harm will outweigh the good. It will compromise the effective enforcement of the Import and Export (General) (Amendment) Regulation 2013. There is a real risk that disclosing such an incomplete list solely prepared for internal reference would neither be comprehensive nor updated. For a list maintained by the Government to

include some but not the other brands may generate a perception which the trade may find prejudicial to their goodwill and commercial interest. On balance, FHB did not find it justifiable or necessary to release the List and considered that paragraph 2.6 of the Code will still be met even if the List is not disclosed. As such, FHB remains the position that the List should not be disclosed. FHB has informed the Office of the explanations.

Government Secretariat – Food and Health Bureau

Case No. 2014/3465(I) – The Food and Health Bureau refused to provide the applicant with information pertaining to a meeting in Chengdu in March 2013

Background

470. On 8 August 2014, the complainant filed a complaint to the Office of The Ombudsman (the Office) against the Food and Health Bureau (FHB).

471. The complainant was a reporter. He with his colleague (collectively known as the applicant) had since January 2014 enquired FHB repeatedly about the meeting in Chengdu on 27 March 2013 with the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) for updating the information on pesticides in food as specified in Schedule 1 to the Pesticide Residues in Food Regulation (the Schedule). However, as at 30 July 2014, FHB had not yet provided the following information –

(a) written account/record of the suggestion made by AQSIQ to FHB to delete three types of pesticides from the Schedule;

(b) minutes of the meeting in Chengdu;

(c) the venue, theme and nature of the meeting;

(d) the itineraries of the Hong Kong representatives funded by public money to attend the visit;

(e) name list of AQSIQ representatives participating in the meeting;

(f) name list of experts from relevant authorities on the Mainland; and

(g) if there is no meeting minutes, the reason for that.

472. The complainant considered FHB's failure to provide them with the above information was in breach of the Government's Code on Access to Information (the Code).

The Ombudsman's observations

473. Paragraph 1.14 of the Code specifies that the Code does not oblige departments (including policy bureaux) to acquire information not in their possession. Paragraphs 1.16 and 1.17 of the Code stipulate that if a department refuses a request for information, it should inform the applicant within 21 days of receipt of the written request about that. If FHB does not have information (a) and (b), it follows that no information could be provided to the applicant. FHB had informed that applicant within 10 days that it was not in possession of information (a) and (b), and had therefore complied with the Code.

474. For information (g) (i.e. the reason for the Chengdu meeting not having minutes) requested by the applicant, although FHB's reply could not be regarded as detailed, the Office considered that FHB had responded to the question of the applicant.

475. For information (d) (i.e. the itineraries of the Hong Kong representatives funded by public money to attend the visit), the Code stipulates that government departments should provide on request information held by them, unless there are specific reasons as set out in the Code not to do so. If a department refuses a request for information, it should explain to the applicant the reason(s) as set out in the Code for doing so. The Office believed the itineraries of government officials' duty visits should, in general, not be kept in confidence. For the applicants' enquiries, FHB had all along avoided a reply without giving any reason. It was only until the Office got involved that FHB provided us with some basic information regarding the duty visit concerned. The evasive manner of handling the matter was undesirable, and contrary to the requirements of the Code.

476. For information (c), (e) and (f), FHB still refused to disclose them even though the Office got involved, citing the following reasons –

(a) paragraph 2.10(b) of the Code (i.e. information that the disclosure of which would inhibit the frankness and candour of discussion within the Government, and advice given to the Government) and paragraph 2.10.3 of the Guidelines on Interpretation and Application (Guidelines) of the Code (i.e. civil servants involved in the decision-making process be able to express views and tender advice without being concerned that these views and advice will be subject to debate and criticism); and

(b) paragraph 2.4(a) of the Code (i.e. information that the disclosure of which would harm or prejudice the conduct of external affairs, or relations with other governments or within international organisations) and paragraph 2.4.1 of the Guidelines (i.e. the above-mentioned "other governments" includes the government of Hong Kong Special Administrative Region's own sovereign state).

477. For reason (a), the Office considered the information involved in the case did not fall within the specific conditions listed in the Code and the Guidelines cited by FHB. The Office failed to see why those conditions could be applied to refusing to disclose information (c), (e) and (f).

478. As for reason (b), the Office considered it acceptable because it would be hard for FHB to unilaterally violate the consensus it had with AQSIQ by disclosing the information concerned to the public. However, despite repeated requests made by the applicant, FHB had all along failed to provide information (c) and (e) without explaining to the applicant frankly the reasons for refusing to disclose the information required by the Code. As for information (f), FHB had delayed for over a month before explaining the reason for refusing to disclose the information, and even then the explanation was not detailed, without making it clear that FHB considered disclosing the information would prejudice the conduct of external affairs or relations with the Mainland government. It was only until the Office got involved that FHB gave the exact reason (b). The Office considered such an evasive manner of handling the matter was not conducive to dispelling the doubts of the applicant, but had caused more speculations instead.

479. Overall speaking, The Ombudsman considered this complaint substantiated.

480. The Ombudsman urged FHB to strengthen the training for all levels of staff to enhance their understanding of the Code and the Guidelines, in particular the applicability of various provisions, in order to ensure that requests for information from the public could be processed properly.

Government's response

481. FHB accepted The Ombudsman's recommendation. With the help of the Constitutional and Mainland Affairs Bureau, FHB completed on 15 May 2015 the training relating to the Code and the Guidelines for staff members from different grades.

Government Secretariat – Food and Health Bureau

Case No. 2014/3773 – Failing to provide adequate public dental services to the elderly

Background

482. The Food and Health Bureau (FHB) provided inadequate public dental services, including inadequate public dental clinics, inadequate general public sessions (GP Sessions) in dental clinics, and narrow scope of dental services at the GP Sessions, etc., rendering the elderly who suffer from oral health issues unable to use the concerned services. The complainant had reflected its views and requests to FHB which, nonetheless, refused to improve public dental services due to insufficient resources.

The Ombudsman's observations

483. The Office of The Ombudsman (the Office) understood that the complainant would like the Government to improve public dental services benefiting more elderlies. Nonetheless, the cost of dental services was high. Expanding the scope of dental services significantly for the public would require a large amount of resources and it was not the usual practice of other advanced countries. Therefore, it was not unreasonable that, under limited resources, the Government focused its resources on taking care of persons with special needs (such as providing dental grant for the elderly recipients of the Comprehensive Social Security Assistance (CSSA) Scheme, and free outreach dental services for elderlies residing in residential care homes (RCHs)).

484. Promotion, education and preventive efforts largely constituted the Government's policy on oral health and dental care. The Office agreed that in dental care area, prevention had better long-term efficiency than treatment. Therefore, it was pragmatic for the Government to focus its resources on promotion and education, as well as providing dental care for students. This prevented problems from the roots.

485. The Office understood that when improving support to elderly dental services, the authority would have to consider, along with resource implications, if the number of dentists in Hong Kong was sufficient to handle the demand. Therefore, gradual, instead of abrupt, implementation of improvement measures would be needed. FHB had been improving dental services for the elderly in the past, for instance, launching the pilot outreach project in 2011, expanding its scope of treatment and service in 2014, increasing the amount of the Elderly Health Care Voucher for a number of times, considering to expand the scope of subsidy under the Community Care Fund (CCF), etc.. In addition, the Government regularly collected and analysed local data for oral health and, from which, set out its objective and policy on oral health services. This reflected that the Government regularly studied and reviewed its policy, in order to ensure the resources were allocated to the most needed areas.

486. Regarding the problem of dentist shortage, the Government had some targeted measures. For example, it had joined hands with the Dental Council of Hong Kong and Hong Kong Dental Association to contemplate some short-term measures with a view to easing the shortage situation. The Government had established a steering committee to review the healthcare manpower (including dentists) planning and advise the University Grants Committee on the publicly-funded places in future (including dental student places), targeting to resolve the problem in the long run. The Office urged FHB to actively consider increasing the dental student places in order to solve the problem of dentist shortage in the long run.

487. In conclusion, although FHB could not comprehensively enhance the dental services for the elderly due to the limitation of resources and number of local dentists, it had been improving the elderly dental services gradually through various measures in order to take care of elderlies with special needs and financial difficulties. In view of policy setting and resource allocation, FHB had cogitated comprehensively and there was no malpractice from the angle of administration.

488. Notwithstanding this, the Office was of the view that the Government would need to increase its attention on the support provided to elderly dental services given the ageing population of Hong Kong and the increase in the number of elderlies. Moreover, the lack of teeth would severely affect the quality of life. The Government should take a step further if resources permitted. The Office understood that the Government's policy was to focus on the care of some elderlies with

financial difficulties (for instance providing dental grant for the elderly recipients of CSSA which covered most dental care items) and those with lower self-care ability (for instance providing free outreach dental services to the elderly residing in RCHs). For elderlies who were not receiving CSSA or residing in RCHs, and did not earn or save much, it would be difficult for them to afford the cost of private dentist. As such, the Office urged FHB to consider targeting on the dental needs of this group of elderlies and providing enhanced support as appropriate during the review of all facets of its dental supports.

489. Overall speaking, The Ombudsman considered this complaint unsubstantiated.

490. The Ombudsman recommended that FHB, when reviewing all facets of its dental supports, should consider targeting on elderlies who were not receiving CSSA or residing in RCHs, and did not earn or save much, with a view to enhancing the support as appropriate.

Government's response

491. FHB accepted The Ombudsman's recommendation.

492. The Chief Executive announced in the 2015 Policy Address that CCF will expand its Elderly Dental Assistance Programme progressively in the second half of 2015 to cover elderly persons who are recipients of Old Age Living Allowance (OALA), starting with those aged 80 or above in the first phase involving about 130000 elderly people. The first phase of the expanded programme (i.e. OALA recipients aged 80 or above who have not benefited from the elderly dental assistance funded by CCF or the Outreach Dental Care Programme for the Elderly) would be launched on 1 September 2015 to provide free dentures and related dental services for the elderly.

Government Secretariat – Security Bureau

Case No. 2014/3164(I) – Refusing to provide the complainant with information regarding the polls conducted for the RESCUE Drug Testing Scheme

Background

493. On 16 July 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Security Bureau (SB).

494. On 2 July 2014, the Action Committee Against Narcotics (ACAN) held a press conference to announce the consultation conclusion on the RESCUE Drug Testing Scheme (RDT). The complainant, as a reporter, attended the conference. During the conference, ACAN Chairman advised that ACAN had conducted three opinion polls[1] on RDT, including two polls (polls A and B) during the public consultation period and the third poll carried out by the Public Opinion Programme of the University of Hong Kong after the consultation period (poll by HKUPOP).

495. In the "Consultation Conclusion on RDT", ACAN had only provided information on the details and results of the poll by HKUPOP, but not polls A and B. Neither was this information provided by ACAN Chairman during the press conference. As the Narcotics Division (ND) of SB was also the secretariat of ACAN, the complainant sent a request to ND on 3 July for information on polls A and B. ND replied on the day after that according to the general practice, this kind of poll results was for internal reference only and was not to be released.

496. On 5 July, the complainant wrote to ND again and queried why ND had been selective in the disclosure of poll results and chose to announce the results of the poll by HKUPOP only, but not polls A and B. ND replied on 9 July that the polls conducted before the end of the consultation period aimed to provide reference for policy formulation by ND. According to the general practice, this kind of poll results was for internal reference only and was not to be released.

[1] Note of SB: The former ACAN Chairman's remark was based on his impression and was not the complete fact. Around the public consultation period of RDT, a total of four polls had actually been conducted. SB had already advised the Office of the fact in SB's response.

497. The complainant was of the view that as RDT involved legislative procedures and had far-reaching implications, the public ought to have the right to know about all the relevant information. It was unreasonable for ND to employ "for internal reference only" as the reason to reject the disclosure of the results of polls A and B. This had also contravened the Code on Access to Information (the Code).

The Ombudsman's observations

498. The Office had studied the replies of ND to the complainant on 4 and 9 July 2014. In the two replies, the reason stated by ND for not providing the information was that "as the results of polls A and B are for internal reference only, the information will not be released".

499. However, "information for internal reference only" was not one of the reasons under Part 2 of the Code on Access to Information (the Code) for refusing to disclose information. The Office considered that if ND needed to decline the complainant's request, it should give the complainant a reason/reasons based on Part 2 of the Code.

500. In response to the investigation by the Office, SB quoted some reasons in Part 2 of the Code to explain the decision of not providing the complainant with the information of the three polls. The Office had the observations as set out below.

Using para. 2.13(a) of the Code as a reason

501. SB raised the concern that the disclosure of information might mislead the public into believing that the three polls was part of the public consultation exercise of ACAN on RDT. Nevertheless, the Office considered that ND's concern was irrelevant to para. 2.13(a) of the Code because information on these polls could not be regarded as "information relating to incomplete analysis, research or statistics". In fact, when the complainant requested for the relevant information (on 3 July 2014), ND had already completed all three polls (August 2013 to January 2014), and these polls were not "information relating to incomplete analysis, research or statistics".

502. Moreover, ND could add a detailed explanatory note when releasing the information to explain to the complainant and members of the public the purposes of these polls. This could also address the complainant's concern that ND was selective in their disclosure of

information.

Using para. 2.9(c) of the Code as a reason

503. The Office agreed that, if the Government prematurely released results of polls on important policy issues, this would lead to misunderstanding and obstruct objective public discussions. The consultation work of departments on these issues would then be affected.

504. However, in this case, when the complainant made the request for access to information, ND had already completed all three polls which were for internal reference and released the results of the poll by HKUPOP which was part of the first-stage public consultation on RDT. In other words, the public were well aware of ND's recommendations in the public consultation document and had fully discussed these recommendations. The Office therefore could not agree that the release of information on the polls to the complainant would arouse unnecessary controversies or bar different sectors of the community from discussing RDT objectively in future public consultations.

505. In this case, ND had not complied with the requirements of the Code as it had refused to provide the complainant with the information of polls A and B on an invalid ground by claiming that the "information was for internal reference only". As such, The Ombudsman considered the complaint substantiated.

506. The Office did not accept SB's incorrect quoting of paras. 2.13(a) and 2.9(c) of the Code as grounds for refusal and recommended SB to –

(a) reconsider providing the complainant with the requested information; and

(b) remind relevant units of the need to follow the requirements under the Code to consider public requests for information.

Government's response

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

(a) complied with The Ombudsman's recommendations and the principles of the Code by reconsidering the request of access to information by the complainant. ND provided the complainant with the requested information on 10 February 2015; and

(b) issued an email to all relevant units of SB on 27 February 2015, enclosing the Code, relevant guidelines as well as the real examples of relevant government departments handling access to information cases. The email also reminded all relevant units to strictly comply with the Code's requirements when considering requests of access to information from members of the public.

Home Affairs Department

Case No. 2014/0097 – (1) Failing to give advance notice of the issuance of number chips for distribution of admission tickets to a public forum; and (2) Unreasonable queuing arrangements

Background

508. On 7 January 2014, the complainant lodged a complaint against the Home Affairs Department (HAD) to the Office of The Ombudsman (the Office).

509. According to the complainant, on the night of 13 September 2013, she went to the Leighton Hill Community Hall at Happy Valley (LHCH) to queue for admission tickets for "The Third Public Forum of the Chief Executive" scheduled to be held in the afternoon of 15 September. In the morning of 14 September, HAD suddenly announced that the admission tickets would be distributed through issuance of number chips (number chip arrangement). Thereafter, staff of HAD even requested public members who had received the number chips, and subsequently the admission tickets, to stay in the designated waiting area until they were admitted into the forum venue on 15 September. Those who wanted to temporarily leave the queue were required to register with the staff, and a maximum of 30 minutes was allowed each time (queuing arrangements).

510. The above complaint against HAD is summarised as follows –

(a) failing to give advance notice of the issuance of number chips for distribution of admission tickets to a public forum; and

(b) unreasonable queuing arrangements which affected the health of the public.

The Ombudsman's observations

511. Noting that there were public members (including the complainant) queuing up as early as the night of 13 September outside LHCH, the Wan Chai District Office (District Office) implemented the number chip arrangement, in order to maintain queuing order and allow public members who still had to wait for a long period of time to leave the queue temporarily. The Office considered the arrangement reasonable. Regarding the failure of HAD to give advance notice of the number chip arrangement, the Office accepted HAD's explanation. Therefore, The Ombudsman considered allegation (a) of the complaint unsubstantiated.

512. The Office took the view that HAD's request for those members of the public who had received number chips to remain in queue for the distribution of admission tickets was consistent with the arrangements already announced to the public, including distributing the admission tickets on a first-come, first-served basis and within the time as earlier announced. The arrangement was not considered inappropriate.

513. As to whether the staff of the District Office had instructed or advised the members of the public with admission tickets to remain in the queue until they were admitted into the forum venue, the account given by the complainant was different from that of the District Office. The Office believed there might be a misunderstanding in the communication between the complainant and the staff. The Office understood that the District Office allowed the queuers to leave the queue temporarily out of goodwill. Nonetheless, even though there were public toilets, shower facilities, fast food restaurants and convenience stores near the designated waiting area, and the queuers were allowed to leave the queue temporarily several times, the time limit of 30 minutes was not long enough to meet the needs of those in queue. Moreover, it had come to the notice of the District Office that members of the public started queuing up in the evening of 13 September, the day before the introduction of the number chip arrangement. Given the fact that the District Office noted the queue well before the morning of 15 September, the scheduled time for the distribution of the admission tickets, it should have responded promptly by extending the time limit for leaving the queue for the convenience of the queuers.

514. The Ombudsman therefore concluded allegation (b) of the complaint partially substantiated.

515. Overall speaking, The Ombudsman considered the complaint partially substantiated.

516. The Ombudsman recommended that HAD should review the arrangement for allowing public members to temporarily leave the queue, and make arrangements more convenient to public members in queue in any similar future events, including considering an appropriate extended time limit for temporarily leaving the queue.

Government's response

517. HAD accepted The Ombudsman's recommendation. Subject to actual circumstances, the time limit for temporarily leaving the queue for similar future events would be extended to one hour or more. Besides, HAD will continue to review and revise from time to time the queuing arrangements to be implemented in similar future events in response to the needs of the public and actual circumstances.

Hong Kong Housing Society

Case No. 2014/1836(R) – Unreasonably refusing to provide the policy document on taking over of public housing tenancy

Background

518. The complainant complained against the Hong Kong Housing Society (HKHS) for unreasonably refusing to provide information.

519. The complainant and his late father were tenants of a flat owned by HKHS. Upon the death of his father, the complainant enquired about his eligibility to take over the tenancy of the flat. Told by HKHS that he was ineligible, the complainant requested a copy of the relevant policy and guidelines but was dissatisfied that HKHS refused it, on the ground that such information was "for internal use". On 24 April 2014 the complainant lodged a complaint with the Office of The Ombudsman (the Office) against HKHS on that.

The Ombudsman's observations

520. The "2005 guide" (an internal circular which HKHS issued in March 2005 to all staff on the subject of disclosure of information) provided for entertaining information requests "as far as practicable" but contained no further guidance on what the phrase specifically entailed in its meaning. While the guide stipulated the approving authority (i.e. the two directorate officers) for releasing confidential and restricted information, it provided neither the guidance on the basis for the approving authority to give or decline consent to release such information, nor details of what information would be classified as confidential or restricted. As such, the Office considers the guide totally inadequate in ensuring transparency of the operation of HKHS and could not meet the four principles (taking reference to the Government's Code on Access to Information (the Government Code)) to be regarded as a reasonable and appropriate set of guidelines/procedures.

521. The HKHS Code on Access to Information (the HKHS Code), which was drawn up after HKHS had refused to provide the information requested by the complainant, includes as information that may be refused "internal papers prepared for, and records of internal meetings" and "information relating to the management and operations of the Housing Society and its businesses such as Codes, Guidelines and Manuals for internal use". However, it provides no explanation as to why such documents by their nature should not be disclosed.

522. By way of comparison, the Government Code has in its Part 2 the provision that information "the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department" may be withheld, which explains the nature of the information that makes it unsuitable for disclosure.

523. The Office does not accept that the complainant's request was met. HKHS expressly refused the request on the ground that the document was "for internal use". It should be noted that whether the complainant was explained the policy in question is irrelevant. He requested a copy of a document and was not given it. That was refusal.

524. The reason for refusal quoted was "for internal use", which may be interpreted as "information of confidential or restricted nature" under the "2005 guide". However, the guide provided no details of what would constitute "information of confidential or restricted nature". The reference to "for internal use" only reflects HKHS's decision not to allow its disclosure to the public rather than the nature of the information to make it unsuitable for disclosure. It is therefore not compliant with the principle of transparency.

525. The Office has examined the "Take Over the Tenancy" document. A large part of the "Take Over the Tenancy" document is about conditions and procedures for applications for taking over tenancies. Such information, i.e. information on conditions and procedures for applications for taking over tenancies, is an important reference for tenants and the public. In fact, the guidance note (on application to take over tenancy) subsequently issued by HKHS bears similar information. The Office has not found anything suggesting that disclosure of such information would harm or prejudice the proper and efficient conduct of the operations of HKHS.

526. In this connection, paragraph 1.13.1 of the Guidelines on Interpretation and Application of the Government Code is relevant. It stipulates that when a request cannot be met by reference to an already published source, it is preferable to provide, if possible, a copy of the original record containing the requested information. If the original record contains information that should not be disclosed, such information should be obliterated from the copy of the document to be provided to the requester. Where the extent of obliteration is such that the original document becomes meaningless or misleading, consideration should be given to providing an intelligible summary of the record. The Office considers it necessary for HKHS to adopt a similar approach in considering the complainant's request for information.

527. To sum up, HKHS had refused the complainant's request for information without justifiable grounds and failed to explain to the complainant why the information should not be disclosed. In addition, The Office considers HKHS to have failed to consider other alternatives to meet the request. The Ombudsman therefore considers this complaint substantiated.

528. The Ombudsman recommends HKHS to –

(a) reconsider the complainant's request for document;

(b) review and revise the HKHS Code to make it in line with the four principles; and

(c) on completion of action on (b) above, provide suitable training to its staff to enable them to handle requests for information according to the revised HKHS code.

Government's response

529. HKHS accepted The Ombudsman's recommendations and has taken the following action –

(a) complied with the complainant's request and sent him a copy of the "Take-over of Tenancy" document on 9 March 2015;

(b) reviewed and revised its Code on Access to Information to make it in line with the four principles set out in the Investigation Report. HKHS's revised Code has been uploaded onto HKHS's website accordingly; and

(c) arranged a briefing for its senior managers and section heads on HKHS's new Code on Access to Information on 11 May 2015. Subsequent training for frontline staff in various sections will be organised by the respective section heads where appropriate.

Hong Kong Monetary Authority

Case No. 2014/1548 – (1) Failing to instruct the staff concerned to record and convey the complainant's message as undertaken; (2) Unreasonably requiring the complainant to provide case details; (3) Unreasonably requesting the complainant to put her enquiry in writing; (4) Improperly keeping the information of a complaint lodged more than seven years ago; (5) Failing to acknowledge receipt of complaint; and (6) Delay in responding to the complainant

Background

530. According to the complainant, she called the Hong Kong Monetary Authority (HKMA) in the end of 2013 to enquire about the two replies issued to her by HKMA in 2011 and 2012 via the Legislative Council Secretariat. Thereafter, staff member A of HKMA called the complainant back but to no avail, thus leaving the number of HKMA's Banking Complaint Hotline (the complaint hotline) in her voice mailbox.

531. The complainant called the complaint hotline repeatedly on 6, 9 and 10 December 2013 to contact staff member A. The calls were all answered by staff member B. Staff member B requested on every occasion that the complainant should state the intent of the calls as well as the case number and details. Staff member B also refused to help her forward the call or leave messages to staff member A.

532. The complainant was eventually able to contact staff member A on 10 December. The latter wrote down the complainant's enquiries. During the conversation, staff member A promised to –

(a) seek staff member C's advice on the complainant's enquiries and then reply to the complainant; and

(b) inform the staff of the complaint hotline that the messages should be forwarded to staff member A when the complainant called in future.

533. Nevertheless, staff member B still refused to forward the complainant's message when the complainant called the complaint hotline later during the same day. Furthermore, staff member A replied thereafter to the complainant that staff member C would not respond to her enquiries. The complainant would have to enquire in writing before HKMA could follow up.

534. The complainant wrote to HKMA in writing via 1823 in the same day. As the complainant could not receive the acknowledgement from HKMA, she requested through 1823 on 21 and 30 December 2013 and 6 January 2014 that HKMA should issue acknowledgement to her direct or via 1823. She also specified the content that the acknowledgement should comprise and requested the responsible staff to contact her as soon as possible. At the same time, the complainant sought the help from members of the Legislative Council. HKMA issued a written reply to the complainant on 28 January 2014.

535. The complainant subsequently lodged a complaint against HKMA with the Office of The Ombudsman (the Office). The complainant alleged that –

(a) staff member A failed to fulfil the promise of instructing staff member B to convey the complainant's message when the complainant called;

(b) staff member B refused to forward the complainant's calls and messages unless the complainant was able to provide the case details;

(c) staff member C refused to respond to the complainant's verbal enquiries and insisted that the complainant must make her enquiry in writing before HKMA could reply;

(d) HKMA inappropriately kept the information of a complaint lodged in 2004 by the complainant for more than seven years;

(e) HKMA only issued automatic acknowledgements to 1823 but refused to accede to the complainant's request for issuing an acknowledgement to her direct; and

(f) HKMA had delayed in responding to the complainant.

The Ombudsman's observations

Allegation (a)

536. After listening to the concerned phone recording, the Office considered that staff member A had indeed promised to inform the complaint hotline staff of the message forwarding arrangement for the complainant. Staff member A was negligent for not having subsequently informed the complaint hotline staff of the relevant arrangement.

537. Furthermore, staff member A did not realise that the complaint hotline staff would not forward any call or message of a caller without verifying his identity. This reflected the inadequacy of information within HKMA, thus not all staff members were familiar with the operation procedures concerned. As such, The Ombudsman considered allegation (a) substantiated.

Allegation (b)

538. The Office considered that staff member B's insistence on verifying the identity of the complainant before handling her enquiry was in accordance with HKMA's established procedures. It was not intended to make the complainant feel uneasy. The Office also accepted that it was not inappropriate for HKMA to adopt divertive processing procedures, having regard to the large amount of enquiries/complaints received. Moreover, HKMA did in fact provide the direct contact method for reaching the staff of the investigation team, though it had not been adequately used in this incident. As such, The Ombudsman considered allegation (b) unsubstantiated.

Allegation (c)

539. In accordance with its established procedures, HKMA required members of the public to raise any request for personal data in writing in order to protect privacy. This was not unreasonable. Nonetheless, HKMA also demanded members of the public to complete a specified form for personal data access request before handling. Staff member A only required the complainant to put her request in writing without mentioning the specified form. It was apparent that such a response lacked sufficient and accurate information. The work carried out by the complainant might be abortive if she followed the instruction of just putting the request in writing.

540. The Office understood that HKMA would accept general verbal enquiries. According to the call recording between the complainant and staff member A, the complainant had indicated in the conversation that she hoped the relevant staff could contact her direct. The Office thus considered that HKMA should have asked the responsible staff to understand the details of the enquiry before deciding the way to follow up (say if the complainant should be requested to put the enquiry in writing).

541. As such, The Ombudsman considered allegation (c) substantiated.

Allegation (d)

542. After listening to the concerned phone recording, the Office accepted HKMA's explanations. The Office believed that it was a misunderstanding of the complainant that HKMA still inappropriately retained the case information of a complaint lodged by her in 2004. As such, The Ombudsman considered allegation (d) unsubstantiated.

Allegation (e)

543. As shown by the relevant records, the complainant had called staff member A on 11 and 20 December 2013, and repeatedly requested HKMA to acknowledge her letter dated 10 December via 1823 as well as provide the information of the responsible staff. Nevertheless, HKMA turned a deaf ear to all the requests. The auto-acknowledgement from HKMA was not sent direct to the complainant and there was no provision of the contact details of HKMA's staff. It was not unreasonable for the complainant to request to receive an acknowledgement direct from HKMA with the contact details of the staff provided. Even HKMA had reasons for not acknowledging the complainant direct, it should still explain to the complainant as soon as practicable while not ignoring her requests completely. It would be of no use to explain later in the substantive reply to the complaint. As such, The Ombudsman considered allegation (e) substantiated.

Allegation (f)

544. HKMA did not acknowledge the four complaint letters from the complainants, and failed to make any reply. This would inevitably make the complainant feel anxious. Although the complainant's case involved several issues which required a longer processing time for HKMA, HKMA should still have issued an interim reply, advising her on the

progress of her complaint case. As such, The Ombudsman considered allegation (f) substantiated.

545. Overall speaking, The Ombudsman considered the complaints against HKMA partially substantiated.

546. The Ombudsman recommended HKMA to –

(a) ensure that staff members are familiar with the relevant operation procedures by strengthening internal communication of information and staff training; and

(b) remind staff members to handle enquiries and complaints with due care, including –

(i) making proper contact arrangements and providing holistic and accurate information to enquirers/complainants;

(ii) notifying complainants, in a timely manner, on the case handling progress and result;

(iii) providing service/assistance to enquirers/complainants in a positive and proactive manner, with a view to meeting their reasonable requests.

Government's response

547. HKMA accepted The Ombudsman's recommendations and has taken/will take the ensuing follow-up actions –

(a) an internal briefing was given to all staff of the Enforcement Department to explain the operation procedures of the complaint hotline and The Ombudsman's recommendations. Staff members were reminded of the importance of familiarising themselves with the relevant procedures and consulting the complaint hotline staff immediately whenever in doubt;

(b) the staff members concerned who handled the case were reminded to have full understanding of HKMA's established complaint handling procedures and ensure that the information provided to complainants would be accurate and appropriate, and that The Ombudsman's recommendations should be followed in order to prevent the occurrence of similar incidents in the future; and

(c) the Enforcement Department will periodically re-circulate the complaint hotline operation procedures to the staff and host regular internal talks with a view to refreshing staff members' understanding on the procedures concerned.

Hospital Authority

Case No. 2013/4316 – (1) Refusing to consider the ambulance record of the complainant's late husband to rectify his inaccurate medical report; and (2) Delay in informing the complainant of the reason for not obtaining the ambulance record and the way for her to obtain the record

Background

548. The complainant's late husband (the patient) had a fall injury at 4 p.m. on 6 November 2011. After 15 minutes and upon the arrival of ambulance, the ambulance staff provided him with an assessment and first-aid care. The patient, however, refused conveyance to the hospital for further investigation. After drinking alcohol during dinner at 8 p.m., the patient developed physical discomfort and fever. The complainant called ambulance service again at 11 p.m., and the patient was accompanied by his son to the Accident and Emergency Department (AED) of a hospital. Noting AED doctor's record that the patient had a fall after alcohol consumption, the complainant considered the documentation in the record of AED (AED record) inaccurate.

549. The medical report issued by the hospital was prepared based on AED record. The complainant considered that the cause of the patient's death as stated in the medical report was inaccurate, and had misled the insurance company to handle her insurance claim in an unjust manner, thus materialising unfairness to the complainant. Subsequently, she lodged a complaint with the Public Complaints Committee (PCC) of the Hospital Authority (HA).

550. The complainant alleged HA the following –

(a) despite her repeated requests, HA and the hospital refused to review the ambulance record at 4 p.m. (the First Ambulance Record), and just replied to her based on the inaccurate AED record. The complainant opined that the First Ambulance Record could prove that the patient did not consume any alcohol before the fall injury; and

(b) the complainant learned from HA's reply on 25 April 2014 that the First Ambulance Record could be obtained from the Fire Services Department (FSD). The complainant questioned why HA had procrastinated her case for two years before informing her of the arrangement, causing her unnecessary perplexity.

The Ombudsman's observations

Allegation (a)

551. The Office of The Ombudsman (the Office) had reviewed AED record. In the record, the triage nurse in AED wrote down the relevant information about the patient's situation, including "chronic drinker", "fever", "felt dizzy", "then fall", etc.. The record of the doctor concerned mentioned two times, i.e. "16:30" and "23:15 tonight", as well as recording the patient's signs, including "fever", "dizzy", "then drinking alcohol", "then fall", "continue drinking", etc.. As such, the real-time records produced by the two healthcare staff were largely identical.

552. On the other hand, HA had indicated that the medical reports written by its doctor on 7 February and 7 August 2012 did not mention the alcohol consumption of the patient before its fall at 4 p.m. on 6 November 2011. Nevertheless, the hospital stated clearly in its reply to the complainant dated 16 November 2012 that the doctor was informed of the alcohol consumption by the patient on the day during the consultation with the patient and his son on 7 November 2011. It was said that the patient continued to drink even after his head injury resulting from his fall in the afternoon.

553. The Office considered that the role of the hospital was to provide the patient with appropriate medical service. It was neither HA nor the hospital's responsibility to investigate issues outside medical treatment in order to facilitate the complainant's insurance claim. As such, if HA would have to consider whether it should seek other non-HA organisations or government departments for information, the emphasis should be the effect of such information on the treatment of patients, as well as the relevance between the two subjects. If such information would be impactful on the treatment of patients, then HA should surely try its best to follow up with a view to ensuring the provision of the most appropriate treatment to patients.

554. In this case, the patient had passed away before PCC had received the complaint. Moreover, the crux of the complaint was unrelated to the treatment rendered to the patient. The Office therefore concurred with HA that it was unnecessary to obtain the First Ambulance Record. Furthermore, both the ambulance and AED records were contemporaneous documentations by the professionals based on the information provided by the patient at the point of care and the circumstances of the moment. There was a few hours' difference in the compilation time of the two records. Even though the contents of the records were not fully consistent, it was difficult to disprove the validity of AED record.

555. According to the First Ambulance Record, the patient's condition at the material time was documented as "scalp hematoma and laceration but the patient strongly refused conveyance to hospital" as well as "the patient refused conveyance to hospital, conscious". Nonetheless, it did not indicate whether he had consumed alcohol before receiving ambulance service.

556. The AED record was documented by healthcare staff based on information as regards the patient's condition voluntarily provided by the relevant persons (e.g. the patient and the patient's relatives). They would then provide diagnosis and appropriate treatment based on their professional medical knowledge and examination results. Therefore, the Office considered that if the documentation in AED record was factually accurate, it would be difficult for the hospital to accede to the relatives' request to amend the medical record. It was appropriate for the hospital to prepare the medical report based on AED record. As such, The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

557. The complainant would like to read the First Ambulance Record. The Office agreed with HA's view. The secretariat of PCC should explain to the complainant in advance for the reason of not providing the First Ambulance Record. The complainant could then consider if she should apply to FSD direct for the First Ambulance Record.

558. After the Office's involvement in the case, the hospital had tried to request the said ambulance record from FSD. According to the reply of HA, the hospital did not indicate to FSD that the patient had already passed away. In accordance with the statute, FSD had to request the hospital to produce the authorisation letter from the patient, so that FSD

could consider the applicability of the Personal Data (Privacy) Ordinance (PDPO). In view of the said situation, HA did not request the hospital to follow up and even wrote in its reply to the complainant that FSD refused to provide the relevant information due to patient privacy.

559. The Office was the view that given HA and the hospital had decided in March 2014 to obtain The First Ambulance Record from FSD in response to the Office's inquiry, the issue should have been handled properly. Knowing that the hospital's handling of The First Ambulance Record application was chaotic and perfunctory without even informing FSD of the most important information (i.e. the passing away of the patient), HA had not righted the wrong. Instead, HA just replied to the complainant that the application was declined by FSD due to patient privacy reasons.

560. In the light of the whole case, the Office considered that in the course of handling, neither HA nor PCC's Secretariat had explained to the complainant their view or rationale. It was only in response to the Office's inquiry that HA vaguely explained in its reply that the hospital's application to obtain the First Ambulance Record from FSD was rejected. Hence, apparently, HA's unclear explanation had impressed upon the complainant that the HA had procrastinated the handling of her request.

561. On the other hand, it also reflected the lack of awareness and understanding of hospital frontline staff in handling issues related to the PDPO. HA and the hospital should strengthen staff training on this subject to prevent recurrence of similar problems.

562. Based on the analysis above, The Ombudsman therefore considered allegation (b) substantiated.

563. The Ombudsman recommended that HA should learn from the incident and strengthen staff training (especially for the handling of PDPO-related issues) to ensure reasonable follow-up and reply to complaint cases.

Government's response

564. HA accepted The Ombudsman's recommendation and will provide regular staff training to strengthen the awareness of frontline staff on the handling of PDPO-related issues.

Hospital Authority

Case No. 2013/4349 – (1) Faulty procedures and unreasonable decisions in favour of a particular bidder in two tender exercises for procurement of laboratory equipment; and (2) Unreasonably cancelling the first tender exercise without addressing the complainant's dissatisfaction

Background

565. The complainant, a medical equipment supplier, was aggrieved by the way the Hospital Authority (HA) conducted an invitation to quote and its subsequent bulk tender for a certain laboratory equipment. Essentially, the complainant alleged that –

(a) HA's tender procedures were faulty as its officers were allowed to manipulate the outcome by repeatedly asking potential bidders for comments on the tender documents and amending the specifications in the two exercises to unfairly favour a particular bidder; and

(b) when the complainant wrote to HA to air its dissatisfaction, HA unreasonably cancelled the quotation exercise and did not address its complaint.

The Ombudsman's observations

566. HA's technical requirements for equipment to be procured involved professional judgement. From the administrative point of view, the Office of The Ombudsman (the Office) considered HA have followed the proper procedures in accordance with its Procurement Manual in the collection of market information and change of tender specifications. In particular, the whole decision-making process involved many parties, including various sections within HA, and the specifications of the two procurement exercises were drawn up by Hospital A and the Tender Assessment Panel respectively. In such circumstances, it was unlikely that any party could seek to make any unreasonable or unjust changes to the specifications in favour of a particular bidder.

567. The Office found no evidence that HA officers had manipulated the outcome in the two procurement exercises. Therefore, The Ombudsman considered allegation (a) unsubstantiated.

568. The Office also noted that the invitation to quote exercise was cancelled with valid reasons in line with the Procurement Manual and there was no change to the specifications in the course of this exercise. However, in its letter informing the complainant of the cancellation, HA did state that its technical requirements had changed. HA explained that since none of the offers received in the cancelled exercise conformed to all the mandatory requirements, it was necessary to change them in the subsequent bulk tender exercise. The Office considered the wording in that letter inaccurate and misleading, resulting in the misunderstanding that the specifications had been changed in the first exercise.

569. Moreover, it was highly undesirable and improper that HA had never given a clear and substantive reply to the complainant. Even though it had duly considered the complaints and found them unjustified, HA should still give specific responses to the complaint points. The Ombudsman considered, therefore, allegation (b) partially substantiated.

570. Overall speaking, The Ombudsman considered the complaint partially substantiated.

571. The Ombudsman recommended HA to –

(a) review its complaint handling procedures regarding quotation and tender exercises; and

(b) ensure that all complaints are properly handled and replied to during and after quotation/tender.

Government's response

572. HA accepted The Ombudsman's recommendations and has taken the following actions –

(a) completed a consultancy review on the procurement procedures; and

(b) established formal procedures for complaint handling and appeals management regarding tender and quotation exercises.

Hospital Authority

Case No. 2014/0859 – Failing to put in place an effective mechanism to prevent the potential conflict of interest faced by doctors

Background

573. The complainant lodged a complaint against the Hospital Authority (HA) to the Office of The Ombudsman (the Office). The complaint claimed that the clinical professorial staff of a university (the University) practicing in a private clinic of a public hospital under HA (the University doctors) could share the income from the proceeds of their private consultations, thus creating a potential conflict of interest, especially with regard to classification of case complexity. HA has confirmed that the University doctors are required to observe the relevant guidelines, regulations and code of conduct of HA. The complainant considered that HA lacked an effective mechanism to avoid the potential conflict of interest faced by the University doctors.

The Ombudsman's observations

574. The Office had no information on whether the University doctors did over-classify the complexity of cases. However, given that the University doctors did share part of the income generated from their private consultations, it was understandable that there was at least a perceived potential conflict of interest if they had sole discretion in determining case complexity and hence the level of income from their private consultations.

575. This perception was accentuated by the difference in the financial arrangements by HA and the University for their doctors participating in providing consultation service to private patients, and the difference in the proportion of cases classified as complex by the two groups of doctors in the private clinic. In a previous complaint lodged by the same complainant, HA confirmed that HA doctors did not receive any additional pay for their consultations to private patients. For private patient cases attended by HA doctors, the income generated was used to support hospital's ongoing services/operations, including clinical service enhancement and/or staff training and development. It was noted that in 2012 and 2013, around 70% of the cases handled by the University doctors were classified as complex, while the corresponding figure for

HA doctors was only around 33%. HA could not explain this difference. As such, it was not easy to remove the perception that the University doctors might have a tendency to over-classify the complexity of cases vis-à-vis HA doctors.

576. The Office appreciated that the degree of case complexity hinged on a number of factors, which had to be determined based on the doctor's clinical judgment on individual cases. Moreover, given the wide range of specialties and complexity of medical condition, it would be difficult to lay down hard and fast rules for classification of case complexity. Nevertheless, with the big and inexplicable variation in such determination between the University and HA doctors, some kind of control mechanism is clearly called for. HA has no such mechanism in place.

577. The Office understood that the University had implemented a series of internal control measures. However, these measures mainly aim to ensure the transparency of charges and to minimise the risk of corruption but do not deal with the issue of over-classification of case complexity.

578. In view of the above, The Ombudsman considered the complaint against HA substantiated.

579. The Ombudsman recommended that HA should consider measures to dispel the perception that the University doctors may have a tendency to over-classify cases, including but not limited to –

(a) continuing to collect data of the private clinic cases attended by the University doctors and HA doctors in different categories and closely monitor the difference in the proportion of cases classified by the two groups of doctors; and if the difference is still substantial, trying to identify a reasonable explanation;

(b) providing more detailed guidelines regarding the classification of cases;

(c) putting in place a mechanism (such as exchanging the data collected in (a) above and conducting occasional case conferences) to enable a more consistent classification standard for HA doctors and the University doctors; and

(d) increasing the transparency of the charging standard (such as disclosing the percentage of simple, intermediate and complex cases charged by individual doctors) so that the patients can make an informed decision when choosing doctors.

Government's response

580. HA accepted The Ombudsman's recommendations. HA and the two universities with medical faculties have set up a working group since September 2014 to review private patient services at public hospitals for service improvement. The Ombudsman's comments and observations are well noted, and HA will take on board all of The Ombudsman's recommendations to work on measures to dispel the misperception that University doctors may have a tendency to over-classify cases. These include the following –

(a) HA would collect data on the charging pattern of University doctors and HA doctors periodically (say, at least annually) for monitoring and further analysis;

(b) HA is working with both universities on more detailed guidelines on the determination of case complexity for charging, including explicit examples and/or considerations for charging consultation fee above the basic levels. The target is to complete this task within six months (i.e. by February 2016);

(c) to enable a more consistent practice on the classification standard for HA doctors and University doctors, HA would share and exchange data on charging practices by the two groups of doctors in a joint platform with the two Universities on an annual basis; and

(d) HA is now analysing the charging pattern at institutional level. To facilitate patients' choice of doctor, HA will provide relevant information (such as guidelines on case classification and charging pattern) to patients, in order to increase transparency of the charging standard.

Hospital Authority

Case No. 2014/1815(R) – (1) Failing to provide the relevant link to and application form for the Code on Access to Information in a hospital's website; (2) Improperly refusing the complainant's access to information request; (3) Delay in reply; (4) Citing inaccurate reasons to reject her information requests; (5) Failing to explain the reason for rejecting her information request; (6) Failing to provide the procedure and names of officers in handling her complaint; and (7) Failing to mention the appeal channel in the reply

Background

581. On 3 March 2014, the complainant complained to a hospital (the Hospital) about the medical service rendered to her son. The Hospital gave a reply on 28 March. On 8 April, the complainant submitted an application requesting to obtain all relevant information related to the Hospital's handling of her complaint (including individual staff's comments, reports, minutes of meetings, etc.), the Hospital's procedures for handling her complaint, as well as a list showing the full names and titles of the staff who had handled the complaint.

582. Concerning the Hospital's handling of her complaint, the complainant was dissatisfied with the following –

(a) The Hospital's website did not provide related information on the "Code on Access to Information" (Code). There was also no mentioning of the address of the Access to Information Officer (AIO) in the application form;

(b) the staff of the Hospital was unfamiliar with the Code and rejected the complainant's application before it was handled by AIO;

(c) the Hospital did not provide a reply or interim reply within ten days;

(d) the complainant could not locate in the Code the sections quoted in the Hospital's reply. She therefore believed that the reply had misquoted the Code;

(e) the complainant disagreed with the justifications given by the Hospital in rejecting her application. The Hospital's reply did not give detailed explanation of the relevant rationale;

(f) the concerned reply did not mention, upon the complainant’s request, the Hospital’s procedures for handling her complaint and the list showing the staff who had handled her complaint. The reply did not provide the reasons for rejection, in accordance with the Code; and

(g) the Hospital did not mention in the reply rejecting her application that she could lodge a complaint with the Office of The Ombudsman on that decision.

The Ombudsman’s observations

Allegation (a)

583. As there are numerous hospitals under the Hospital Authority (HA) and all HA hospitals follow the same set of procedures and requirements in processing applications for access to information, the Office considered that it was not improper even if HA did not mention in its hospitals’ websites the information regarding application procedures on access to information. Nevertheless, after reviewing the complainant's case, HA had included the information regarding access to information and the hyperlinks to the application forms into the Hospital’s website, for the convenience of members of the public.

584. In view of the improvement measures above, the Office was of the view that HA should consider including the hyperlinks on access to information into all hospitals’ website, as HA had already decided to include the relevant hyperlinks in the Hospital’s website. This could facilitate public access.

585. The complainant alleged that the absence of AIO’s address in the application form had made it inconvenient for those members of the public who lodged applications in person. The Office considered that the relevant application would have to be lodged in writing and AIO would be unable to respond immediately to the applicant upon the receipt of the application. If the member of the public would like to submit the application in person, he/she might do so via the Hospital’s enquiry counter with attention to AIO. The Office was therefore of the view that

the absence of AIO's exact office address in the application form was not improper.

586. All in all, The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

587. The Office agreed with the complainant's view. It was in contravention to the Code's requirements as the concerned staff immediately rejected her application on the ground that internal documents would not be disclosed. In fact, the Office had not received only one complaint of this nature against hospitals. This reflected that frontline staff members were not familiar with the requirements and procedures of the Code. The Ombudsman recommended that HA should address this issue and strengthen the training to frontline supporting staff on this aspect.

588. The Ombudsman considered allegation (b) substantiated.

Allegation (c)

589. HA explained that the letter was sent out on 17 April 2014, but it was not processed by the Post Office until 22 April. The Office found HA's explanation not unreasonable. As to the complainant's expectation that the Hospital might have informed her by phone or email if it foresaw that she might receive the letter after the holidays, the Office considered that such action might have avoided misunderstanding on any delay in the Hospital's reply. However, such inaction by the Hospital was not a contravention to HA's guidelines. As such, The Ombudsman therefore considered allegation (c) unsubstantiated.

Allegation (d)

590. After a detailed review of the Hospital's reply to the complainant dated 17 April, the Office confirmed that the sections of the Code quoted in the reply were correct without error. The Ombudsman considered allegation (d) unsubstantiated.

Allegation (e)

591. The Hospital had explained the reasons (i.e. sections 2.10(b)(i) and 2.14(a) of the Code) for rejecting her application for access to information in the letter to the complainant dated 17 April.

592. With regard to the Hospital's citation of section 2.10(b)(i) of the Code, the Office agreed with HA's explanations, i.e. if the staff knew that the contents of the internal discussions would be disclosed to the complainant, the frankness and candour of discussion on the case would be inhibited as they would be hesitant to raise opinion or comment. Thus, the Office considered that it was appropriate for HA to invoke section 2.10(b)(i) of the Code to reject the complainant's application for access to all comments, reports and minutes of meetings collected when handling the complaint. The complainant pointed out that the Hospital should provide explanation for some of the issues (such as why there was no clean bed sheet for her son), and that revealing related information (including the Hospital's justifications for refuting her complaint) would be in public interest and in line with the public's right to know. The Office considered that the Hospital needed to provide explanations and justifications for its decision (including the findings of the complainant's case), and should make those explanations clear in its reply to the complainant. If the complainant raised doubts, she could approach the Hospital for further enquiries. As such, the complainant would not have to obtain the contents of internal meetings and staff testimonies as the sole way to understand the rationale for the Hospital's decision.

593. With regard to HA's citation of the rationale from section 2.14(a) of the Code, the Hospital had provided the Office with the internal communication records of the staff concerned. The records affirmed that the doctors involved objected to the disclosure of the related information to the complainant. Nonetheless, the Office considered that when quoting the Code, "third party" should not include the staff of the institution concerned. Hence, section 2.14(a) of the Code was not applicable to this case.

594. On the other hand, the Office considered that the Hospital's reply might have been too brief, making it difficult for the complainant to understand why such disclosure of the related information would inhibit the frankness and candour of internal discussions, as well as which staff objected to the disclosure of the related information to the complainant. It would be more desirable if the Hospital's reply could provide detailed explanations on its rationale.

595. In view of the above, The Ombudsman considered allegation (e) partially substantiated.

Allegation (f)

596. The complainant clearly stated, in the application form, her wish for access to information on complaint handling procedures of the Hospital and a list showing the staff members who were responsible for granting information or making such decisions. The Hospital's reply of 17 April 2014 only provided a cursory reference to its complaint handling procedures and the ranks of the staff in the complaints management team. The Office was of the view that as the names and post titles of public organisation employees could in general be disclosed. As such, the Hospital had no justifications to decline the provision of the related information upon the complainant's request. The Ombudsman therefore considered allegation (f) substantiated.

Allegation (g)

597. HA adopted the Code on a voluntary basis, and was not one of the government departments or public organisations which the Code applied. In this connection, HA could set up its own related procedures and guidelines that were suitable to its operational needs. For example, according to the related procedures and guidelines formulated by HA, HA would explain to the applicant its internal review mechanism if the applicant's application for access to information was denied. If HA maintained the decision to deny the application after internal reviews, the applicant would have to be informed of the avenue of complaining to the Office. As regards the complainant's application, the Hospital's reply of 17 April had conformed to HA's procedures and guidelines without inadequacies. The Ombudsman therefore considered allegation (g) unsubstantiated.

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

599. The Ombudsman recommended that HA should –

(a) particularly strengthen training pertaining to the problem of frontline supporting staff being not familiar with the requirements and procedures of the Code;

(b) consider including hyperlinks to the Code into the websites of all HA hospitals to facilitate public access; and

(c) expeditiously arrange for the provision of AIO's phone numbers in the application form for access to information.

Government's response

600. HA accepted The Ombudsman's recommendations and has adopted the following measures –

<u>*Recommendation (a)*</u>

Training activities with regard to the Code

(a) HA held a seminar on 21 May 2014 where speakers from the Constitutional and Mainland Affairs Bureau (CMAB) gave a detailed briefing on the Code and shared experience on case handling. The seminar was attended by about 170 HA staff, including AIOs, Patient Relations Officers, as well as front-line staff handling applications for access to information;

(b) HA held an experience-sharing workshop on 25 March 2015 for all AIOs in HA. Representatives from CMAB shared their experiences citing real cases handled by government departments and answered questions raised by AIOs concerning the application of the Code. AIOs also took this opportunity to have in-depth exchanges and discussions on many complicated cases handled by the Head Office and hospitals of HA;

(c) HA will continue holding the training activities mentioned above as appropriate;

Updated HA's operational guidelines on access to information (HA guidelines)

(d) In March 2015, HA promulgated a circular to all staff concerned regarding the updated HA guidelines;

Intranet webpage

(e) HA has added a webpage about access to information in its intranet, providing updates as well as resources on HA guidelines, training materials, case repository, sample replies and useful links for staff reference;

Recommendation (b)

(f) HA has included hyperlinks to the Code in the individual websites of all HA hospitals; and

Recommendation (c)

(g) HA has listed the contact numbers of all AIOs of HA in the application form for access to information.

Housing Department

Case No. 2013/3259 – Failing to properly attend to the complainant's request for retention and release of lift surveillance footage

Background

601. The complainant reported that she had sustained an injury inside the lift of a public housing estate and requested to view the relevant footage captured by the closed circuit television (CCTV) system. The Housing Department (HD) and the property management agent (PMA) rejected her request on various grounds before finally admitting that the footage had been deleted long ago. The complainant was dissatisfied with the way HD handled her case and suspected that it had deliberately destroyed the evidence. She, therefore, lodged a complaint with the Office of The Ombudsman (the Office).

The Ombudsman's observations

602. Prompted by the personal injury report filed by the complainant, HD reviewed the relevant footage together with the PMA and the contractor and concluded that no one had suffered any injury. Clearly, their observation did not tally with the complainant's account of the incident. Since there were two different versions as to what had happened, it was indeed unwise of HD to allow the objective evidence to be erased by the system automatically.

603. The Office considered that a number of factors would need to be taken into account when deciding whether to keep the video footage. The matter would also need to be handled with extra caution as personal data was involved. While the PMA's judgement was important, over-reliance on the judgement of individual staff could easily lead to inconsistent or even unsound decisions, as in the present case.

604. Moreover, while there was no impropriety in stating their principles for refusal to release the footage, HD and PMA should also have provided the complainant with specific information about her case. The Office considered it undesirable in just citing various principles without mentioning that the footage no longer existed.

605. HD's existing guidelines on the use of CCTV system were inadequate and there were deficiencies in handling this case. In the light of the above, The Ombudsman considered the complaint substantiated.

606. The Ombudsman recommended HD to draw up guidelines on the retention and destroy of records captured by the closed circuit television system at public housing estates for compliance by its staff, so that they can deal with similar incidents more properly and in a consistent manner.

Government's response

607. HD accepted The Ombudsman's recommendation and issued guidelines to its frontline staff on 31 October 2014. The principles for the retention of surveillance footage were further elaborated in the guidelines. Additional major and common scenarios where surveillance footage should require to be retained were listed for staff's compliance and reference.

Housing Department

Case No. 2013/3845 – Unreasonably deleting the complainant's status as one of the tenants of a public rental housing unit

Background

608. The complainant had lived with his family members in a public rental housing (PRH) unit of which the principal tenant was his mother (Ms A). In December 2010, Ms A applied to the Housing Department (HD) for deletion of the complainant's status as one of the tenants on the ground that he had moved out. The complainant was dissatisfied that HD had deleted his tenant status without verification of his situation or his consent.

The Ombudsman's observations

609. More than one and a half years had lapsed between Ms A's notification to HD about the complainant's departure for work abroad and HD's subsequent receipt of her application for deletion of the complainant's tenant status. It was, therefore, not unreasonable of HD to consider Ms A's application on the basis of her statement. HD had followed established procedures in processing the application and no impropriety was involved.

610. Accordingly, The Ombudsman considered this complaint unsubstantiated.

611. Nevertheless, deletion of tenant status seriously affects the rights and interests of PRH residents. The Ombudsman considered that as the complainant had raised a query, HD should have given him an opportunity to state his case and then considered whether there was any special reason that warranted its exercise of discretion to reinstate his tenant status. When dealing with similar cases in future, HD should also allow those persons having their tenant status deleted a chance to explain.

Government's response

612. HD accepted The Ombudsman's recommendation and invited the complainant to a meeting at its office on 25 April 2014 to give him another chance to explain his case. However, the complainant failed to provide a reasonable explanation or other new justifications for HD to exercise its discretion to reinstate his name into the tenancy. As a result, HD could not withdraw its decision to delete the complainant's name from the public housing tenancy.

613. Meanwhile, HD has reminded its frontline staff to handle cases of deletion carefully by further verifying the actual reasons given by residents for not living in the PRH units, so as to ensure that it is reasonable and fair for HD to carry out deletion.

Housing Department

Case No. 2013/4067 – (1) Unreasonably refusing to grant public housing tenant status to a tenant's brother to allow him to stay in the flat and take care of the tenant; (2) Failing to take into account the living space for the tenant's minder in re-allocation of flat; (3) Delay in processing the tenant's application for special transfer;(4) Delay in carrying out modification works at the newly allocated flat; and (5) Delay in processing the tenant's application to purchase the flat

Background

614. The complainant's sister (Ms A) was ill, wheelchair-bound and dependent on others in her daily life. Ms A, therefore, applied to the Housing Department (HD) for its granting of public housing tenant status to her brother and for its permission for a minder (i.e. the complainant) to live together in her flat. She also asked for a special transfer to a flat suitable for wheelchair use in the public housing estate where the complainant was living (Estate B), so that the latter could take care of her.

615. Later on, Ms A agreed to transfer to a flat allocated by HD (Flat A). She then asked HD to carry out modification works at the flat to make it suitable for wheelchair use. Meanwhile, she also applied to purchase that flat under the Tenants Purchase Scheme (TPS). Unfortunately, she passed away a few days after the completion of the modification works, but before the completion of the TPS formalities.

616. In relation to Ms A's applications mentioned above, the complainant lodged a complaint to the Office of The Ombudsman (the Office) against HD for –

(a) unreasonably refusing to grant public housing tenant status to Ms A's brother;

(b) failing to take into account the living space for the minder when allocating a flat for Ms A's special transfer;

(c) delay in processing Ms A's application for special transfer;

(d) delay in carrying out the modification works at Flat A; and

(e) delay in processing Ms A's application to purchase Flat A.

The Ombudsman's observations

Allegations (a) and (b)

617. HD's refusal to grant Ms A's brother public housing tenant status was in accordance with its established policy. No maladministration was involved.

618. Minders who are granted conditional temporary stay can only temporarily live in the public housing flats concerned. They do not have tenant status and have not gone through the necessary means test or other vetting procedures. The Office found it reasonable of HD not to take such persons into account when calculating living space requirement. This is to ensure equitable allocation of public housing resources.

619. Therefore, The Ombudsman considered allegations (a) and (b) unsubstantiated.

Allegations (c) and (d)

620. HD had in fact acted on Ms A's application for special transfer in a timely manner. Given the shortage in Estate B of flats suitable for wheelchair users, allocation of one of those flats to Ms A would still have been difficult even if HD staff had not made the mistake in computer input. There was no delay in HD's modification works at Flat A either.

621. In this light, The Ombudsman considered allegations (c) and (d) unsubstantiated.

Allegation (e)

622. There had been no delay in HD's processing of Ms A's TPS application. That HD had refused to accept the complainant's application to purchase Flat A in place of Ms A was in accordance with its policy.

623. The Ombudsman, therefore, considered allegation (e) unsubstantiated.

624. In the light of the above, The Ombudsman considered the complaint unsubstantiated.

625. Nevertheless, The Ombudsman urged HD to review its procedures for updating computer records on public housing flats so as to avoid similar mistakes.

Government's response

626. HD accepted The Ombudsman's recommendation and completed enhancing the workflow of the Domestic Tenancy Management Sub-system for dealing with newly converted public rental housing units. The enhanced measures were promulgated to the staff concerned in detail and implemented in July 2014. Currently, when HD staff delete or add a housing unit, the computer will display an alert message to remind them to review carefully all items required to be input, including important information such as "environmental factors", etc..

Housing Department

Case No. 2013/5290 – (1) Failing to strictly control the use of an emergency vehicular access by vehicles; and (2) Failing to provide the complainant with a substantive reply

Background

627. The complainant lodged a complaint to the Office of The Ombudsman (the Office) against the Housing Department (HD). The complainant pointed out that there is an emergency vehicular access (EVA) located at a public rental housing estate (Estate B) adjoining a Home Ownership Scheme (HOS) Court (Court A). The complainant observed that vehicles often entered the EVA and parked there for a prolonged period of time. Not only was the safety of pedestrians jeopardised, the access to the EVA by emergency vehicles was also obstructed (the obstruction). In November 2013, she lodged a complaint with the Property Service Management Office (PSMO) of Estate B and 1823 about the obstruction. The PSMO's staff replied that security guards had been deployed at the EVA but vehicles were allowed to turn around in order to exit after entering the EVA. HD, however, did not provide her with a substantive reply.

628. The complainant alleged that HD –

(a) failed to exercise strict control over the use of the EVA by vehicles, thus resulting in the obstruction; and

(b) failed to provide her with a substantive reply.

The Ombudsman's observations

Allegation (a)

629. While the day-to-day management work of Estate B was handled directly by the property management agent and the staff of PSMO, HD had to bear the ultimate responsibility for Estate B's management. The Office considered that HD was not at fault to allow limited vehicular access to the EVA and to park there for not more than 30 minutes, provided that HD could keep the EVA clear at all times so that the entry

and exit of emergency vehicles would not be obstructed.

630. From the photos provided by the complainant when she lodged the complaint with the Office, it was evident that –

(a) the area where a number of cars were parked was not the loading/unloading area of the EVA and hence might cause obstruction to the entry and exit of emergency vehicles;

(b) vehicles were seen parking even at night and the drivers were nowhere to be seen; and

(c) the emergency crash gate at the entrance to the EVA was not locked and vehicles were free to enter and leave.

631. Though the photos might not reflect the daily situation, the fact was that security guards were deployed to patrol the EVA only and were not stationed at the entrance to the EVA on a permanent basis before the Office stepped in. This had created a loophole and enabled vehicles to enter the EVA arbitrarily, and to park therein without authorisation while the security guards were not watching, thereby obstructing the EVA. However, after the Office stepped in, HD implemented a number of measures to strengthen the management of the EVA.

632. In view of the above, The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

633. As to whether HD provided the complainant with a substantive reply, PSMO had actually all along, on behalf of HD, communicated with individual A in order to explain the follow-up actions taken by PSMO. On 23 January 2014, PSMO (on behalf of HD) briefed individual A specifically on the follow-up action to deal with the obstruction problem.

634. It was understandable that PSMO was not able to inform the complainant of the outcome at the initial stage of follow-up. As such, The Ombudsman considered allegation (b) unsubstantiated.

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

636. While both Chinese and English are the official languages of Hong Kong, the Office found that the notice posted by PSMO at the EVA entrance was in Chinese only and did not have an English version. Not only did the practice neglect the needs of people who did not understand Chinese, it did not conform to the Government's language policies as well.

637. The Ombudsman urged HD to pay attention to the problem with a view to comprehensively take forward bilingualism in its public housing estates.

Government's response

638. HD accepted The Ombudsman's recommendation and has posted a notice in English at the entrance to the EVA.

Housing Department

Case No. 2014/4012 – Failing to take effective measures to prevent improper operations of shops in a public housing estate and poor staff attitude

Background

639. The complainant complained against the Housing Department (HD) for failing to take effective measures to handle problems of misuse of shops in the public housing estate where the complainant was residing (the Estate), as well as the poor attitude of HD staff.

640. On 29 November 2013, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against HD for dereliction of duty in not handling his complaint about the estate management problems (including allowing dogs to urinate and defecate everywhere, environmental hygiene problems and the misuse of shops as warehouses), as well as not monitoring the property management agent (PMA) in properly carrying out its estate management work.

641. On 27 January 2014, HD replied to both the complainant and the Office concurrently, explaining the follow-up actions taken and the improvement measures implemented by HD in response to the complaint. In the reply, HD indicated that only a shop (the Shop) in the Estate was temporarily closed for business pending renovation works while all other shops on the 3/F podium of one of the blocks of the Estate were open for business; and no shop was found being used as a warehouse. Subsequently, HD replied to the complainant on 26 February.

642. On 20 and 21 March 2014, the complainant emailed the Office, stating that HD had not resolved the problem of the shops being misused for other purposes in the Estate (allegation (a)) and that its staff (Staff A) had a poor attitude (allegation (b)). The Office was requested to review the case.

The Ombudsman's observations

Allegation (a)

643. When the Office made the initial enquiry, HD indicated that the Shop was the only one closed for business pending renovation works while other shops in the Estate were operating as usual and no irregularity was found. However, according to the observations made during site visits by the staff of the Office, some irregularities as claimed by the complainant indeed existed.

644. As far as the Shop was concerned, according to the information provided by HD, the Office arranged its staff to carry out a site visit again on 19 December 2014 during its business hours (11:00 a.m. to 3:00 p.m., Monday to Friday). The Shop was open for business that day. No dog was found inside the Shop and no goods were stored inside. However, when the staff of the Office entered the Shop, there was no one inside and no one responded to their calls. Therefore, they could not patronise the Shop. Besides, the staff of the Office found that Shop A was close for business that day and therefore no goods were placed outside the shop. Shop B was operating beauty care business.

645. After consolidating the findings of the investigations conducted by HD and the Office, the Office believed that Shop A and Shop B were operating their businesses normally. As for the Shop, though it was open for business during the second site visit conducted by the staff of the Office, customers were not able to patronise the Shop as there was no one inside. Moreover, the Shop had applied for renovation to be carried out but the renovation works never started in the four months following the application. Given the Shop's renovation and business hours, the Office doubted very much whether the Shop was genuinely running a photofinishing business.

646. HD claimed that the Shop had been operating from the time the tenancy agreement took effect in July 2013 until January 2014 when it applied for carrying out renovation works. Yet HD could not produce any records or photos to support its claim and merely said that there was no record of the Shop committing any irregularities. However, since the involvement of the Office, PMA started to inspect the Shop frequently in April 2014 and kept a detailed record of the inspections. No similar records were kept for other periods. This revealed that although follow-up actions were indeed taken by HD when problems were found, HD did not keep a regular record on the operations (in particular the

business hours) of the shops. Thus, HD could not detect any problems promptly, nor could it take appropriate actions accordingly. The Office considered that since there were specific clauses in the tenancy agreements to regulate the operations of the shops (including business hours, type of business, display of signboard, etc.), HD had the responsibility to ensure that all requirements were strictly observed. Therefore, HD had to make improvements on PMA's system of inspection and record-keeping to ensure that PMA handled the irregularities in the operations of the shops seriously.

647. Furthermore, the Shop never started the renovation works after submitting the application in January 2014, and resumed business in May only until being urged by HD repeatedly and receiving a warning letter from HD. As mentioned by HD, from the business point of view, shop tenants would normally complete the works as soon as possible to resume business. The Office agreed that this should be the case if a shop was running its business normally, then it would not be necessary for HD to set a deadline for completing the renovation works. However, the shop tenant in this case might probably use the renovation works as a pretext for not operating business. Therefore, the Office was of the view that HD should consider whether there was a need to impose additional conditions when granting approval to applications for carrying out renovation works (such as setting a deadline, and the requirement to submit an application with justifications to HD by tenants if the deadline would have to be extended).

648. As for other shops, the complainant, HD and the staff of the Office had all found irregularities (such as running a tuition centre, a dog was seen in a shop) in the operations of various shops. It was evident that there were still irregularities occasionally. After the involvement of the Office, HD actively followed up on the case and took appropriate actions accordingly against the shop tenants concerned.

649. The Office understood that various restrictive terms were imposed by HD when leasing its shops. The purpose was to make sure that the shops would provide the services required by residents. The Office also believed that HD charged shop tenants lower rents in order to encourage them to provide reasonably-priced goods and services. To this end, HD set out very specific terms to regulate the operations of the shops. If the shop tenants did not run their businesses in accordance with the terms of the tenancy agreements and were not able to provide the necessary services to residents, this would run contrary to HD's intention. The Office was of the view that HD needed to seriously review the terms

of the tenancy agreements and consider if it was necessary to set out such detailed terms to regulate the operations of the shops given that some of the trades (such as photofinishing shops, sewing shops, etc.) might be outdated. HD might also consider allowing the shops to adjust their operations according to the market situation. In view of the above, The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

650. Regarding the complainant's allegation about Staff A's unresponsiveness to his enquiry and poor attitude, the staff concerned denied the allegation. Since there was no other independent corroborative evidence, the Office was unable to comment. As to the allegation that Staff A refused to let the complainant talk to his supervisor, the Office was of the view that it was not inappropriate for Staff A to try to handle the enquiry first as Staff A was a frontline staff member in handling complaints. Anyway, the Office understood that the complainant had already met the supervisor of Staff A and the representative(s) of PMA to discuss the management problems of the Estate on 3 July 2014. In view of the above, The Ombudsman considered allegation (b) unsubstantiated.

651. In sum, The Ombudsman considered the complaint partially substantiated.

652. The Ombudsman recommended HD to –

(a) continue to monitor closely and combat the suspected irregularities in the operations of the shops at the said locations, and strictly enforce the terms of the tenancy agreements;

(b) improve PMA's inspection mechanism and step up monitoring the operations of the shops;

(c) improve PMA's record system to ensure that it can take actions against the shop tenants promptly when irregularities are found;

(d) improve the procedures for handling shop tenants' applications for carrying out renovation works, and impose additional conditions as appropriate for granting approval to prevent tenants from evading being monitored on the pretext of carrying out renovation works; and

(e) review the terms of the tenancy agreements (including rent levels and restrictive terms, etc.) of the shops at the said locations so as to reduce the opportunity to misuse the shops.

Government's response

653. HD accepted The Ombudsman's recommendations (a) to (d). Concerning recommendations (a) and (d), in an effort to strengthen the monitoring of shop tenants, HD reminded the frontline staff again on 1 April 2015 to strictly enforce the relevant guidelines. HD also revised the application form for alteration/addition works by adding an item of expected completion date filled by shop tenants.

654. Regarding recommendations (b) and (c), HD issued a set of guidelines to PMA on 16 July 2015, requiring its staff at the rank of officer or above to conduct monthly site visits to inspect the operations of the shops and to keep a record and make an assessment after inspection, including recording any irregularities found and the progress of follow-up actions. Such reports, after confirmation by the property manager of PMA, are to be submitted to HD for follow up in a timely manner.

655. HD did not accept recommendation (e). Currently, all commercial premises of HD are leased at market rents. Every lessee of the shop has to sign a tenancy agreement with the Hong Kong Housing Authority. Details such as the trade of the shop, rent amount, tenancy period, rights of both parties and terms to be observed are clearly set out in the tenancy agreements, with a view to protecting the rights of both parties. The agreements also provide the basis for estate management staff to manage the operations of the shops, and prevent irregularities such as the shops not opening for business or changing the type of trade without prior approval. HD will also revise the terms of the tenancy agreements when there are such management needs.

656. In its letter to the Office on 10 April 2015, HD reiterated that all its commercial premises were leased at market rents and HD would revise the terms of the tenancy agreements when there were such management needs according to the existing mechanism. No objection was expressed in the Office's reply letter of 16 April 2015.

Inland Revenue Department

Case No. 2013/4151 – Unreasonably taking tax recovery actions against the complainant

Background

657. The complainant was an expatriate native speaking English teacher employed in Hong Kong. Upon return from her own country after a brief visit, she learned that the Inland Revenue Department (IRD) had requested her school (the Employer) to withhold her end-of-contract gratuity on the grounds of outstanding tax. Although she then actively followed up the tax matters with IRD, IRD continued to take tax recovery actions against her, including issuing notices to the Employer and her bank.

658. The complainant alleged that IRD had been negligent and unfair in handling her case. Worried that such actions might have affected her employment and damaged her credibility, she requested IRD to issue letters of apology to the relevant parties to clear her name, but to no avail.

The Ombudsman's observations

659. Tax recovery action could have been avoided if the complainant had notified IRD of her new address. Even though her new address had been provided by the Employer in the Notification Form in June 2013, this did not absolve the complainant's obligation to notify IRD. The Office of The Ombudsman (the Office), therefore, considered IRD reasonable and proper in issuing the recovery notice to the Employer in August, but the two notices issued in September were a result of mistakes made by IRD staff.

660. In handling cases of taxpayers who are about to leave Hong Kong, the Assessing Group is required to set a tax payment due date well before the departure of the taxpayers or at least four working days before the expiry of the statutory Money Withholding Period. The Office noticed that in this case, the complainant's file should have been brought up to Officer A for further action seven days after the tax returns were issued, but it was only brought up after one month. By the time the assessment notices were issued, the complainant had already left Hong

Kong and the Money Withholding Period applicable to the Employer had expired. Such delays might have defeated the purpose of IRD's guidelines to protect tax revenue.

661. The Office noted that IRD had reminded the Assessing Group of the need to contact the taxpayer by telephone to ascertain whether it was a genuine leaving Hong Kong case where a date of return to Hong Kong was provided in the Notification Form. IRD had also introduced improvement measures on the transmission of internal memos and reminded its staff to better monitor the file bring-up system.

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

663. Though regarded as an isolated incident by IRD, this case suggested problems in communication among different sections of IRD. In this connection, The Ombudsman recommended IRD to closely monitor the effectiveness of its internal communication system and keep relevant complaint statistics in this regard to facilitate a systemic review, where appropriate.

Government's response

664. IRD accepted The Ombudsman's recommendation and has reviewed the internal communication system and strengthened the related work procedures to ensure effective and efficient transfer of officers' requests from different sections for deferral of tax recovery action to the Collection Enforcement Section. Since 1 August 2014, officers from different sections are required to transmit this kind of requests via an internal memo, in electronic format, to a designated internal notes mail account of the Collection Enforcement Section. IRD has also reminded the concerned officers, when handling requests for deferral of tax recovery, to take prompt action and maintain effective communication with officers making the requests.

665. IRD has been closely monitoring the effectiveness of the enhanced work procedures. No complaint has been recorded for similar cases arising from internal communication problem since 1 August 2014. IRD will continue to review and strengthen the internal communication system and related work procedures to avoid incidents of communication gap in its operations.

Judiciary Administrator

Case No. 2013/4726A – Improper handling of the complainant's application for transcripts and records of court proceedings

Background

666. The complainant was an inmate who intended to appeal against his conviction and sentence by a magistrates' court (the original court). He asked the Registry of the original court (the Registry), which is under the Judiciary Administrator (JA), about the procedures for applying for transcripts of court proceedings and the fees for such transcripts. However, he was given several different answers and the transcripts were still unavailable after more than two months. The complainant considered there was deliberate delay by the Registry staff.

667. The court proceedings, judgement and sentencing of the complainant's case took a total of four days. This complaint case mainly involved the transcripts of the second- and third-day hearing and the verdict delivered on the third day.

668. Transcripts of the second-day hearing involved transcripts of the first session, the second session and that of the whole hearing (Session 1 Transcript, Session 2 Transcript and Complete Transcript). Since the complainant had lodged an appeal, the Appeals Registry of the High Court would prepare an appeal bundle comprising a number of legal documents to be delivered to him free of charge. The Session 2 Transcript, a major part of the transcript of the third-day hearing, as well as the transcript of the verdict (Verdict Transcript) were already included in the appeal bundle. The complainant lodged an appeal in early July 2013, but did not receive the appeal bundle by late August.

The Ombudsman's observations

669. The Office of The Ombudsman (the Office) considered staff of the original court to have properly handled the complainant's various applications without delay. Nevertheless, they could have told the complainant in late September when he first applied for the Complete Transcript that the Session 2 Transcript was already included in the appeal bundle, or notified him earlier when the High Court approved the

inclusion of the Complete Transcript in the supplementary appeal bundle, which would be provided free of charge. This could have saved the complainant the trouble of making various applications, only to cancel them afterwards. Besides, the complainant had enquired about the arrangements for releasing the Verdict Transcript, but the Registry staff, instead of telling him that it was already in the appeal bundle for free delivery to him, reiterated that he had to submit a written application. That was indeed improper.

670. The question of authorisation was also an issue. JA indicated that magistrates' courts had yet to formulate specific guidelines on arrangements in cases where the applicants for legal documents were inmates in a correctional institution and could not collect the documents in person. The Correctional Services Department (CSD) could not make any supporting arrangements as a result. The Office also noticed that JA seemed to have no way of knowing when an inmate actually received the letters that the court issued to him/her via CSD. All in all, The Ombudsman considered the complaint partially substantiated.

671. The Ombudsman recommended JA that –

(a) in addition to adding to the application form for transcripts and reply letters to the applicants a note to let the applicants know as early as possible that all the court records and documents that have been approved for inclusion in the appeal bundle will be provided to appellants free of charge, JA should state clearly in its replies to applicants whether the court documents they requested are already included in the appeal bundle, and advise them on the proper procedures for collecting those documents; and

(b) it should discuss with CSD about setting up a letter acknowledgement mechanism to ensure that inmates receive letters from the court in a timely manner.

Government's response

672. JA accepted The Ombudsman's recommendations and has drafted a template of the reply letter so that when staff of magistracies reply to appellants regarding applications for court documents/transcripts of court proceedings, the appellants will be informed clearly whether the documents they requested have already been included in the appeal bundle and the appellants will be asked to confirm whether they need to apply for those documents.

673. JA has had discussions with CSD about the recommendation. Since the number of letters sent out by various courts to inmates was over 15,000 each year, the recommended letter acknowledgement mechanism would involve a large quantity of extra workload as well as a large amount of resources. Given the main issue of the complaint is not about the complainant not being able to receive the letters sent to him by the court, CSD has indicated after the above discussions that letters will be delivered to the inmates concerned within about three working days from the date those letters arrived at CSD. Such an arrangement at the present stage has achieved the purpose of ensuring that inmates receive letters from the court in a timely manner. JA and CSD therefore would not consider for the time being setting up a letter acknowledgement mechanism. The Office noted in its letter of 31 March 2015 that JA has finished the discussions with CSD. According to the letter, JA would no longer be required to inform the Office of the implementation status of the recommendation.

Lands Department

Case No. 2013/3366 – Delay in removing two rotten trees that were in danger of collapse

674. The complainant had complained to 1823 about a seriously decaying tree in the New Territories with its trunk and branches in danger of falling on the side of a highway (Case 1). A few months later, he complained to 1823 again about another rotten tree, which was also in danger of collapse, alongside the same highway (Case 2). 1823 referred both cases to the Lands Department (LandsD) for follow-up. However, the problem remained unresolved after more than six months. The complainant contacted 1823 time and again to urge prompt action by the Government, but to no avail.

The Ombudsman's observations

675. Although the contractor had not made any suggestion to the District Lands Office concerned (DLO) about giving higher priority to the two cases, the two trees involved were actually located alongside a major highway in the district. Had the rotten tree trunks fallen on the carriageway, they could have caused obstruction to traffic or even casualties or property damage. The Office of The Ombudsman (the Office), therefore, considered that DLO should have taken precautionary measures and quickly arranged site inspection to assess the condition of the trees, or even classified the two cases as "urgent".

676. In this incident, DLO only arranged tree inspection by its contractor after one and a half months and four months for Case 1 and Case 2 respectively. There was indeed serious delay. DLO's inefficiency in dealing with tree cases could be seen from the fact that, in Case 1, it had taken five months to instruct its contractor to remove the collapsed tree trunk; and, in Case 2, it had taken one month to issue the works order after receiving the inspection report. The delay on the part of the contractor in carrying out site inspection for Case 1 also showed that DLO had failed to effectively monitor the work progress of its contractor.

677. Overall, The Ombudsman considered the complaint substantiated.

678. The Office noted that DLO had deployed staff to expedite the handling of backlog tree cases. Nonetheless, there were 702 backlog tree cases as at 26 March 2014. Given that the number of tree cases would surge again with the onset of the rainy and typhoon season, it was concerned that there would be further delays in following up on these cases. The Ombudsman therefore urged LandsD to step up efforts in clearing the backlog of tree cases expeditiously and entirely in DLO before the start of the rainy and typhoon season.

Government's response

679. LandsD accepted The Ombudsman's recommendation.

680. There were still 571 backlog tree cases as at 4 July 2014. As trimming or removal works by the vegetation maintenance contractors had already been arranged for 185 of these cases, the number of backlog tree cases was in fact reduced to 386. The Office wrote to inform LandsD on 8 August 2014 that, since the number of backlog tree cases had been reduced substantially, they would stop following up on this case. DLO will continue to clear the backlog cases.

Lands Department

Case No. 2013/4347 – Delay in handling an application for temporary use of a piece of government land

Background

681. According to the complainant, he was a resident of a housing estate and had set up a Concern Group. In April 2013, the complainant submitted an application to the District Lands Office concerned (DLO) of the Lands Department (LandsD) for organising the Concern Group's publicity activities at the government land outside the housing estate on the weekends and public holidays between 1 May and 1 December the same year (the application). However, DLO had not made a reply to the complainant ever since. On 3 October 2013, the complainant made a telephone enquiry with DLO about the progress, but to no avail.

682. The complainant criticised DLO for delaying the processing of the application.

The Ombudsman's observations

683. The complainant applied on 29 April 2013 for using the government land concerned from 1 May 2013 onwards. Upon the receipt of the application, DLO verbally informed the complainant that it would take time to process the application. However, it was not until 28 June the same year that DLO started to consult the District Office (DO) concerned and other relevant departments. After DO had provided no comment on the application on 8 July 2013, DLO further sought the advice of DO as to what conditions should be imposed regarding the approval of the application. During that time, the complainant was not given any interim reply or informed of the progress of processing. The delay in DLO's processing of the application should be considered serious.

684. In view of this, The Ombudsman considered the complaint substantiated. After the intervention of the Office of The Ombudsman, the District Lands Officer concerned had reviewed the case and eventually approved the application in December 2013.

685. The Ombudsman's recommendations for LandsD are as follows –

(a) instructing staff to follow up on applications from members of the public and inform them of the progress in a timely manner;

(b) considering to devise performance pledges to the public so as to avoid delays in the processing of applications. Even if this may not be achievable in the near future, an internal work schedule should at least be formulated as a basis of reference for staff to process applications for temporary use of government land, as well as for the supervisors to monitor progress; and

(c) in addition, this case has shown that the definition of "the application of not a controversial or unusual nature" in the guidelines to apply for temporary occupation of unallocated government land (the Guidelines) is so abstract that it is difficult for the staff to grasp and is detached from the nature of many public activities held in recent years, thus recommending LandsD to review the Guidelines.

Government's response

686. LandsD accepted The Ombudsman's recommendations and has amended the internal guidelines to stipulate clearly that the staff of DLOs should inform applicants of the outcome of applications within a specified time for simple and straight-forward cases. The applicant should also be kept informed of the progress if a substantive reply cannot be given or the outcome of the application is not readily available. If the application is controversial or unusual in nature (e.g. DLO has not received any similar application in the past three years), the staff of DLOs should consult DO (and relevant policy bureaux, if considered necessary) on that type of application and thereafter submit the application to the District Lands Officer for decision.

Lands Department

Case No. 2013/5090 – Wrongly felling a tree without having tried to rescue it or consulted the relevant Village Representatives

Background

687. On 2 December 2013, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD). Allegedly, LandsD had wrongly felled an old tree (the Tree) in the village concerned (the Village) without having tried to rescue it or consulted the Village Representatives.

The Ombudsman's observations

688. Having examined the relevant guidelines, records and reports, the Office considered that the District Lands Office concerned (DLO) had duly followed the established procedures when handling the complainant's first complaint. As both Contractor A and the Tree Unit of LandsD (the Tree Unit) recommended removal of the Tree, it was not unreasonable of DLO to arrange felling it on safety grounds.

689. However, before the felling took place, the complainant had made a second complaint on the Tree. Contractor B's Report 2 showed that the Tree might have "fung shui" significance. The Office noted that DLO was not required to consult the public on the felling of trees, even if a tree had "fung shui" significance. However, DLO should have, in this case, tried to ascertain the "fung shui" significance of the Tree; and if there was any, posted a notice on site for public information before the felling of the Tree.

690. LandsD attributed DLO's oversight to the wrong location of the tree indicated in Report 2, which had misled DLO into thinking that the tree with possible "fung shui" significance was not the Tree. However, the Office considered that DLO should have been more alert to the following signs that it was in fact the Tree –

(a) while the 1823 had assigned a new reference number to the complainant's second complaint, the reference number of his/her first complaint was quoted in the 1823's referral to LandsD; and

(b) the photographs taken in DLO's site inspection and those in Report 1 and Report 2 actually showed the same tree.

691. The Ombudsman considered the complaint against LandsD unsubstantiated but other inadequacies found.

692. The Ombudsman recommended that LandsD reminds staff to examine information from complainants, contractors and any other parties with greater care.

Government's response

693. LandsD accepted The Ombudsman's recommendation and has taken the following actions in handling tree complaints –

(a) reminded its staff to examine all the information provided by complainants, contractors and any other parties with greater care;

(b) reminded its staff to examine the cases carefully, in particular those referred from the 1823, on whether they refer to the same tree(s) being handled;

(c) reminded its staff to follow the established procedures when handling tree related complaints;

(d) reminded its staff to work with the Tree Unit to ensure the accuracy and completeness of tree assessment/inspection reports provided by the arboricultural contractors;

(e) advised the arboricultural contractors that their reports and other findings including the location of the trees should be verified before submission to LandsD; and

(f) provided courses to strengthen staff knowledge on tree works.

Lands Department

Case No. 2013/5304 – Renewing a short-term tenancy with a company without open tender

Background

694. On 19 December 2013, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD).

695. According to the complainant, LandsD granted a piece of land (the site) by short term tenancy (STT) and allowed the tenant to repeatedly renew the tenancy upon expiry on a quarterly basis, such that the site had been rented to the tenant continuously for over six years. The complainant alleged that LandsD did not put up the site for open tender and thus deprived other interested companies and members of the public the right to rent the site, which was contrary to the principle of fair competition.

696. LandsD indicated that for common STTs (Category (1)), after expiry of the three-year lease term, if the Government proposed developing the site within three years, the District Land Office concerned (DLO) would not retender the site but would instead renew the tenancy on a quarterly basis according to the market rent. On the contrary, if the site could be rented by STT for more than three years, the relevant DLO would lease out the site by open tender.

697. Separately, for cases where STTs were converted from Government Land Licences (GLLs) and where STTs were granted years ago to regularise the occupation of urban sites for industrial or commercial use (Category (2)), generally, upon expiry of the tenancy, the relevant DLO would not put up the sites for open tender. Instead, the tenancy would be renewed on a quarterly basis (i.e. every three months) until the site was required for long-term development. The rental would be adjusted to the market level every three years. The STT in question belonged to Category (2). According to the procedures mentioned above, the DLO in the case renewed the tenancy, on a quarterly basis, to the tenant all along in the past years without open tender.

The Ombudsman's observations

698. According to the information provided by LandsD, the automatic renewal of Category (2) STTs followed the practice adopted decades ago for GLLs. From the perspective of complying with the established procedures, the way that DLO handled the STT of the site was understandable. In this connection, The Ombudsman considered the complaint against LandsD unsubstantiated.

699. That said, the automatic renewal of Category (2) STTs has been, after all, only a usual practice of LandsD over the decades. Whether its related policy had gone through a rigorous formulation process and whether it is acceptable by the public are highly questionable. The Office is of the view that it is against the principle of fair competition by allowing STT on government land, being a valuable public resource, to be renewed automatically for a long period of time without open tender. This would inevitably attract public criticism of underhand dealings between the Government and individuals.

700. In view of this, The Ombudsman urged LandsD to review the STT arrangement of Category (2) cases as soon as possible.

Government's response

701. LandsD accepted The Ombudsman's recommendation. As The Ombudsman's recommendation involves a long-standing practice and policy consideration, the Development Bureau and LandsD would have to study relevant information in detail and consider policy factors. A considered response will be provided after completing an internal review.

Lands Department

Case No. 2014/0459(I) – Refusing to provide the complainant with the reports prepared by other department and organisation with respect to an application for building village houses

Background

702. On 30 January 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD).

703. The complainant lives in a village (Village B) in an area (Area A). According to the complainant, applications were made to LandsD's District Lands Office concerned (DLO) for building four small houses in the Village B. In 2012, the complainant raised objection to DLO for the reasons that the proposed small houses would affect the fung shui of the ancestral hall in Village B and that the proposed houses would be located near the overhead power lines of a company (Company C), hence posing hazard to the proposed houses and other houses. On 20 November 2012, DLO replied to the complainant, stating that his objection was rejected.

704. On 8 December 2012, the complainant wrote to LandsD to appeal against DLO's rejection of his objection. In the letter, the complainant made the following requests:

(a) "If DLO is in possession of any documents concerning the fung shui area of Area A, the documents should be given to us for verification; … If DLO is in possession of any documents proving that the fung shui area of Area A is equivalent to that of the ancestral hall of Village B, they should be given to us for verification"; and

(b) "We request DLO to make the recommendation report of Company C available to us… … If DLO has consulted the Electrical and Mechanical Services Department (EMSD) on the risks posed by the high voltage lines, please make the recommendation report of EMSD available to us".

705. On 24 January 2014, LandsD wrote to the complainant in response to his appeal. For request (a), LandsD made no response in the reply. For request (b), LandsD said that neither Company C nor EMSD objected to the small house applications, and Company C recommended that no works be carried out within seven metres of the overhead power lines to ensure safety. However, LandsD did not provide the complainant with the documents requested as they involved "third-party information" and were "internal documents". The complainant alleged that LandsD breached the Code on Access to Information (the Code) by not providing him with the requested information.

The Ombudsman's observations

706. The Office has perused the complainant's letter of 8 December 2012 to LandsD. While the Office considered that the major purpose of the letter was to make an appeal, the concerned request (a) and request (b) were also made clearly to LandsD in the letter. LandsD should not have considered the complainant's appeal only without addressing at the same time the complainant's requests for information.

707. For request (a), what the complainant requested were documents on the fung shui area of Area A and also documents proving that the fung shui areas of Area A and that of the ancestral hall of the Village B were equivalent. The Office was of the view that what the complainant raised was not merely a challenge, as said by LandsD, but also a specific request for access to information. Even if the complainant had previously been provided with part of the information, and notwithstanding the reasons for non-disclosure as relayed to the Office by LandsD, LandsD should have responded specifically to the complainant's requests and provided him with an explanation instead of being evasive.

708. Regarding request (b), the correspondence of LandsD with Company C and EMSD did not suggest that LandsD, when provided with the documents, had reached an agreement or a tacit understanding with Company C and EMSD that the information should not be further disclosed. The Office thus believed that Company C and EMSD might not necessarily object to disclosing to the complainant the advice which they offered.

709. LandsD's concern (i.e. the concern whereby the disclosure of the information would allow the complainant to exert pressure on LandsD in an attempt to influence the latter's decision on small house applications) was in fact not considered by the Office as a reason as stipulated in the Code for refusing a request for access to information. Company C and EMSD did not object to and adopt a contradicting stance against LandsD's position on the small house applications either. LandsD's argument was therefore rather not convincing.

710. The Office took the view that, notwithstanding LandsD's concern, LandsD should have at least consulted Company C and EMSD on the disclosure of information according to the instructions of the Guidelines on Interpretation and Application of the Code, instead of hastily declining the complainant's request for access to information.

711. Finally, LandsD took as long as 14 months to respond to the complainant's requests for information. No response was made to the complainant as to whether such information was held and would be provided by LandsD. This constituted a serious breach of the requirement under the Code which specified the maximum response time of 51 days regarding to applications for access to information.

712. All in all, LandsD failed to fully comply with the Code in handling the complainant's requests for access to information. Therefore, The Ombudsman considered the complaint partially substantiated.

713. The Ombudsman urges LandsD to –

(a) provide the complainant with the requested information unless Company C and EMSD raise an objection; and

(b) provide training for its staff to ensure that they clearly understand and comply with the content and provisions of the Code and the Guidelines on Interpretation and Application.

Government's response

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

(a) LandsD has consulted Company C and EMSD on the disclosure of their comments to the complainant. Company C considers it inappropriate to disclose its comments to the complainant, whereas EMSD has no objection to the disclosure. Accordingly, LandsD has provided the complainant with EMSD's comments. Also, LandsD has provided the complainant once again with the map showing the fung shui area of Area A; and

(b) LandsD would hold seminars every two years to enable staff to have a more in-depth understanding of the contents of the Code and its scope of application. Two seminars were held in August and September 2013 and the next two seminars would be held in October and November 2015.

Lands Department

Case No. 2014/1203 – (1) Failing to inspect the land to be resumed (including part of the complainant's land) after gazetting the notice of proposed resumption of land for sewerage works; (2) Failing to register the notice of proposed resumption of land in the Land Registry in respect of the complainant's land; and (3) Failing to provide the complainant with the land resumption plan

Background

715. In 2011, the complainant purchased a ground floor unit with garden (the Property) on a lot in the New Territories.

716. In November 2012, the Lands Department (LandsD) notified the complainant that the Government was going to resume part of the land of the Property (the Property land) for undertaking certain sewerage works. The complainant later came to realise that the land resumption proposal for the sewerage works had actually been gazetted by the Government in 2008.

717. The complainant told the Office of The Ombudsman that before purchasing the Property, he had already hired a solicitor to conduct a land search. However, the records at the Land Registry (LR) did not indicate that part of the Property land was to be resumed. He, therefore, had no way to learn of the resumption plan drawn up back in 2008. The complainant alleged that LandsD had failed to provide the necessary information to prospective property buyers.

The Ombudsman's observations

718. The departments concerned had indeed followed the statutory procedures in publicising the information concerning the sewerage works and the land resumption plan, and deposited the "Plan and Scheme" in LR for public inspection. From an administrative point of view, there was no impropriety regarding LandsD's dissemination of information about the land resumption plan. In fact, those pieces of information were available in LR for public inspection when the complainant purchased the Property.

719. In view of the above, The Ombudsman considered the complaint unsubstantiated.

720. The case showed that in handling property transactions, some solicitors might just focus on checking the land register records of the property when conducting a land search in LR, without looking for the "Plan and Scheme" relating to any possible land resumption at the same time, such as the one in this case. As a result, prospective property buyers might not be able to get such information. The Ombudsman, therefore, recommended LandsD to attempt to contact the Law Society of Hong Kong and advise it to consider reminding its members to pay attention in future.

Government's response

721. LandsD accepted The Ombudsman's recommendation and has written to the Law Society of Hong Kong, asking it to consider reminding its members to pay attention to the "Plans and Schemes" of land resumption when conducting land search at LR in future.

Lands Department

Case No. 2014/1818 – Delay in handling the complainant's application for the Modification of Tenancy and Certificate of Exemption

Background

722. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD) on 24 April 2014. According to the complainant, he is the owner of a lot. Issued with a Modification of Tenancy Permit (the permit) in the early years, the complainant's father had built a house, including a domestic structure, on the lot. In August 2002, the District Lands Office concerned (DLO) of LandsD informed his father in writing that the permit had been cancelled on 14 May the same year because road works would be carried out by the Government. DLO further said that the complainant's father could apply for re-issuing the permit for any remaining portion of the private lot that was not required for the road works, if the road works did not utilise the entire site under the permit.

723. The complainant's father had passed away by the time the road works was near completion in 2007. The complainant applied to DLO for re-issuing the permit in respect of the remaining portion of the permit site. The complainant said that at that time a staff member of DLO suggested that he first repaired the brick house on the site covered by the permit. But subsequently the Buildings Department (BD) and DLO claimed that the house on the lot was built without approval and encroached upon the adjoining government land. He was thus required to demolish the house. In December the same year, the complainant applied to DLO in writing for re-issuing the permit and for a Certificate of Exemption (CoE) required for building a house on the lot. DLO has, however, not finished processing the two applications.

724. The complainant alleged DLO for delaying the processing of the two applications.

The Ombudsman's observations

725. DLO's records showed that both applications made by the complainant in 2002 and 2007 failed to satisfy the conditions for issuing permits.

726. However, shortly after receiving the complainant's application in 2002, DLO received objections from other immediate family members of the original permit holder against the application. In other words, it was obvious at that time that the complainant was not eligible for permit re-issuance. Nevertheless, DLO did not advise the complainant of this in a timely manner and did not inform him of the progress. Regarding the application made in 2007, DLO did not make an early response to the supplementary information submitted by the complainant and to the request made by him, resulting in the lack of substantial progress on the complainant's application. This should be considered a delay.

727. Notwithstanding the large number of cases which DLO had to deal with and which could only be processed according to priorities, the complainant's two applications were not attended to until several years after they were made. Amongst others, no action has been taken since the complainant submitted supplementary information regarding his application in 2007. It was not until 2014 when a notice requiring the demolition of the unauthorised structure was affixed by the New Territories Action Team of LandsD and when the complainant approached DLO to enquire about his applications for permit re-issuance and rebuilding did DLO proceed to take follow-up action. The Office considered the delay in taking follow-up action rather serious.

728. Based on the above analysis, The Ombudsman considered the complaint against LandsD substantiated.

729. The Ombudsman recommended LandsD to keep a close watch on the progress of the above applications of the complainant, learn from the experience of the case, as well as remind its staff of informing applicants of the application result or progress in a timely manner when handling similar applications in the future. In particular, applicants found not satisfying the conditions for issuing permits have to be so informed as soon as possible, so that they can make early adjustment to their plans. Apart from this, DLO should also review the progress of cases from time to time and expedite the processing of long outstanding cases to minimise delays.

Government's response

730. LandsD accepted the recommendation from The Ombudsman. For this case, DLO received in mid-October 2014 the required documents from the complainant regarding his application for re-issuing the permit and rebuilding the house, and approved the application. DLO has informed the complainant of the progress and the result of his application in a timely manner.

Lands Department

Case No. 2014/2143 – Delay in taking clearance action against a wall stall adhered to a building

Background

731. The complainants lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD) in April and May 2014.

732. According to the complainants, since 2009 they had been requesting the District Lands Office concerned (DLO) of LandsD to demolish a stall affixed to the external wall of the ground floor of a building (the stall). In January 2013, DLO informed the complainants in writing that demolition works would be carried out according to the applicable procedures. However, in August the same year, DLO wrote to the complainants again, asking them to provide information to prove that the building would soon undergo repair and that the stall would obstruct repair works before the demolition of the stall would be considered. The complainants criticised LandsD for making an unreasonable request and delaying enforcement action.

733. In the Environmental Improvement and Clearance Programme (the programme) conducted in 1986, the Government carried out a survey for the unauthorised structures on developed government land (including rear lanes). Structures that were allocated a survey number under the programme were allowed to remain on a temporary basis. LandsD would consider clearance only under one of the following circumstances (reasons for clearance) –

(a) posing an imminent danger;

(b) causing fire safety problems;

(c) causing hygienic nuisance;

(d) having to make way for government development projects; and

(e) posing an obvious risk to public lives and properties.

734. Before considering clearance, LandsD will consult the relevant government departments to ascertain whether there are reasons for clearance.

The Ombudsman's observations

735. DLO initially intended to demolish the stall because the complainants alleged that the stall would obstruct the repair works to be carried out on the building. Subsequently, DLO withheld the clearance action in response to the stall owner's challenge, and requested the complainants to provide information to prove that repair works would be carried out on the building shortly and that the stall would cause obstruction to such works. The Office took the view that it was not unreasonable for DLO to act in this way. Nor was there delay on the part of DLO in taking enforcement action since DLO could hardly take further action in the absence of the required information from the complainants.

736. Based on the analysis above, The Ombudsman considered the complaint against LandsD unsubstantiated.

737. The Office noted that apart from the reasons for clearance mentioned above, there were no other reasons by virtue of which LandsD could demolish the structures surveyed in the programme (the stall was no exception). LandsD said it was based on the reason for clearance (e) that DLO considered demolishing the stall. However, there was no available information to show that the building, without undergoing repair, would become structurally unsafe and consequently "pose an obvious risk to public lives and properties". So even if the complainants were able to provide information to prove that repair works would soon be carried out on the building and that the stall would cause obstruction to such works, the "obvious risk to public lives and properties" as stated in the reason for clearance (e) had yet to be ascertained. The Ombudsman thus advised DLO not to ignore this point when further considering whether to demolish the stall.

Government's response

738. LandsD accepted The Ombudsman's recommendation and has requested the complainants to provide further information to prove that repair works would soon be carried out on the building and that the stall would cause obstruction to such works. Upon receiving the said information and ascertaining whether the stall poses the reason for clearance of "obvious risk to public lives and properties", DLO will consider demolishing the stall under applicable procedures.

Lands Department

Case No. 2014/4322(I) – (1) Inaccuracy in recording the particulars of a certain structure in the surveyed squatter control record and impropriety in handling an investigation related to the structure; and (2) Unreasonably refusing to provide the complainant with squatter control record related to the subject structure

Background

739. On 9 October 2014, the complainant lodged a complaint with the Office of the Ombudsman (the Office) against a Squatter Control Office (SCO) of the Lands Department (LandsD).

740. According to the complainant, the structure on a lot, which has been used by the complaint's father for operating glass and mirror business (the structure), was assigned a squatter structure survey number (the number). The structure was situated in part on government land and in part on private land. In the letter issued to the complainant on 10 April 2014 and the subsequent meeting, SCO pointed out that the use (workshops/shops) of the structure was incompatible with the use (storage) in the squatter structure survey and requested the complainant to rectify. In mid-June 2014, the complainant provided SCO with a letter issued by the Business Registration Office (BRO), certifying that his father began to operate glass and mirror business in the structure from 1978. He was informed by SCO in writing on 25 September 2014 that the squatter hut to which the number was assigned had already been demolished in 1982 for road construction, and that there was no survey record for the existing structure on the lot. SCO referred the case to the District Lands Office concerned (DLO) for follow-up actions.

741. During a meeting with SCO on 6 October 2014, the staff of SCO showed the complainant an aerial photo and a surveyed structure map (the map) and told the complainant that, as indicated on the map, the squatter hut to which the number had been assigned was not situated at the location currently occupied by the existing structure. The complainant asked SCO for copies of the two materials for seeking professional advice. Nonetheless, staff of SCO only provided the complainant with a copy of the aerial photo, and his request for a copy of the map was not acceded to.

742. The complainant then alleged SCO that –

(a) the squatter structure survey records and the investigation were not accurate/proper. SCO initially claimed that according to its survey records, the structure was used for storage. After he had provided some information to prove that the structure had all along been used as a shop, SCO claimed that the squatter structure to which the number was assigned had long been demolished as revealed by its investigation; and

(b) he was refused a copy of the map without a reason.

The Ombudsman's observations

Allegation (a)

743. Having examined relevant records, the Office was satisfied with LandsD's representations concerning SCO's follow-up action on the structure. Given the lack of a squatter survey record for the structure, it was not improper for SCO to refer the case to DLO so that land control and lease enforcement actions could respectively be taken with regard to the government land and the private lot on which the structure was located.

744. That said, the investigation of SCO was clearly not entirely satisfactory. Failing to ascertain the exact location of the squatter hut of the number in its initial handling of the complaint, SCO was unable to find out earlier that the structure under complaint did not have a valid squatter survey record at all. As a result, the complainant had to spend time seeking information, which was in fact not useful to his case, from BRO, and LandsD's overall follow-up action was delayed.

745. In conclusion, The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

746. The Office considered LandsD's explanation for not providing the complainant with the full version of the map justified. However, instead of refusing the complainant's request completely, LandsD should have followed the spirit of the Code on Access to Information (the Code) by providing the complainant with the map, having crossed out the parts of the map containing information not relevant to him, instead of turning down completely his request.

747. The Office was also of the view that SCO had breached the Code by not explaining to the complainant the reasons for rejecting his request and not informing him of the channels of review and complaint.

748. All in all, The Ombudsman considered allegation (b) partially substantiated.

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

750. The Ombudsman recommended LandsD to –

(a) provide the complainant with a copy of the map with the survey numbers of other squatter huts crossed out; and

(b) remind its staff to follow the provisions of the Code in handling requests for access to information by members of the public.

Government's response

751. LandsD accepted The Ombudsman's recommendations and provided the complainant with the survey map on 22 April 2015 with the parts containing information not relevant to him being crossed out. LandsD also reminded all SCO staff on 12 May via email that the Code had to be followed when handling requests for access to information by members of the public, and members of the public could apply to SCO for copies of squatter survey maps with information not relevant to the applicants crossed out.

Leisure and Cultural Services Department

Case No. 2013/3429 – Failing to take due consideration in approving organisations to hold the Yu Lan Ghost Festival, thereby causing noise nuisance to nearby residents

Background

752. The complainant complained against the Leisure and Cultural Services Department (LCSD) for failing to fully consider the sound and noise generated by an event when approving the event to be held in one playground, thereby causing noise nuisance to the nearby residents.

753. The complainant resided in a building near the playground. On May 2013, he lodged a complaint to LCSD alleging that there were organisations holding events (including Chinese opera) at the playground from 7 p.m. to 11 p.m., causing noise nuisance to the nearby residents. LCSD made a pledge to the complainant that it would fully consider the impact of events on nearby residents with a view to reducing the nuisance to the minimum when hiring out venues to organisations for holding activities in future.

754. On August 2015, LCSD hired out the playground concerned to one organisation for holding the Yu Lan Ghost Festival (the Festival). The event time continued to be from 7 p.m. to 11 p.m., rendering most members of the public resting after 9 p.m. sleepless with the noise. The complainant was of the view that LCSD ignored his earlier complaint and did not consider the noise nuisance of the event caused to the nearby residents. The complainant phoned LCSD to express his discontent and demanded LCSD to adjust the event time of the organisation. Nevertheless, LCSD indicated that it would be difficult to request the organisation to change the event time as the event was about to commence.

755. The complainant felt aggrieved and thus lodged a complainant with the Office of The Ombudsman (the Office).

The Ombudsman's observations

756. Although LCSD had required the organiser to sign undertakings to comply with the conditions of use (including the relevant guidelines issued by the Environmental Protection Department (EPD)), the organiser still did not comply with the conditions repeatedly. The Office reviewed the relevant documents and discovered that a number of organisers contravened the conditions of use. The information showed that one organiser did not comply with the advice of LCSD when holding the Festival in another playground, delaying the finish of the event until 12 a.m.. The root of the problem was the insufficient monitoring of LCSD on the organisers and that LCSD had not formulated an appropriate penalty mechanism.

757. The organiser did not comply with the requirements to distribute notices to the nearby residents to inform them of the date, time, venue and programmes of the event. However, LCSD was completely unaware of the non-compliance, reflecting its failure to strictly monitor the compliance of the organiser with the guidelines and fulfill its role as a gatekeeper. In fact, it would be difficult for LCSD to verify the information provided by the organiser after the event even if the documents had been submitted. For that reason, LCSD should have collected all the documents from the organiser beforehand (e.g. three days before the event) and taken the initiative to verify the information by visiting the buildings in the vicinity. Nonetheless, LCSD failed to do so.

758. The Office was of the view that LCSD should consider including new clauses into the conditions of use that would require organisers to distribute notices to the buildings within a specific area (e.g. within 100-metre radius of the playground) and submit in advance to LCSD relevant information such as the places and dates of distribution. A notice board should also be placed in the venue, listing in detail the actions taken and to be taken by the organisers, to keep LCSD and members of the public more informed and facilitate the monitoring work.

759. The undertakings stated clearly that in case of non-compliance with any condition of use, LCSD could cancel the hirer's right to use the venue at once. In practice, this penalty was difficult to administer as it might lead to immediate conflicts and even clashes. Similarly, issuing verbal advice and warnings, as well as keeping records of non-compliance could hardly produce any effect. LCSD had never rejected subsequent applications for hiring venue by non-compliant organisers. In other words, an organiser would not suffer any actual

consequences even if it breached the undertakings and failed to comply with the requirements of LCSD under the prevailing penalty system. The Office considered that the mechanism seemed to exist in name only.

760. The Office considered that the penalty on non-compliant organisers must bear real deterrent effects and be practical in order to reduce non-compliance by the organisers. LCSD should seriously consider setting fines for non-compliance, for example, a fixed penalty for each minute of event overrun or for each decibel of noise exceeding the limit. If the penalty system had been instituted, LCSD could consider requesting the organisers to deposit a sum in advance, for paying the possible fines for non-compliance at a later stage.

761. On the other hand, LCSD had warned organisers that any non-compliance would be recorded for consideration in processing their future applications. However, given the fact that the content of the Notice of Offence was far from being specific, apparently it was an empty gesture rather than an action to be taken by LCSD. The Office recommended that LCSD should consider implementing a "demerit point system" under which each case of non-compliance would carry different points depending on its severity and an organiser would be penalised after accumulating certain points, for instance the suspension of the right to hire venues for a certain period of time (say, two years). This unambiguous penalty mechanism should be conducive to enhancing the deterrent effects and thus reducing the repeated non-compliance of the contraveners.

762. In response to the concerns of members of the public, LCSD undertook to take their views into account when handling future applications. Nevertheless, LCSD did not convey their views to the departments concerned and the persons affected when consulting them on the said application.

763. The conditions of use set by LCSD generally require that activities must end by 11 pm. Yet, the circumstances may vary with districts or events. LCSD should consider, on a case-by-case basis, imposing more stringent restrictions on the duration of events if necessary. LCSD should consider changing the current conditions of use to impose these restrictions. It is also specified in the conditions of use that an appropriate person should be appointed by the organiser to monitor the noise level. However, the name and qualifications of such person were not recorded on the Noise Monitoring Form submitted by the organiser. Obviously, LCSD did not verify whether the monitoring person was an

"appropriate person", reflecting that LCSD was lax in checking the compliance of the organiser with the conditions of use.

764. The Ombudsman recommended that LCSD should –

(a) consider adding new conditions so as to strengthen the monitoring of compliance of event organisers;

(b) review the prevailing penalty mechanism to set down workable and adequate punishments with real deterrent effects;

(c) provide collated public views for the departments and persons concerned when consulting them on similar events;

(d) consider revising the existing conditions of use to restrict the duration of activities if necessary; and

(e) remind the staff to conscientiously and closely monitor the compliance with conditions of use by the organisers.

Government's response

765. The Festival has been inscribed onto the National List of Intangible Cultural Heritage (ICH). In line with the Government's policy of promoting and supporting ICH, LCSD gives special consideration to applications for holding activities related to the Festival. LCSD will continue to strike a balance between the need to honour the long-time tradition of the Festival and the impact on the residents nearby. It will further discuss with the organisers of the events in order to come up with practicable improvement measures. LCSD has taken forward four of the five recommendations made by The Ombudsman.

Recommendation (a)

766. LCSD accepted and implemented the recommendation.

767. From 2014 onwards, LCSD's District Leisure Services Offices have required organisers of events related to the Festival to follow the normal consultation practice of the Home Affairs Department and distribute advance notices to residents of buildings close to the event venue. LCSD has also incorporated the requirement into the "Guidelines on Noise Monitoring and Control at Outdoor Leisure

Venues" (Noise Guidelines) and "Guidelines on Processing Applications for Non-designated Use of Leisure Venues". To help ensure strict compliance with this requirement, event organisers are required to submit in advance a copy of the notice to LCSD and post a notice at the venue one week before the event, informing members of the public of the details of the event and the noise control arrangements to be made.

Recommendation (b)

768. LCSD did not accept the recommendation and has informed the Office.

769. LCSD has already put in place provision to impose penalties for non-compliance when booking and using leisure venues. Under the current system, if an organisation receives two default notices in respect of the same venue within 12 months, its priority booking status for the facilities in the same district will be suspended for six months.

770. LCSD considers it not feasible to introduce a fine for non-compliance for the following reasons –

(a) non-compliance with the noise and time requirements is currently not an offence subject to penalties under the Pleasure Grounds Regulation (Cap. 132BC). Furthermore, since the fee-setting authority in the relevant ordinance is not intended to be penal in nature, it may not be appropriate to invoke the statutory power to penalise a hirer for excessive noise and programme overrun; and

(b) as noise levels fluctuate in response to the sound generated by the events and ambient noise, it would be difficult to establish an appropriate method of setting fines according to the noise measurements.

771. LCSD will continue to work with EPD to implement practicable improvement measures to reduce the nuisance that may be caused to nearby residents by events held at its venues. LCSD will also explore the merits and feasibility of introducing further administrative measures to discourage programme overrun beyond the designated time. LCSD has proposed alternative measures to the Office.

Recommendation (c)

772. LCSD accepted and implemented the recommendation.

773. As specified in LCSD's Noise Guidelines, venue staff members are required to provide detailed information when consulting other departments on an application if there have been noise complaints about similar events held by the same organiser.

Recommendation (d)

774. LCSD accepted and implemented the recommendation.

775. LCSD's Noise Guidelines require staff to specify clearly the duration of events when approving an application. With the exception of special occasions (such as the New Year's Eve Countdown), events are normally required to end by 11 p.m.. Musical, singing and instrumental performances must end by 10:30 p.m. so as to avoid a breach of the Noise Control Ordinance. If an organiser strongly requests to extend a musical, singing or instrumental performance beyond 11 p.m., LCSD has to seek EPD's comments. To facilitate consideration of the request, the District Leisure Services Offices must consult EPD, making reference to residents' views on previous activities and the justification given by the event organiser.

Recommendation (e)

776. LCSD accepted and implemented the recommendation.

777. To enable venue staff to monitor effectively whether event organisers have implemented noise control measures in compliance with EPD's guidelines (i.e., the "Noise Control Guidelines for Music, Singing and Instrument Performing Activities"), LCSD has updated its Noise Guidelines to include a template for a log book for the Festival. By using the log book, venue staff can keep a record of follow-up action. Briefing sessions for staff were held in 2014 and 2015 to explain the requirements of the Noise Guidelines.

Leisure and Cultural Services Department and Environmental Protection Department

Case No. 2013/5253A&B – Ineffective control over the organisers of the Yu Lan Ghost Festival and failing to collect scientific data on-site for understanding the effects of pollution caused by the activities on nearby residents' health

Background

778. The complainant alleged that the Yu Lan Ghost Festival (the Festival) held at a playground in August and September 2013 produced excessive noise and strong light. The smoke from joss paper burning also seriously affected the housing estate in which he was living. The organisers, however, had not alerted the estate's management office in advance of details of the activities. The problems had allegedly persisted for several years and he had previously lodged complaints with the Leisure and Cultural Services Department (LCSD), the department for approving such activities. Nevertheless, the situation hardly improved. The complainant considered LCSD to have failed to monitor and regulate the Festival properly, resulting in serious nuisance to residents. Besides, LCSD and the Environmental Protection Department (EPD) had failed to collect scientific data on-site for understanding the effects of various kinds of pollution caused by the activities on the health of nearby residents.

The Ombudsman's observations

LCSD

779. Documentary records showed that over the past three years, the two organisations (the Organisers) had repeatedly failed to comply with the requirements of the undertakings. The Office of The Ombudsman (the Office) considered LCSD lax in its monitoring and did not put in place an adequate penalty system.

780. The Organisers had failed to fulfil the requirements to submit to LCSD in advance a distribution list of the notices for residents. Consequently, LCSD could not verify whether the notices had really been distributed or ascertain the accuracy of the contents. In fact, LCSD

should have checked this at all the buildings in the vicinity before the Festival.

781. On the nights of the *Shengong* opera performance, the Organisers did not appoint a person to measure the noise level but LCSD did not take immediate follow-up actions. It only issued a Notice of Offence three months later. Devoid of substance, such Notices would have little effect.

782. The undertakings stated clearly that in case of non-compliance, LCSD could cancel the right to use the venue at once. In reality, this penalty was hard to administer. Similarly, issuing verbal advice and warnings and keeping records of non-compliance hardly had any effect. LCSD had actually never rejected subsequent applications for booking the venue by the Organisers. In other words, the penalty system existed in name only.

EPD

783. EPD had formulated regulatory guidelines for controlling air and noise pollution. It had also conducted an analysis of the composition of the smoke emitted during the burning of paper artefacts to better understand the air pollution problem. Also, EPD had properly followed up the relevant complaints.

784. Overall speaking, The Ombudsman considered the complaint against LCSD substantiated whilst the one against EPD unsubstantiated.

785. The Ombudsman recommended that LCSD should –

(a) consider adding new conditions so as to strengthen the monitoring of compliance of event organisers;

(b) review the penalty system and draw up workable and adequate punishments with real deterrent effect; and

(c) remind the staff to conscientiously and closely monitor the compliance with conditions of use by the event organisers.

Government's response

786. The Festival has been inscribed onto China's National List of Intangible Cultural Heritage (ICH). In line with the Government's policy of promoting and supporting ICH, LCSD gives special consideration to applications for holding activities related to the Festival. LCSD will continue to strike a balance between the need to honour the long-time tradition of the Festival and the impact on the residents nearby. It will further discuss with the organisers of the Festival in order to come up with practicable improvement measures. LCSD accepted and implemented two of the three recommendations made by The Ombudsman. The details are set out below.

Recommendation (a)

787. LCSD accepted and has implemented the recommendation.

788. From 2014 onwards, LCSD's District Leisure Services Offices have required organisers of events related to the Festival to follow the normal consultation practice of the Home Affairs Department and distribute advance notices to residents of buildings close to the event venue. This requirement has also been incorporated into the "Guidelines on Noise Monitoring and Control at Outdoor Leisure Venues" and the "Guidelines on Processing Applications for Non-designated Use of Leisure Venues". To help ensure strict compliance with this requirement, event organisers are required to submit in advance a copy of the advance notice to LCSD and post a notice at the venue one week before the event, informing the public of the details of the event and the noise control arrangements to be made.

Recommendation (b)

789. LCSD did not accept the recommendation and has informed the Office.

790. LCSD has already put in place provision to impose penalties for non-compliance when booking and using leisure venues. Under the current system, if an organisation receives two default notices in respect of the same venue within 12 months, its priority booking status for the facilities in the same district will be suspended for six months.

791. LCSD considers it not feasible to introduce a fine for non-compliance for the following reasons –

(a) non-compliance with the noise and time requirements is currently not an offence subject to penalties under the Pleasure Grounds Regulation (Cap. 132BC). Furthermore, since the fee-setting authority in the relevant ordinance is not intended to be penal in nature, it may not be appropriate to invoke the statutory power to penalise a hirer for excessive noise and programme overrun; and

(b) As noise levels fluctuate in response to the sound generated by the events and ambient noise, it would be difficult to establish a robust method of setting fines according to the noise measurements.

792. LCSD will continue to work with EPD to implement practicable improvement measures to reduce the nuisance that may be caused to nearby residents by events held at its venues. LCSD will also explore the merits and feasibility of introducing further administrative measure to discourage programme overrun beyond the designated time. LCSD has proposed alternative measures to the Office.

Recommendation (c)

793. LCSD accepted and has implemented the recommendation.

794. To enable venue staff to monitor effectively whether event organisers have implemented noise control measures in compliance with EPD's guidelines (i.e., the Noise Control Guidelines for Music, Singing and Instrument Performing Activities), LCSD has updated its "Guidelines on Noise Monitoring and Control at Outdoor Leisure Venues" to include a template for a log book for the Festival. By using the log book, venue staff can keep a record of follow-up action. Briefing sessions for staff were held in 2014 and 2015 to explain the requirements of the Guidelines.

795. In order to reduce potential air pollution from the burning of paper artefacts during the Festival, LCSD and EPD have jointly obtained the consent of three organisers to use "environmental friendly joss paper burners" developed by EPD. The burners will be used on a trial basis for Yu Lan events at three venues this year. LCSD will include new conditions of use as appropriate for the three pilot venues and venue staff will closely monitor whether the facilities concerned are properly used by the organisers as required by EPD.

Mandatory Provident Fund Schemes Authority

Case No. 2014/1559 – (1) Failing to clearly explain the reason for not initiating prosecution; and (2) Delay in handling the complainant's case

Background

796. The complainant claimed that his employer had dismissed him in July 2010 (the pertinent month) without paying him wages in lieu of notice of termination of service, year-end bonus, and the wages of the pertinent month. The complainant then filed a claim with the Labour Tribunal to pursue the outstanding payments, while the employer also filed a counterclaim against the complainant. The two parties subsequently reached a settlement agreement at the Labour Tribunal by which the employer would pay a lump sum to the complainant in order to resolve all claims involved.

797. In October 2013, while the complainant was consolidating his Mandatory Provident Fund (MPF) accounts, he discovered that the employer had submitted a false statement to his MPF trustee, reporting that he did not have income in the pertinent month, and consequently no contribution was made for his MPF account for that month. The complainant thus lodged a complaint with the Mandatory Provident Fund Schemes Authority (MPFA) in November 2013.

798. In March 2014, MPFA contacted the complainant by phone and informed him that having considered all the factors including the triviality of the amount involved, the uncertainty of the amount of the wages of the pertinent month, and the expiry of the time limit for institution of prosecution, it was decided that no prosecution action would be taken against the employer. The complainant was dissatisfied with MPFA's decision and requested MPFA to list the justifications for not initiating prosecution to facilitate his consideration of taking legal action in the future.

799. On 4 April 2014, MPFA issued a reply letter to the complainant informing him of the investigation result. Nevertheless, regarding the institution of criminal prosecution, MPFA only reiterated that: "Having considered all the evidences and the factors of the case, the Authority would not take further action against the employer concerned".

800. The complainant alleged MPFA that –

(a) the final reply letter issued on 4 April 2014 by MPFA failed to clearly explain the reason for not instituting prosecution; and

(b) it was arguably a delay for replying to the complainant on the decision of not instituting prosecution as the reply was issued more than five months after receiving the complaint.

The Ombudsman's observations

Allegation (a)

801. In this case, although MPFA staff had verbally informed the complainant of the reasons for not instituting prosecution, the final reply letter had only provided the complainant with an unclear explanation.

802. The Office of The Ombudsman considered that the final reply letter is an important document which must be clear and easily understandable, enabling the complainant to fully comprehend the justifications for MPFA to or not to institute prosecution. Otherwise, it would violate the principles set out in the Department of Justice's "Prosecution Code".

803. Hence, The Ombudsman considered allegation (a) substantiated. The Ombudsman was pleased to note that in response to its inquiry, MPFA issued a written reply to the complainant on 27 May 2014, providing him with further information regarding the decision of not instituting prosecution.

Allegation (b)

804. Having reviewed MPFA's handling of the case, The Ombudsman considered that it was not unreasonable for MPFA to take time to conduct investigation into the complaint, and therefore found allegation (b) unsubstantiated.

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

806. The Ombudsman urged MPFA to complete a review on disclosure of prosecution decisions in writing. This should particularly address, in an appropriate manner, complainants' rights to information.

Government's response

807. MPFA accepted The Ombudsman's recommendation and has taken the following measures –

(a) MPFA had completed a review on disclosure of prosecution decisions in writing and revised the relevant procedures and guidelines. These direct staff members to inform complainants of investigation results of cases with the relevant and an appropriate dose of details, as well as explanations for not instituting prosecution; and

(b) to ensure that MPFA staff fully understands the new measures, MPFA had conducted briefing sessions for relevant staff members explaining to them the new procedures and guidelines in detail. The new measures had also been incorporated into the staff training programme.

Mandatory Provident Fund Schemes Authority

Case No. 2014/3137 – (1) Unreasonably requesting the complainant to pay a contribution surcharge while having failed to request the trustee to provide proof of the date of receiving the contribution from the complainant; (2) Failing to explain to the complainant about the reasons of a complaint being classified as unsubstantiated; (3) Lack of an independent appeal mechanism against its decision; (4) Failing to inform the complainant about the progress of a staff complaint; and (5) Lack of independent individuals to handle staff complaints

Background

808. The complainant was an information technology company. Having been notified by the complainant's mandatory provident fund (MPF) trustee (Trustee A) that the complainant was late in paying the contribution for its employees for March 2014, the Mandatory Provident Fund Schemes Authority (MPFA) imposed on the complainant the contribution surcharge (the surcharge, which equalled 5% of the amount in default). The complainant claimed that it had in fact sent out the contribution cheque one or two days before the due day. Believing that the problem was with Trustee A instead, the complainant lodged a complaint with MPFA, which, however, considered the complaint unsubstantiated.

809. The complainant was dissatisfied that MPFA had accused it of late contribution and imposed the surcharge, without any evidence to prove that Trustee A had received the complainant's cheque after the due day.

The Ombudsman's observations

810. The Office of The Ombudsman (the Office) considers that documents relating to the date an employer pays the contribution (such as the envelope stamped with the date chop) can be reliable independent corroborative evidence to substantiate whether or not the employer has been late in mailing out the contribution cheque. Trustee A contended that the complainant had been late in paying the contribution, but it had not followed MPFA' s instructions to keep the relevant documents and could only show MPFA its computer records. As the date of receipt of

the cheque on those records was only entered into the system manually by Trustee A's staff, it could be wrong.

811. The complainant's failure to follow Trustee A's instruction to despatch the contribution cheque earlier did not necessarily mean that the cheque had reached Trustee A after 10 April. However, the complainant could not produce any independent evidence to prove the cheque's timely arrival either. In other words, both the complainant and Trustee A could not provide concrete evidence regarding the payment date. MPFA, just on the balance of probabilities, chose to believe more in Trustee A and imposed the surcharge on the complainant. That was clearly not well-justified. The Office considered that MPFA's decision on the case should have been "inconclusive".

812. In view of the above, The Ombudsman considered this complaint partially substantiated.

813. The Ombudsman recommended MPFA to –

(a) review its decision of imposing the surcharge on the complainant;

(b) follow up on Trustee A's failure to properly keep documents relating to receipt dates of employers' payment of contributions (in particular, the relevant documents related to late payment must be kept to prove incompliance); and

(c) explain the reasons of investigation results in the final reply to the complainant.

Government's response

Recommendation (a)

814. MPFA accepted recommendation (a) and had already appointed an independent officer, who was not involved in handling the complaint, to review Trustee A's internal control system and record keeping procedures. MPFA's review finding was that the documentation provided by Trustee A, including its internal records, business model, a cheque copy scanned on the date of receipt by Trustee A and relevant internal control procedures, was confirmed as adequate and credible proof that the cheque posted by the complainant for payment of the

contribution of March 2014 reached Trustee A on 11 April 2014, instead of on or before the Contribution Day (i.e. 10 April).

815. Having reviewed all the evidence on hand, MPFA was of the view that the complainant had remitted the contribution of March 2014 late. As a result, the complainant was required under the MPF legislation to pay a contribution surcharge, which would be credited into the affected scheme member's MPF account. After review, MPFA upheld its decision of imposing a contribution surcharge on the complainant.

Recommendation (b)

816. MPFA accepted recommendation (b) and had already followed up with Trustee A to see if Trustee A had complied with the circular letter issued by MPFA in January 2014 in handling contributions. Paragraph 3(b) of the circular letter stipulated that trustees should keep proper records of receipt dates of payment of contributions and relevant supporting documents relating to such payments.

817. In response to The Ombudsman's recommendation, MPFA had followed up with Trustee A and confirmed that Trustee A did keep proper records of receipt dates of the employers' payment of contributions and relevant supporting documents relating to such payments.

818. MPFA had also reiterated to all MPF trustees (including Trustee A) that they must comply with the circular letter relating to the handling of contributions. Furthermore, each trustee must develop an internal control and risk management system that best meets its own business model, so as to ensure their compliance with the requirements of the MPF legislation and the circular letter when handling contributions.

Recommendation (c)

819. MPFA accepted recommendation (c). Subject to the relevant restriction imposed by the MPF legislation, MPFA will use its best endeavours to explain the investigation results to complainants.

Marine Department

Case No. 2013/3794 – (1) Negligence in inspecting a vessel; and (2) Giving preferential treatment to the former owner of the vessel in its application for a Certificate of Survey and providing fraudulent information in the certificate

Background

820. In April 2012, the complainant decided to purchase a vessel from a shipping company (Company A) on condition that an updated Certificate of Survey (CS) issued by the Marine Department (MD) would be provided. Company A's representative claimed that he was very familiar with MD's staff and so the Operating Licence of the vessel could be renewed in a "speedy" way. Shortly afterwards, Company A provided an updated CS and the complainant made payment for the purchase.

821. In July 2012, the complainant arranged an inspection and the vessel was found to have a number of defects, which was contradictory to its condition as described in the inspection records and CS of February and April the same year. Moreover, the information on the model of two main engines contained in the CS was different from that stated in the official records of the manufacturer.

822. The complainant alleged that MD's staff had been negligent in conducting the vessel inspections, hence failing to discover the defects and the "wrong" type of engines used on board. The staff had also inappropriately given preferential treatment to Company A by helping it pass the vessel inspections and provided fraudulent information in the updated CS.

The Ombudsman's observations

823. The relevant Periodical Inspection Records and Final Inspection Records revealed that MD staff had discovered a number of defects, indicating that the equipment/machinery concerned had been tested and inspected. MD stressed that the main engines were tested and found to be operational in April 2012. Based on those records, the Office of The Ombudsman (the Office) accepted that MD had followed the Code of

Practice and established procedures in carrying out the inspections.

824. There was a time gap of about three months between the final inspection carried out by MD in April 2012 and the checking of the vessel by the complainant in July 2012. According to MD's professional advice, if the machinery and main engines of the vessel were flooded by or soaked in water, especially when there was a typhoon in June 2012, they could deteriorate and become rusty in a short period of time. In this light, the Office could not establish that MD officers had been negligent in conducting the inspections.

825. The manufacturer's inspection result in February 2013 could not confirm the model of the two main engines due to the lack of proper identification. However, MD's inspection records of the vessel in the year of build showed that the engines were of the same model as those indicated in the CS of April 2012. There was no evidence suggesting that Company A had replaced the main engines or the engines as indicated in the CS were of the "wrong" type. MD noted that the manufacturer provided inconsistent information about the engine model in 1999 and 2013 and was seeking clarification from the manufacturer.

826. In fact, all local vessel owners could book an inspection with MD in a "speedy" way, i.e. one working day in advance. Therefore, Company A had not been given any preferential treatment. Regarding the allegation of fraudulence, the Office could not find any conclusive evidence that the information stated in the inspection reports was incorrect.

827. Based on the above analysis, The Ombudsman considered the allegations against MD unsubstantiated.

828. The Ombudsman recommended MD to –

(a) conduct a comprehensive review on the need and appropriateness of its requirements then in force regarding alterations to engines and, if reaffirmed, ensure that such requirements could be effectively enforced; and

(b) consider whether it is necessary to revise the format of the CS to avoid giving a misleading impression that all the information contained therein has been verified by its staff.

Government's response

829. MD accepted The Ombudsman's recommendations and has taken the following actions –

(a) MD has completed the preparation for the proposal to introduce a system of engraving engines with an official mark. The Local Vessels Advisory Committee's sub-committee (Survey Work of Local Vessels) will be consulted in the fourth quarter of 2015. If endorsed, the proposal would be implemented shortly afterwards; and

(b) The revision of the format of CS is in progress. Subject to further consultation with the trade and legal advice, it is likely that the revision will be completed by end 2015 or early 2016.

Official Receiver's Office

Case No. 2014/4514 – (1) Unreasonably selling the complainant's interest in a flat after his discharge of bankruptcy; (2) Unreasonably selling the complainant's interest in a flat when no repayment of debts was required by his debtors; and (3) Rude manners of staff

Background

830. According to the complainant, he and his wife were the joint owners of a flat (Property A). In March 2007, a bankruptcy order was made against him by the court. Since then, the mortgage payment for Property A had been made by his family member(s). In March 2011, he was discharged from bankruptcy. It was until the end of August 2014, the Official Receiver's Office (ORO) wrote to inform him that his interests in Property A (the Interests) were vested in the Official Receiver & Trustee in March 2007, and that ORO intended to sell the Interests for repayment of his debts and expenses of the bankruptcy.

831. During September and October 2014, he learned from his creditors (the four banks) that he was not required to make repayments or his debts had been written off, and that it would be for him to decide whether to make repayments or not.

832. In October 2014, he phoned staff member A of ORO twice and relayed the creditors' responses to her and requested ORO not to sell Property A. However, staff member A was rude in responding and then hung up the phone.

833. The complainant made the following allegations against ORO –

(a) it was unreasonable to sell the Interests after his discharge of the bankruptcy order;

(b) it was unreasonable for ORO to say that it was necessary to sell the Interests for repayment of his debts and expenses of the bankruptcy when the creditors did not require him to make repayments; and

(c) staff member A was rude to him.

The Ombudsman's observations

834. The Office of The Ombudsman (the Office) considered that as the trustee of the bankrupt's property, ORO has the responsibility to protect the creditors' interests. There was no impropriety for ORO to make the decision of realising the Interests after confirming that the creditors' debts could be paid off by such realisation. The Ombudsman therefore considered allegation (a) unsubstantiated.

835. Besides, the ORO had explained the reasons for having to realise the Interests (among other things, that the relevant creditors had not withdrawn their Proofs of Debts), and its explanation was considered reasonable by the Office. In the light of the above, The Ombudsman considered allegation (b) unsubstantiated.

836. Regarding whether staff member A had been rude to the complainant, both staff member A and the complainant stuck to their own versions of the account. In the absence of independent corroborating evidence, the Office could not ascertain the facts concerning the conversations between the complainant and staff member A. As such, The Ombudsman considered allegation (c) inconclusive.

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

838. The Ombudsman urged ORO learn a lesson from the incident, and remind staff member A to correct the mistakes if she had made any and guard against them if she had not.

Government's response

839. The ORO accepted the recommendation of The Ombudsman and has taken the following actions –

(a) staff member A was reminded on 21 January 2015 that it was important to remain polite and patient when handling public enquiry; and

(b) ORO's staff members were also reminded once again on 29 January 2015 that any misunderstanding and bad feeling generated from verbal communication should be avoided, and that they should remain gentle in attitude and tone when communicating with members of the public.

Transport Department

Case No. 2014/0619 – (1) Delay in opening the lift and escalator at a historical building for public use; and (2) Failing to respond to the complainant's enquiry

Background

840. The complainant lodged a complaint against the Transport Department (TD) for the delay in opening an access connecting a subway of Tsim Sha Tsui MTR Station to the basement of 1881 Heritage (1881) shopping mall, thus making people in need unable to use the escalator and lift to go to 1881. The complainant also complained against TD for the delay in responding to her enquiry made in September 2013.

841. The granddaughter of the complainant was a wheelchair user. The complainant often brought her to visit the historical buildings of the former Marine Police Headquarters and the festive decorations at 1881. After going through the subway connecting the MTR Station, they needed to go up a long and winding ramp to reach the ground level and the entrance of the shopping mall, and the journey was tiring.

842. The complainant learnt from the 1881 management service centre that an escalator and a lift had already been installed in the shopping mall. Upon removal of the structural wall separating the shopping mall and the subway, pedestrians could reach the basement of the shopping mall from the subway direct and then use the escalator or lift to reach the ground floor and other floors. However, TD had not provided a substantive reply, resulting in the delay in opening the above facilities at the shopping mall.

The Ombudsman's observations

843. TD had stressed repeatedly that it had no objection to the opening of the access connecting the subway of Tsim Sha Tsui MTR Station and the basement of 1881 shopping mall. TD only disagreed with the developer's proposal for demolishing the pedestrian ramp in the subway. The developer argued that it would not be technically feasible to open the access while keeping the existing ramp intact. Both TD and the Highways Department (HyD) disagreed with the argument based on

their professional judgment. They considered that the above objective could be achieved if appropriate internal alteration works were made to the building at 1881.

844. The Office of The Ombudsman (the Office) considered that a win-win situation would be opening the access to the shopping mall while keeping the ramp intact as this would facilitate the public going to 1881 without affecting those who were not going there. Nevertheless, the Government and the developer had divergent views over the feasibility of the concerned proposals. It would be difficult for ordinary members of the public who were not engineering experts to judge who was right and who was wrong. In view of this, the Office recommended TD (or together with HyD) to explain to the developer how the engineering works could be carried out to meet TD's requirements, so that the developer could take follow-up actions and give response. This could then clearly show whether the engineering works would not be feasible, or it was just the developer being unwilling to make alteration to its structure.

845. The Office agreed that mechanical wheelchair platforms were indeed very inconvenient and should not be used to replace the existing ramp. Moreover, the lift might experience malfunctioning and require repair and maintenance. If there were several wheelchair users wishing to go to 1881 at the same time, the lift and escalator alone might not be able to handle them swiftly. Therefore, it was necessary to keep the existing ramp intact as this would be better in the public interest and particularly convenient to those who did not have the intention to go to the shopping mall. Nevertheless, the Office recognised that the existing ramp was quite long and wheelchair users and the elderly would find it strenuous to go up the ramp. Thus, the public would be pleased to have the existing ramp kept intact with an access from the subway to the shopping mall being opened.

846. The Office also understood the view of TD that as the proposal was brought up by the developer, it had the responsibility to propose an option to the satisfaction of the Government. However, having considered that the proposal should be beneficial to the public and the discussions had been dragged on for years, the Office urged TD to discuss with the developer alternative engineering options that would meet TD's requirements, such that the developer could follow up and work out a win-win proposal that could provide an access to the shopping mall and at the same time keep the existing ramp intact.

847. Regarding the ramp design not in compliance with the prevailing guidelines, the Office considered that unless there was imminent safety problem or concern requiring immediate replacement of the ramp, its demolition would lead to a waste of public resources and cause nuisances to the public during demolition.

848. In view of the above, The Ombudsman considered that there was no evidence to indicate that there was maladministration of TD in handling the case. Therefore, the complaint was unsubstantiated.

849. The Ombudsman recommended TD to continue to discuss with the developer other engineering options that would meet TD's requirements without compromising the interests of the Government and the public, with a view to looking for a win-win proposal that could provide an access to the shopping mall and at the same time keep the existing ramp intact as soon as possible.

Government's response

850. TD accepted The Ombudsman's recommendation and has discussed with the developer various engineering options, with a view to looking for a win-win proposal that could provide an access to the shopping mall and at the same time keep the existing ramp intact. The developer submitted to TD a new proposal in February 2015 and made further amendment in May 2015. The developer would carry out internal alteration works to open a barrier-free access to the 1881 shopping mall while keeping the existing ramp intact. TD considered the revised proposal acceptable and reported the progress to the Office respectively in February and May 2015.

Transport Department and Environmental Protection Department

Case No. 2014/2432A&B – Unreasonably rejecting the complainant's application under the Ex-gratia Payment Scheme for Phasing Out Pre-Euro IV Diesel Commercial Vehicles

Background

851. The complainant complained about the Transport Department (TD) and Environmental Protection Department (EPD) mishandling his company's application made to the Ex-gratia Payment Scheme for Phasing Out Pre-Euro IV Diesel Commercial Vehicles (the Scheme).

852. Diesel Commercial Vehicles (DCVs) are a major source of roadside pollution in Hong Kong. To improve air quality and better protect public health, the Government will phase out some 82000 pre-Euro IV DCVs by 2020 progressively and assist the affected vehicle owners to replace their vehicles by a $11.4 billion Ex-gratia Payment Scheme. The proposal for implementing the Scheme was endorsed by the Finance Committee of the Legislative Council at its meeting on 10 January 2014.

853. In the application period, vehicle owners need to scrap their vehicles by vehicle scrapping companies registered with EPD and then approach TD for cancelling the vehicle registration and making an ex-gratia payment application. To ensure proper use of public funds, the Scheme requires the vehicle to have a valid licence on the day when the registration is cancelled, so as to prevent abandoned vehicles without valid licences being used for applying for the ex-gratia payment.

The Ombudsman's observations

854. The Office of The Ombudsman (the Office) opined that as the Scheme involved a substantial amount of public funds, the departments concerned should process applications with prudence. To prevent people from using abandoned vehicles without valid vehicle licences to apply for the ex-gratia payment, the 5th requirement of the eligibility criteria under the Scheme has stipulated that on the day when the registration is cancelled, the vehicle should still have a valid vehicle licence. As the complainant missed this requirement and applied for

cancellation of vehicle registration three days late, it was not eligible for the ex-gratia payment.

855. The Office agreed that the content of TD's letter might cause confusion. However, as the vehicle licence had expired when the complainant applied to TD on 7 March 2014, the content of the letter did not have any substantive impact on the eligibility of the complainant. Nevertheless, The Office was pleased to note that to avoid misunderstanding, TD had reviewed and amended the relevant standard letter in light of the case.

856. The Office understood that TD had reminded applicants specifically in clause 3 of the Notes for Attention on the Application Form that an application must be submitted within three months after the vehicle was scrapped and not later than the respective application deadline. The purpose of this clause was to remind applicants to submit applications as early as possible to prevent sudden closure of vehicle scrapping companies without notification to EPD from affecting the processing of applications. The Office was of the view that clause 3 of the Application Form was concerned with submission of ex-gratia payment applications whereas the 5th requirement of the eligibility criteria dealt with the date of cancelling vehicle registration. They in fact involved two different procedures and steps.

857. The crux of this case was whether TD and EPD had properly informed applicants of the relevant eligibility criteria and requirements. The Office noticed that the eligibility criteria of the Scheme were not listed out in the two TD's documents, i.e. Application Form and Notes for Application. Applicants who wished to obtain such information would have to refer to the leaflet or EPD's webpage. While application methods and procedures were mentioned in the TD's webpage, details concerning the eligibility criteria could only be obtained through a hyperlink to the EPD's webpage. It was until September 2014 that the leaflet could be downloaded together with the Application Form from TD's webpage. As a result, the complainant had to browse through webpages of both TD and EPD to obtain all the information of the Scheme.

858. On the other hand, the Scheme was complex and sophisticated. Apart from the 4th and the 5th requirements concerned, there were other requirements and terms. Therefore, it was not totally unreasonable for TD not including all the information in the Application Form to avoid further complicating it. Moreover, EPD had launched a series of

publicity activities to promote the Scheme and even sent letters to every affected vehicle owner to notify them of the details. TD had also reminded applicants to visit EPD's webpage on clause 4 of the Notes for Attention in the Application Form and provided the relevant website and hotline number for enquiries.

859. The Office believed that quite a lot of applicants learned about the terms and application procedures of the Scheme from registered vehicle scrapping companies. EPD should therefore enhance the understanding of these companies of the relevant requirements so as to avoid them providing incorrect information to applicants.

860. According to the actual number of the applications received, TD had approved over 13000 applications since the commencement of the Scheme up to October 2014 and there were only 41 (0.3%) applications not meeting the 5th requirement. It showed that the vast majority of the applicants were aware of and could meet the requirement.

861. As to whether the complainant was misled by the scrapping company, EPD had clarified that registered vehicle scrapping companies were not obliged to explain the details of the Scheme.

862. In view of the above, The Ombudsman considered that not including all eligibility criteria in the Application Form by TD and EPD did not constitute maladministration and the complaint was therefore unsubstantiated. However, TD, by providing in its letter incorrect cancellation date of vehicle registration, caused unnecessary misunderstanding to the complainant although the document did not have any substantive impact on whether the application fulfilled the 5th requirement of the eligibility criteria. Therefore, The Ombudsman considered the complaint against TD unsubstantiated but other inadequacies found.

863. The Office was pleased to note that TD made amendments soon afterwards by revising the content of the document. However, the Office also considered that from the perspective of facilitating members of the public, there was still room for improvement in terms of the whole application arrangement.

864. This case showed that when preparing for retirement of vehicles, owners were required not only to determine the time for scrapping but also get well acquainted with the timeframes of scrapping, licence renewal, cancellation of vehicle registration and submission of

applications as stipulated by law and the terms of the Scheme. The Office opined that TD and EPD should enhance publicity and promotion in this regard to minimise any technical errors made by vehicle owners.

865. On the other hand, although the Office considered that there was no maladministration on the parts of TD and EPD in processing the complainant's application, the Office sympathised deeply with the complainant. While the complainant should be a target of the Scheme, his application was rejected not because of abuse but due to technical problems. The Scheme provided a substantial amount of ex-gratia payments, ranging from a few tens of thousands to several hundreds of thousands of dollars. If applicants were deprived of such payments due to technical reasons, they might experience financial difficulties. Before implementing the following improvement measures, the Office therefore recommended EPD to consider exercising discretion in handling this kind of cases or further providing reasons for not doing so to avoid giving people the impression that the department was inconsiderate and rigid. EPD in fact had already obtained from the Legislative Council the funding for the over 80000 affected vehicles for implementing the Scheme. If EPD could ascertain that only technical errors instead of abuse was involved in the cases concerned, granting ex-gratia payment to such similar cases at discretion would not be unfair to other owners nor affect the grant they might receive.

866. The Ombudsman recommended TD to –

(a) consider including the eligibility criteria in the Notes for Application since the latter has already been prepared to explain the application procedures, so as to provide another source for applicants to obtain the relevant information;

(b) consider including frequently violated terms in the Application Form since a number of similar cases have been received by the Office, indicating that quite many applicants felt aggrieved at missing the relevant requirement;

(c) consider including a checklist in the Application Form to assist applicants in checking if all requirements of the Scheme are met;

(d) provide the leaflets of the Scheme to applicants who pick up the Application Form at TD offices in person; and

(e) request applicants to sign a declaration to confirm that they have read and understand the terms and details of the Scheme on the Application Form.

867. In addition, The Ombudsman recommended EPD to –

(a) consider enhancing publicity on the sequence and timeframes concerning vehicle licence renewal, vehicle scrapping, cancellation of vehicle registration and submission of ex-gratia payment application in view of the importance of the above procedures; and providing examples for illustration to ensure that applicants were fully aware of the sequence of various procedures;

(b) consider exercising discretion in handling the complainant's case and similar cases or providing detailed explanations before introducing effective improvement measures; and

(c) enhance the understanding of registered vehicle scrapping companies of the requirements of the Scheme since many applicants might approach them for information on the application procedures even though they were not obliged to explain the details of the Scheme to applicants. The differences in the requirements on the validity of vehicle licence between the Scheme and the Incentive Scheme for Replacement of Euro II DCVs might cause confusion to registered vehicle scrapping companies, who might then provide wrong information to applicants.

Government's response

TD

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

Recommendations (a) & (b)

869. TD has studied with EPD and improved the design of the Application Form by including the eligibility criteria, application procedures and relevant terms to enable applicants to know the application requirements of the Scheme. TD has introduced a new Application Form since mid-February 2015.

Recommendation (c)

870. TD has included a checklist in the new Application Form to assist applicants in checking if all requirements of the Scheme are met.

Recommendation (d)

871. Since September 2014, TD had started to attach the leaflet of the Scheme to the Application Form for distribution. When downloading the Application Form from TD's website, the said leaflet would be downloaded concurrently so that applicants would have a better understanding of the eligibility criteria and relevant requirements of the Scheme. As the new Application Form contains all the relevant information of the leaflet, TD has stopped attaching the leaflet to the new Application Form since its introduction in February 2015.

Recommendation (e)

872. TD has revised the wording in Part C "Declaration and Undertaking" of the Application Form to require applicants to sign a declaration to confirm that they have read and understand the terms and details of the Scheme.

EPD

873. EPD accepted The Ombudsman's recommendations (a) and (c) for EPD and has taken the following follow-up actions –

(a) EPD issued letters again in February 2015 to remind all owners of pre-Euro IV DCVs who had not applied for the ex-gratia payment of the requirements, procedures and salient points of the Scheme. EPD also attached (i) a "checklist for application submission" for vehicle owners' checking against all application requirements, and (ii) examples of common errors made by vehicle owners in the ex-gratia payment applications to remind

vehicle owners to pay special attention to application requirements, as well as sequence and timeframe of various procedures in the application, so as to avoid errors which will eventually cause the applications to be rejected. EPD already uploaded such information to its website in February 2015 for reference by vehicle owners; and

(b) EPD held two additional briefing sessions for vehicle scrapping companies in January 2015 to enhance their understanding of the application requirements of the Scheme. When vetting the applications of registration and re-registration for vehicle scrapping companies at scrapping yards, EPD staff will also distribute promotion leaflets to the responsible persons and brief them on the salient points concerning application for the ex-gratia payment.

874. EPD did not accept recommendation (b) because the Scheme involves substantial amount of public funds and all the applications should be processed with prudence. It is thus necessary to verify the applications against the established eligibility criteria and procedures, which have been approved by the Finance Committee of the Legislative Council. EPD has indeed reviewed the case of the complainant and similar cases but consider them to be clearly outside the approved eligibility criteria, and as such it will be problematic for EPD to exercise discretion. If EPD grants approval to applicants who have not fully met the eligibility criteria to obtain ex-gratia payment, there are possibilities that vehicle scrapping companies and vehicle owners will have room and incentive to cheat.

875. On the other hand, for some rejected cases in which the applicants or the registered vehicle scrapping companies claimed that they had put in incorrect information inadvertently, EPD had already obtained the details of the cases from TD, and had been reviewing the cases. If the reviews support the claims, EPD would request via TD the applicants or the registered vehicle scrapping companies to clarify or provide supplementary information; and then consider exercising discretion in handling this kind of cases.

876. The Office understood and accepted EPD's explanation.

Transport Department and Environmental Protection Department

Case No. 2014/3317A&B – Unreasonably rejecting the complainant's application under the Ex-gratia Payment Scheme for Phasing Out Pre-Euro IV Diesel Commercial Vehicles

Background

877. The complainant complained about the Transport Department (TD) and Environmental Protection Department (EPD) mishandling his company's application made to the Ex-gratia Payment Scheme for Phasing Out Pre-Euro IV Diesel Commercial Vehicles (the Scheme).

878. Diesel Commercial Vehicles (DCVs) are a major source of roadside pollution in Hong Kong. To improve air quality and better protect public health, the Government will phase out some 82000 pre-Euro IV DCVs by 2020 progressively and assist the affected vehicle owners to replace their vehicles by a $11.4 billion Ex-gratia Payment Scheme. The proposal for implementing the Scheme was endorsed by the Finance Committee of the Legislative Council at its meeting on 10 January 2014.

879. In the application period, vehicle owners need to scrap their vehicles by vehicle scrapping companies registered with EPD and then approach TD for cancelling the vehicle registration and making an ex-gratia payment application. To ensure proper use of public funds, the Scheme requires the vehicle to have a valid licence on the day when the registration is cancelled, so as to prevent abandoned vehicles without valid licences being used for applying for the ex-gratia payment.

The Ombudsman's observations

880. The Office of The Ombudsman (the Office) opined that as the Scheme involved a substantial amount of public funds, the departments concerned should process applications with prudence. To prevent people from using abandoned vehicles without valid vehicle licences to apply for the ex-gratia payment, the 5th requirement of the eligibility criteria under the Scheme has stipulated that on the day when the registration is cancelled, the vehicle should still have a valid vehicle licence. As the complainant missed this requirement and applied for

cancellation of vehicle registration one day late, it was not eligible for the ex-gratia payment.

881. The crux of this case was whether TD and EPD had properly informed applicants of the relevant eligibility criteria and requirements. The Office noticed that the eligibility criteria of the Scheme were not listed out in the two TD's documents, i.e. Application Form and Notes for Application. Applicants who wished to obtain such information would have to refer to the leaflet or EPD's webpage. While application methods and procedures were mentioned in the TD's webpage, details concerning the eligibility criteria could only be obtained through a hyperlink to the EPD's webpage. It was until September 2014 that the leaflet could be downloaded together with the Application Form from TD's webpage. As a result, the complainant had to browse through webpages of both TD and EPD to obtain all the information of the Scheme.

882. The Office understood that EPD had reminded applicants specifically about the application procedures in its webpage that application must be submitted within three months after the vehicle was scrapped and not later than the respective application deadline. The purpose was to remind applicants to submit applications as early as possible to prevent sudden closure of vehicle scrapping companies without notification to EPD from affecting the processing of applications. The Office was of the view that such an instruction was concerned with the submission date of ex-gratia payment applications whereas the 4th and 5th requirements of the eligibility criteria dealt with the necessary procedure of cancelling vehicle registration and the date of such cancellation respectively. They in fact involved different procedures and steps.

883. On the other hand, the Scheme was complex and sophisticated. Apart from the 4th and the 5th requirements concerned, there were other requirements and terms. Therefore, it was not totally unreasonable for TD not including all the information in the Application Form to avoid further complicating it. Moreover, EPD had launched a series of publicity activities to promote the Scheme and even sent letters to every affected vehicle owner to notify them of the details. TD had also reminded applicants to visit EPD's webpage on clause 4 of the Notes for Attention in the Application Form and provided the relevant website and hotline number for enquiries.

884. The Office believed that quite a lot of applicants learned about the terms and application procedures of the Scheme from registered vehicle scrapping companies. EPD should therefore enhance the understanding of these companies of the relevant requirements so as to avoid them providing incorrect information to applicants.

885. The Office agreed that applicants were responsible for checking whether they could meet the application criteria before submission. Moreover, the amount of ex-gratia payment was believed to be one of the issues of most concern to applicants and such information could only be found on the leaflet or EPD's webpage. Therefore, vehicle owners would have to refer to the information on the leaflet or EPD's webpage before submitting applications.

886. According to the actual number of the applications received, TD had approved over 13000 applications since the commencement of the Scheme up to October 2014 and there were only 41 (0.3%) applications not meeting the 5th requirement. It showed that the vast majority of the applicants were aware of and could meet the requirement.

887. While the complainant alleged that the 4th requirement of the eligibility criteria stated that registration of vehicles would be cancelled after the scrapping of vehicles, the Office agreed with EPD's response that the 4th requirement should be interpreted as requiring applicants to apply for "cancellation of vehicle registration" after scrapping their vehicles. It did not imply that vehicle registration would be automatically cancelled on the day of scrapping the vehicle.

888. In view of the above, The Ombudsman considered the complaint against TD and EPD unsubstantiated.

889. This case showed that when preparing for retirement of vehicles, owners were required not only to determine the time for scrapping but also get well acquainted with the timeframes of scrapping, licence renewal, cancellation of vehicle registration and submission of applications as stipulated by law and the terms of the Scheme. The Office opined that TD and EPD should enhance publicity and promotion in this regard to minimise any technical errors made by vehicle owners.

890. Although the Office considered that there was no maladministration on the parts of TD and EPD in processing the complainant's application, the Office sympathised deeply with the complainant. While the complainant should be a target of the Scheme,

his application was rejected not because of abuse but due to technical problems. The Scheme provided a substantial amount of ex-gratia payments, ranging from a few tens of thousands to several hundreds of thousands of dollars. If applicants were deprived of such payments due to technical reasons, they might experience financial difficulties.

891. Before implementing the following improvement measures, the Office therefore recommended EPD to consider exercising discretion in handling this kind of cases or further providing reasons for not doing so to avoid giving people the impression that the department was inconsiderate and rigid. EPD in fact had already obtained from the Legislative Council the funding for the over 80000 affected vehicles for implementing the Scheme. If EPD could ascertain that only technical errors instead of abuse was involved in the cases concerned, granting ex-gratia payment to such similar cases at discretion of the department would not be unfair to other owners nor affect the grant they might receive.

892. The Ombudsman recommended TD to –

(a) consider including the eligibility criteria in the Notes for Application since the latter has already been prepared to explain the application procedures, so as to provide another source for applicants to obtain the relevant information;

(b) consider including frequently violated terms in the Application Form since a number of similar cases have been received by the Office, indicating that quite many applicants felt aggrieved at missing the relevant requirement;

(c) consider including a checklist in the Application Form to assist applicants in checking if all requirements of the Scheme are met;

(d) provide the leaflets of the Scheme to applicants who pick up the Application Form at TD offices in person; and

(e) request applicants to sign a declaration to confirm that they have read and understand the terms and details of the Scheme on the Application Form.

893. In addition, The Ombudsman recommended EPD to –

(a) consider enhancing publicity on the sequence and timeframes concerning vehicle licence renewal, vehicle scrapping, cancellation of vehicle registration and submission of ex-gratia payment application in view of the importance of the above procedures; and providing examples for illustration to ensure that applicants were fully aware of the sequence of various procedures;

(b) consider exercising discretion in handling the complainant's case and similar cases or providing detailed explanations before introducing effective improvement measures; and

(c) enhance the understanding of registered vehicle scrapping companies of the requirements of the Scheme since many applicants might approach them for information on the application procedures even though they were not obliged to explain the details of the Scheme to applicants. The differences in the requirements on the validity of vehicle licence between the Scheme and the Incentive Scheme for Replacement of Euro II DCVs might cause confusion to registered vehicle scrapping companies, who might then provide wrong information to applicants.

Government's response

TD

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

Recommendations (a) & (b)

895. TD has studied with EPD and improved the design of the Application Form by including the eligibility criteria, application procedures and relevant terms to enable applicants to know the application requirements of the Scheme. TD has introduced a new Application Form since mid-February 2015.

Recommendation (c)

896. TD has included a checklist in the new Application Form to assist applicants in checking if all requirements of the Scheme are met.

Recommendation (d)

897. Since September 2014, TD had started to attach the leaflet of the Scheme to the Application Form for distribution. When downloading the Application Form from TD's website, the said leaflet would be downloaded concurrently so that applicants would have a better understanding of the eligibility criteria and relevant requirements of the Scheme. As the new Application Form contains all the relevant information of the leaflet, TD has stopped attaching the leaflet to the new Application Form since its introduction in February 2015.

Recommendation (e)

898. TD has revised the wording in Part C "Declaration and Undertaking" of the Application Form to require applicants to sign a declaration to confirm that they have read and understand the terms and details of the Scheme.

EPD

899. EPD accepted The Ombudsman's recommendations (a) and (c) for EPD and has taken the following follow-up actions –

(a) EPD issued letters again in February 2015 to remind all owners of pre-Euro IV DCVs who had not applied for the ex-gratia payment of the requirements, procedures and salient points of the Scheme. EPD also attached (i) a "checklist for application submission" for vehicle owners' checking against all application requirements, and (ii) examples of common errors made by vehicle owners in the ex-gratia payment applications to remind vehicle owners to pay special attention to application requirements, as well as sequence and timeframe of various procedures in the application, so as to avoid errors which will eventually cause the applications to be rejected. EPD already uploaded such information to its website in February 2015 for reference by vehicle owners; and

(b) EPD held two additional briefing sessions for vehicle scrapping companies in January 2015 to enhance their understanding of the application requirements of the Scheme. When vetting the applications of registration and re-registration for vehicle scrapping companies at scrapping yards, EPD staff will also distribute promotion leaflets to the responsible persons and brief them on the salient points concerning application for the ex-gratia payment.

900. EPD did not accept recommendation (b) because the Scheme involves substantial amount of public funds and all the applications should be processed with prudence. It is thus necessary to verify the applications against the established eligibility criteria and procedures, which have been approved by the Finance Committee of the Legislative Council. EPD has indeed reviewed the case of the complainant and similar cases but consider them to be clearly outside the approved eligibility criteria, and as such it will be problematic for EPD to exercise discretion. If EPD grants approval to applicants who have not fully met the eligibility criteria to obtain ex-gratia payment, there are possibilities that vehicle scrapping companies and vehicle owners will have room and incentive to cheat.

901. On the other hand, for some rejected cases in which the applicants or the registered vehicle scrapping companies claimed that they had put in incorrect information inadvertently, EPD had already obtained the details of the cases from TD, and had been reviewing the cases. If the reviews support the claims, EPD would request via TD the applicants or the registered vehicle scrapping companies to clarify or provide supplementary information; and then consider exercising discretion in handling this kind of cases.

902. The Office understood and accepted EPD’s explanation.

Transport Department and Environmental Protection Department

Case No. 2014/3724A&B – Unreasonably rejecting the complainant's application under the Ex-gratia Payment Scheme for Phasing Out Pre-Euro IV Diesel Commercial Vehicles

Background

903. The complainant complained about the Transport Department (TD) and Environmental Protection Department (EPD) mishandling his company's application made to the Ex-gratia Payment Scheme for Phasing Out Pre-Euro IV Diesel Commercial Vehicles (the Scheme).

904. Diesel Commercial Vehicles (DCVs) are a major source of roadside pollution in Hong Kong. To improve air quality and better protect public health, the Government will phase out some 82000 pre-Euro IV DCVs by 2020 progressively and assist the affected vehicle owners to replace their vehicles by a $11.4 billion Ex-gratia Payment Scheme. The proposal for implementing the Scheme was endorsed by the Finance Committee of the Legislative Council at its meeting on 10 January 2014.

905. In the application period, vehicle owners need to scrap their vehicles by vehicle scrapping companies registered with EPD and then approach TD for cancelling the vehicle registration and making an ex-gratia payment application. To ensure proper use of public funds, the Scheme requires the vehicle to have a valid licence on the day when the registration is cancelled, so as to prevent abandoned vehicles without valid licences being used for applying for the ex-gratia payment.

The Ombudsman's observations

906. The Office of The Ombudsman (the Office) opined that as the Scheme involved a substantial amount of public funds, the departments concerned should process applications with prudence. To prevent people from using abandoned vehicles without valid vehicle licences to apply for the ex-gratia payment, the 5th requirement of the eligibility criteria under the Scheme has stipulated that on the day when the registration is cancelled, the vehicle should still have a valid vehicle licence. As the complainant missed this requirement and applied for

cancellation of vehicle registration three days late, it was not eligible for the ex-gratia payment.

907. While the complainant alleged that the meanings of clause 3 of the Notes for Attention on the Application Form and the 5th requirement of the eligibility criteria were different, the Office understood that TD had reminded applicants specifically in clause 3 of the Notes concerned that application must be submitted within three months after the vehicle was scrapped and not later than the respective application deadline. The purpose of this clause was to remind applicants to submit applications as early as possible to prevent sudden closure of vehicle scrapping companies without notification to EPD from affecting the processing of applications. The Office was of the view that clause 3 of the Application Form was concerned with submission of ex-gratia payment applications whereas the 5th requirement of the eligibility criteria dealt with the date of cancelling vehicle registration. They in fact involved two different procedures and steps and there was no contradiction.

908. The crux of this case was whether TD and EPD had properly informed applicants of the relevant eligibility criteria and requirements. The Office noticed that the eligibility criteria of the Scheme were not listed out in the two TD's documents, i.e. Application Form and Notes for Application. Applicants who wished to obtain such information would have to refer to the leaflet or EPD's webpage. While application methods and procedures were mentioned in the TD's webpage, details concerning the eligibility criteria could only be obtained through a hyperlink to the EPD's webpage. It was until September 2014 that the leaflet could be downloaded together with the Application Form from TD's webpage. As a result, the complainant had to browse through webpages of both TD and EPD to obtain all the information of the Scheme.

909. On the other hand, the Scheme was complex and sophisticated. Apart from the 4th and the 5th requirements concerned, there were other requirements and terms. Therefore, it was not totally unreasonable for TD not including all the information in the Application Form to avoid further complicating it. Moreover, EPD had launched a series of publicity activities to promote the Scheme and even sent letters to every affected vehicle owner to notify them of the details. TD had also reminded applicants to visit EPD's webpage on clause 4 of the Notes for Attention in the Application Form and provided the relevant website and hotline number for enquiries.

910. The Office believed that quite a lot of applicants learned about the terms and application procedures of the Scheme from registered vehicle scrapping companies. EPD should therefore enhance the understanding of these companies of the relevant requirements so as to avoid them providing incorrect information to applicants.

911. The Office agreed that applicants were responsible for checking whether they could meet the application criteria before submission. Moreover, the amount of ex-gratia payment was believed to be one of the issues of most concern to applicants and such information could only be found on the leaflet or EPD's webpage. Therefore, vehicle owners would have to refer to the information on the leaflet or EPD's webpage before submitting applications.

912. According to the actual number of the applications received, TD had approved over 13000 applications since the commencement of the Scheme up to October 2014 and there were only 41 (0.3%) applications not meeting the 5th requirement. It showed that the vast majority of the applicants were aware of and could meet the requirement.

913. In view of the above, The Ombudsman considered the complaint against TD and EPD unsubstantiated.

914. This case showed that when preparing for retirement of vehicles, owners were required not only to determine the time for scrapping but also get well acquainted with the timeframes of scrapping, licence renewal, cancellation of vehicle registration and submission of applications as stipulated by law and the terms of the Scheme. The Office opined that TD and EPD should enhance publicity and promotion in this regard to minimise any technical errors made by vehicle owners.

915. Although the Office considered that there was no maladministration on the parts of TD and EPD in processing the complainant's application, the Office sympathised deeply with the complainant. While the complainant should be a target of the Scheme, his application was rejected not because of abuse but due to technical problems. The Scheme provided a substantial amount of ex-gratia payments, ranging from a few tens of thousands to several hundreds of thousands of dollars. If applicants were deprived of such payments due to technical reasons, they might experience financial difficulties.

916. Before implementing the following improvement measures, the Office therefore recommended EPD to consider exercising discretion in handling this kind of cases or further providing reasons for not doing so to avoid giving people the impression that the department was inconsiderate and rigid. EPD in fact had already obtained from the Legislative Council the funding for the over 80000 affected vehicles for implementing the Scheme. If EPD could ascertain that only technical errors instead of abuse was involved in the cases concerned, granting ex-gratia payment to such similar cases at discretion of the department would not be unfair to other owners nor affect the grant they might receive.

917. The Ombudsman recommended TD to –

(a) consider including the eligibility criteria in the Notes for Application since the latter has already been prepared to explain the application procedures, so as to provide another source for applicants to obtain the relevant information;

(b) consider including frequently violated terms in the Application Form since a number of similar cases have been received by the Office, indicating that quite many applicants felt aggrieved at missing the relevant requirement;

(c) consider including a checklist in the Application Form to assist applicants in checking if all requirements of the Scheme are met;

(d) provide the leaflets of the Scheme to applicants who pick up the Application Form at TD offices in person; and

(e) request applicants to sign a declaration to confirm that they have read and understand the terms and details of the Scheme on the Application Form.

918. In addition, The Ombudsman recommended EPD to –

(a) consider enhancing publicity on the sequence and timeframes concerning vehicle licence renewal, vehicle scrapping, cancellation of vehicle registration and submission of ex-gratia payment application in view of the importance of the above procedures; and providing examples for illustration to ensure that applicants were fully aware of the sequence of various procedures;

(b) consider exercising discretion in handling the complainant’s case and similar cases or providing detailed explanations before introducing effective improvement measures; and

(c) enhance the understanding of registered vehicle scrapping companies of the requirements of the Scheme since many applicants might approach them for information on the application procedures even though they were not obliged to explain the details of the Scheme to applicants. The differences in the requirements on the validity of vehicle licence between the Scheme and the Incentive Scheme for Replacement of Euro II DCVs might cause confusion to registered vehicle scrapping companies, who might then provide wrong information to applicants.

Government’s response

TD

919. TD accepted The Ombudsman’s recommendations and has taken the following follow-up actions.

Recommendations (a) & (b)

920. TD has studied with EPD and improved the design of the Application Form by including the eligibility criteria, application procedures and relevant terms to enable applicants to know the application requirements of the Scheme. TD has introduced a new Application Form since mid-February 2015.

Recommendation (c)

921. TD has included a checklist in the new Application Form to assist applicants in checking if all requirements of the Scheme are met.

Recommendation (d)

922. Since September 2014, TD had started to attach the leaflet of the Scheme to the Application Form for distribution. When downloading the Application Form from TD's website, the said leaflet would be downloaded concurrently so that applicants would have a better understanding of the eligibility criteria and relevant requirements of the Scheme. As the new Application Form contains all the relevant information of the leaflet, TD has stopped attaching the leaflet to the new Application Form since its introduction in February 2015.

Recommendation (e)

923. TD has revised the wording in Part C "Declaration and Undertaking" of the Application Form to require applicants to sign a declaration to confirm that they have read and understand the terms and details of the Scheme.

EPD

924. EPD accepted The Ombudsman's recommendations (a) and (c) for EPD and has taken the following follow-up actions –

(a) EPD issued letters again in February 2015 to remind all owners of pre-Euro IV DCVs who had not applied for the ex-gratia payment of the requirements, procedures and salient points of the Scheme. EPD also attached (i) a "checklist for application submission" for vehicle owners' checking against all application requirements, and (ii) examples of common errors made by vehicle owners in the ex-gratia payment applications to remind vehicle owners to pay special attention to application requirements, as well as sequence and timeframe of various procedures in the application, so as to avoid errors which will eventually cause the applications to be rejected. EPD already uploaded such information to its website in February 2015 for reference by vehicle owners; and

(b) EPD held two additional briefing sessions for vehicle scrapping companies in January 2015 to enhance their understanding of the application requirements of the Scheme. When vetting the applications of registration and re-registration for vehicle scrapping companies at scrapping yards, EPD staff will also distribute promotion leaflets to the responsible persons and brief them on the salient points concerning application for the ex-gratia payment.

925. EPD did not accept recommendation (b) because the Scheme involves substantial amount of public funds and all the applications should be processed with prudence. It is thus necessary to verify the applications against the established eligibility criteria and procedures, which have been approved by the Finance Committee of the Legislative Council. EPD has indeed reviewed the case of the complainant and similar cases but consider them to be clearly outside the approved eligibility criteria, and as such it will be problematic for EPD to exercise discretion. If EPD grants approval to applicants who have not fully met the eligibility criteria to obtain ex-gratia payment, there are possibilities that vehicle scrapping companies and vehicle owners will have room and incentive to cheat.

926. On the other hand, for some rejected cases in which the applicants or the registered vehicle scrapping companies claimed that they had put in incorrect information inadvertently, EPD had already obtained the details of the cases from TD, and had been reviewing the cases. If the reviews support the claims, EPD would request via TD the applicants or the registered vehicle scrapping companies to clarify or provide supplementary information; and then consider exercising discretion in handling this kind of cases.

927. The Office understood and accepted EPD's explanation.

Transport Department and Judiciary Administrator

Case No. 2013/5280A&B – Unreasonably prosecuting the complainant for failing to complete the driving improvement course despite the fact that her disqualification from driving order had been suspended by High Court

Background

928. The complainant complained against the Transport Department (TD) and Judiciary Administrator (JA) as regards the maladministration in the handling of her appeal case for a traffic accident. The complainant was convicted of careless driving at the Eastern Magistrates' Courts on 24 April 2013. She was sentenced to a fine of $4,000, disqualified from holding a driving licence for five months (Disqualification Order) and required to attend and complete a driving improvement course (DIC Order) within the last three months of the disqualification period at her own expense. The complainant applied to the High Court for appeal against the conviction on the same day. On 14 June 2013, the High Court suspended the Disqualification Order and the driving licence was returned to the complainant pending the appeal hearing.

929. The complainant later received a summons issued by the Eastern Magistrates' Courts on 14 December 2013 to attend a hearing on 15 January 2014 as TD made a prosecution against her for failing to comply with DIC Order. The complainant accused TD of negligent investigation and initiating prosecution without checking the facts clearly, thereby causing unnecessary inconvenience to her.

The Ombudsman's observations

930. The Road Traffic Ordinance clearly states that if a person appeals, the compliance period specified in DIC order should not commence or continue to run, until the appeal is withdrawn or dismissed. In this connection, although the Judge did not concurrently suspend DIC order when ordering to suspend the Disqualification Order, the DIC order concerned ought to be automatically suspended. JA had, in accordance with its established procedures, input the court's order into the computer system in an accurate and timely manner, as well as informed TD. From

the angle of administration, there was no malpractice.

931. As regards the complainant's claim for the Eastern Magistrates' Courts issuing summons to her without verification, the Office of The Ombudsman (the Office) agreed with JA's view. The responsibility of the Eastern Magistrates' Courts was to handle the charges initiated by prosecutorial departments. The authority to decide whether the grounds for the prosecution concerned were sufficient should rest with the court. The Eastern Magistrates' Courts did not have an obligation to vet the appropriateness of the prosecution concerned, which should be the responsibility of the prosecutorial departments.

932. Concerning the complainant's view that the Eastern Magistrates' Courts should not refuse TD to withdraw the application for summons and request for seeking legal advice, JA clarified that this was the judicial decision of the magistrate. According to The Ombudsman Ordinance, the Office had no authority to comment.

933. In view of the above, The Ombudsman considered the complaint against JA unsubstantiated.

934. The Office considered that instituting prosecution was a serious decision. People being prosecuted had to go through complicated prosecution process and face a lot of stress even if they were acquitted at last. Hence, before instituting any prosecution, the department would have to ensure that their decision was appropriate. As the complainant got her driving licence back from TD, the latter should be aware of the appeal case. It was therefore understandable that the complainant felt aggrieved and angry when she was prosecuted by TD merely a few months afterwards due to system problems of TD.

935. In this case, it was undoubtedly inappropriate for TD to institute prosecution without finding out that the complainant was making an appeal. The staff members of TD were found to have acted in accordance with established procedures during the whole process, but such a serious mistake still occurred. The crux of the problem was that the original prosecution procedures and computer system of TD failed to take into account the situation of the complainant. The Office understood that the complainant's case was rare and this was the first case of making such an error in handling almost 10000 cases by TD. The Office also agreed that there was a need for TD to set different levels of right of access to conviction and sentence records of the people involved for its staff in accordance with their operational needs, so as to protect the

privacy and prevent such information from being accessed randomly or even abused. However, the complainant did suffer from unnecessary distress due to the loopholes in the system of TD.

936. The Office was glad to note that upon learning the problem as shown in this case, TD had reviewed its computer system and prosecution procedures and proposed concrete improvement measures.

937. In view of the above, The Ombudsman considered the complaints against TD substantiated.

938. The Ombudsman recommended TD to implement as soon as possible the following two improvement measures proposed after the review as soon as possible –

To modify the computer system logic

(a) after reviewing the relevant screen layout and the programme of its computer system, TD noted that the original design of the system logic did not cater for the situation where the compliance period for DIC Order should not be counted due to suspension of the Disqualification Order. The relevant screen layout of TD's computer system showed only whether the Disqualification Order of a driver was in force, the disqualification period and any compliance with DIC Order. If the Disqualification Order was suspended following an appeal, the information of the Disqualification Order would be deleted from TD's computer record, without any indication showing that the case concerned was under appeal. Moreover, DIC record would not show the suspension of Disqualification Order. In view of the above, TD would arrange to modify the programme and system logic of its computer system, so that the due date for completion of DIC Order would become invalid automatically pending determination of the appeal in case of suspension of Disqualification Order; and

To review and revise prosecution procedures

(b) TD had also reviewed its prosecution procedures. In the past, the Prosecution Unit of TD (the Unit) would apply for a summary report of the "Traffic Conviction and Fixed Penalty Payment Citations Summary" (Traffic Conviction Summary) from the Police after a summons was issued, to prepare for any

enquiries from the Magistrate in court. If the defendant had made an appeal application against conviction and/or an order, such information would be shown in the Traffic Conviction Summary. After review, TD had revised its prosecution procedures. Before applying for a summons, the Unit will obtain the Traffic Conviction Summary from the Police to confirm if the case is under appeal in order to ensure that such application for summons is appropriate.

Government's response

939. TD accepted The Ombudsman's recommendations and has implemented the following measures –

To modify the computer system logic

(a) if any person, who has been ordered to be disqualified from driving and to attend DIC by the court, is granted suspension of the Disqualification Order pending for appeal, it would not be possible to project the compliance period for DIC Order and thus the person will not be required to complete DIC for the time being. TD has modified the programme and system logic of its computer system by adding a remark column in respect of DIC status in relevant screen pages showing that the case is "under appeal". To facilitate its staff to follow up similar cases, such information is displayed on the relevant screen pages containing the due date for court order/attending DIC as appropriate. The modified computer programme and system logic have been implemented since December 2014; and

To review and revise prosecution procedures

(b) the Unit has revised its prosecution procedures for implementation since June 2014. At present, the staff in the Unit will obtain the Traffic Conviction Summary from the Police to confirm if the case is under appeal before applying for a summons to ensure such application is appropriate.

Urban Renewal Authority

Case No. 2014/4732(R) – (1) Unreasonably refusing the complainant's request for a copy of the valuation reports; and (2) Providing wrong information in response to the complainant's enquiry

Background

940. On 9 November, 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Urban Renewal Authority (URA). The complainant indicated that URA issued acquisition offer to her on 10 September 2014 based on the valuation reports compiled by the seven surveyor firms URA had appointed. During the acquisition process, URA failed to handle the following issues properly –

(a) on 21 and 29 September 2014, the complainant sent letters to URA, requesting a copy of the valuation report on the seven-year Home Purchase Allowance (HPA) notional rate as assessed by the seven surveyor firms and a copy of the valuation report on the subject property for review by her surveyor. URA rejected her requests and directed her to approach the URA Sham Shui Po Neighbourhood Centre (SSPNC) for inspection of the valuation reports compiled by the seven surveyor firms. During inspection at SSPNC, the complainant asked to make copies of the valuation reports but her request was turned down; and

(b) there was a valuation certificate of the subject property attached to URA's acquisition offer letter. The complainant's son asked the staff of SSPNC to provide him with a copy of the detailed valuation report of the subject property. However, the staff member replied that there was no such detailed valuation report compiled for individual properties. The complainant felt that the staff member was not telling the truth as the valuation certificate should have been prepared on the basis of a detailed valuation report.

The Ombudsman's observations

Allegation (a)

941. The main justification of URA in refusing to provide copies of the seven-year HPA notional rate valuation report and the valuation report of the subject property to the owner himself directly was to avoid misunderstanding or misinterpretation by the owners. This justification was obviously premised on the assumption that owners did not possess adequate professional knowledge and capability to understand the report contents.

942. The Office concurred that the valuation reports involved professional knowledge in surveying. However, the Office considered that the ground cited by URA could not adequately support its decision not to provide copies of the valuation reports to the owners. In fact, some of the owners might possess sufficient professional knowledge and capability to understand the contents of the valuation reports. If the owners were provided with copies of the valuation reports, they could consult professional opinion in case of doubt.

943. More importantly, the acquisition offers of URA were based on the valuation reports compiled by the surveying firms concerned. In case the owners as parties directly affected had queries over the acquisition offers and requested copies of the valuation reports so as to get a better understanding of the basis for the acquisition offers, URA as a public body should provide them with such critical information so that they could fully understand the details of the acquisition offers for further negotiation with URA. The Office considered that it was only reasonable and fair for URA to institute such arrangements. The number of pages of the valuation reports involved was irrelevant in the consideration of the matter.

944. URA pointed out that owners could inspect the valuation report on the seven-year HPA notional rate at the neighbourhood centres. Nevertheless, the Office was of the view that as the valuation reports comprised hundreds of pages, and the information and data involved were colossal, it was unreasonable for URA to put up such unnecessary hurdle for the owners. This limited their access to the contents of the valuation reports by restricting owners' examination of the valuation reports only at the neighbourhood centres and prohibiting them from making photocopies or taking photos of the reports.

945. URA emphasised that in order not to influence on the assessment of the surveyor firms employed by owners, URA would only provide owners with copies of the valuation reports after they had obtained the professional advice of their own surveyor firms.

946. Nonetheless, the Office was the view that professional surveyors had independent assessments and the valuation certificate had already contained some relevant information for reference. It was an excessive concern for URA to claim that the non-provision was meant to avoid the influence on the assessment of the surveyor firms employed by owners.

947. The Office noted that the property concerned was an owner-occupied residential property, and thus the valuation of the property would not affect its acquisition price. Notwithstanding this, the Office considered that the complainant as the target of the acquisition offer should have the right to know and to demand for copies of the valuation reports relating to her property so as to better understand and examine the contents of the acquisition offer.

948. URA was of the view that it was not necessary for it to handle the complainant's request in accordance with URA's own Code on Access to Information (COAI) because the complainant did not indicate explicitly that her request was made pursuant to COAI. Nonetheless, URA did not further elaborate in its reply to the Office on whether URA would grant the access to information if the complaint and her son stated clearly in their application that the request for information was made pursuant to COAI.

949. URA's COAI was based on the Code on Access to Information of the Government (the Code). In line with the spirit of the Code, government departments/public organisations should try to provide information to the public as far as possible and should not be confined by the manner in which the requests were made. Moreover, though COAI did request members of the public to make requests for access to information to URA in writing, it did not state that the applicants must explicitly indicate that they were relying on COAI in making their requests for information. It should be considered complied with COAI as the complainant made requests for access to information to URA in writing on 21 and 29 September 2014. As such, URA's claim of the inapplicability of COAI on the complainant could not be established.

950. In view of the above, the Office considered that URA lacked the grounds to refuse the provision of a copy of the valuation reports. In this connection, The Ombudsman considered allegation (a) substantiated.

Allegation (b)

951. The Ombudsman accepted URA's explanation that the staff member of SSPNC, when responding to the enquiry of the complainant and her son, was telling them the truth when he said that there were no valuation reports of the subject property kept at SSPNC. The staff member did refer them to the officer responsible for the acquisition of the subject property for direct contact. The staff member did not say that URA had not compiled detailed valuation reports for individual properties. Only the seven-year HPA notional rate valuation report was available at SSPNC for owners' inspection and it was not inappropriate for the staff member to say that the valuation report of the affected property was not kept at SSPNC. The Office could not exclude the possibility for communication misunderstandings between both sides.

952. As such, The Ombudsman considered allegation (b) unsubstantiated.

953. The Ombudsman recommended URA to –

(a) provide copies of the seven-year HPA notional rate valuation report and the valuation report of the subject property to the complainant;

(b) review and revise the guidelines for handling owners' requests for copies of the valuation reports so as to facilitate the owners in obtaining the related information more promptly and conveniently; and

(c) review and revise COAI to cover enquiries which are not explicitly raised pursuant to COAI so as to enable URA to monitor the implementation of COAI more comprehensively.

Government's response

954. URA accepted The Ombudsman's recommendations. After the commencement of investigation by the Office, URA had reviewed and formulated new guidelines to improve the arrangements for provision of valuation reports to owners. URA has implemented the following new measures –

(a) in addition to the current arrangement of providing the valuation certificate to the owner upon issuance of the acquisition offer letter, URA would state in the offer letter that the owner could inspect both the seven-year HPA notional rate valuation report and valuation report of the owner's own property at the neighbourhood centre nearby;

(b) owners could request copies of both of the said reports. After receiving such requests, URA would make arrangement to inform the owners to pay the prescribed fees for the photocopies; and

(c) URA has reviewed and revised COAI and internal guidelines to cover all non-COAI requests which will be considered on the same basis as those applicable to COAI requests.

Water Supplies Department

Case No. 2014/1644 – Unreasonably refusing an application for erection of a small house

Background

955. The complainant complained that the Water Supplies Department (WSD) had unreasonably refused his first cousin's application for erection of a small house at a village.

956. The complainant is the Indigenous Inhabitant Representative (IIR) of a village. The complainant's first cousin (the applicant) submitted an application for erection of a small house on a lot in the expansion area of village type development zone 16 years ago. As the applicant was old and had suffered from a stroke, the complainant (as the applicant's first cousin and IIR) had been assisting in following up on the application. The complainant said the Chief Land Executive of the District Lands Office (DLO) explained on the Annual Village Representative Meeting of the Rural Committee concerned held in March 2013 that small houses could be built even before the completion of the public sewerage system if septic tanks were to be located in the original village type development zone. Subsequently, the complainant successfully identified a site in the original village type development zone for accommodating the septic tanks and obtained the permission of the relevant land owner for future maintenance of the septic tanks and associated pipework at the site. As understood by the complainant, the Environmental Protection Department (EPD) did not object to this application. However, the application was rejected by WSD, and the complainant considered it unreasonable.

The Ombudsman's observations

957. It is the current position of WSD that applications are processed according to the agreement with relevant bureaux and departments in 2002 (2002 Agreement) and all construction works for small houses within the expansion area of village type development zone are only allowed to be carried out upon the completion of the public sewerage system. Therefore, even though the septic tanks of the small house would not be installed in the expansion area of village type development

zone, WSD would refuse the application. The Office of The Ombudsman (the Office) considered that WSD's objection to this application according to the wording in the 2002 Agreement was not unreasonable.

958. After all, several relevant government departments had been handling and responding to the application, but no breakthrough was achieved despite continuous inputs and endeavours made by the applicant over the years. The complainant's ill feeling was understandable.

959. Nevertheless, WSD approved the application in 2005 with conditions. It obviously did not process the application according to the criteria of the 2002 Agreement, which was thus considered inappropriate by the Office.

960. The 2002 Agreement is a consensus among relevant government bureaux and departments (including the then Environment, Transport and Works Bureau, Housing, Planning and Lands Bureau, EPD, WSD, Drainage Services Department, Lands Department and Planning Department). As the representative of the public, the District Council concerned takes on an advisory role through which it should inform the relevant stakeholders of the contents of the agreement. However, the relevant government departments should also be under an obligation to ensure that members of the public affected, particularly villagers affected, understand clearly the details of the agreement. As shown in this case, it seems that the villagers did not really understand the specific restrictions under the agreement. Therefore the Office believed that, as one of the initiating departments for the agreement, WSD has the responsibility to reflect the situation to the relevant government departments and improve its coordination with various departments, so as to ensure that the villagers affected understand thoroughly the details and restrictions of the agreement, which can prevent them from wasting their efforts on unrealistic proposals.

961. Overall speaking, The Ombudsman considered this complaint against WSD unsubstantiated but other inadequacies found.

962. The Ombudsman recommended the WSD to discuss with the relevant departments about the possible means of promulgating and explaining the key contents of the 2002 Agreement to the stakeholders, so as to ensure that the stakeholders understand thoroughly the details and restrictions of the agreement.

Government's response

963. WSD accepted The Ombudsman's recommendation. To implement the Ombudsman's recommendation, WSD had discussed with DLO about measures for promulgating and explaining the details of the 2002 Agreement to the stakeholders. DLO agreed to the proposal of the WSD that a "standard" paragraph providing information on the 2002 Agreement should be included in the initial replies when processing applications regarding the expansion area of village type development zone.

Water Supplies Department and Lands Department

Case No. 2013/2296 A&B – Evasion of responsibility for maintenance and repairs of waterworks installations

Background

964. The Owners' Corporation of a private housing estate (the complainant) lodged a complaint with the Office of The Ombudsman against the Water Supplies Department (WSD) and the Lands Department (LandsD), alleging that they had refused to take over the waterworks (including the underground pipelines and fire hydrants) in the areas of the five streets owned by Government (the Streets) within the estate. They further shifted the maintenance and repairs responsibilities to the complainant. The dispute had dragged on for 16 years.

965. The estate concerned was developed in three phases, with a Certificate of Compliance (CoC) issued for each phase by LandsD in 1986, 1992 and 1997. In other words, the relevant Government departments had checked and confirmed that the land owner had complied with the requirements and obligations they stipulated in the land lease conditions, and that the Streets had been taken over by the Government. In fact, various types of facilities on the Streets, such as road signs, street lights and sewers, had been taken over by the relevant Government departments for management, maintenance and repairs. In September 1997, WSD liaised with the local District Lands Office (DLO) in preparation for taking over the waterworks in the area in question.

The Ombudsman's observations

WSD

966. If WSD considered that the pipelines in question could not be regarded as public water supply facilities to be taken over by the Department, it should have made it clear that it would not take over such waterworks, rather than just requiring the complainant to submit the as-built drawings. Furthermore, prior to LandsD's issuance of CoC, WSD had confirmed the project's compliance with the relevant conditions. So, it should take over the water pipes.

967. Since WSD had all along stayed aloof from the matters, it missed the opportunities to request the as-built drawings from the estate developer. When it suddenly realised that it had to take over the facilities in question, it then requested the as-built drawings from the individual flat owners, who never possessed such drawings. It even asked them to hire professionals at their own expense to survey the distribution of pipelines, putting an unnecessary burden on those owners.

968. WSD failed to identify the problems and its handling procedures were not appropriate. Its senior management seemed to take no notice of the matter despite a long delay of 16 years. The complainant's dissatisfaction was justified. The Ombudsman, therefore, considered the complaint against WSD substantiated.

LandsD

969. While LandsD did point out to WSD that the responsibility for the Streets was taken over by Government since CoC had been issued, it failed to uphold this stance or discuss with WSD to resolve their differences. Rather, LandsD left the problem to the complainant and only reiterated WSD's incorrect views. There was impropriety on the part of LandsD.

970. In the light of the above, The Ombudsman considered the complaint against LandsD partially substantiated.

971. The Ombudsman recommended –

WSD

(a) to take over immediately all the waterworks in question and consider requesting the as-built drawings from the estate developer. Professional surveys should be arranged for preparing the as-built drawings if necessary;

(b) to draw up guidelines on taking over of waterworks and fire service installations built by developers in order to provide clear handling procedures. The guidelines should cover the actions and measures to be taken between the consultation exercise prior to LandsD's issuance of CoC and the taking over of the relevant facilities. They should also set out the circumstances in which a case should be escalated to a more senior level for handling; and

LandsD

(c) to review the consultative arrangements prior to issuance of any CoC and to discuss with WSD and other relevant departments the clear demarcation of responsibilities. Where necessary, LandsD should issue guidelines to avoid recurrence of similar incidents.

Government's response

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

(a) WSD had taken over the relevant water mains and fire service installations on 12 December 2013, and finished digging trial pits to obtain information on underground water mains for the preparation of the as-built drawings; and

(b) WSD discussed with LandsD, the Highways Department (HyD) and Drainage Services Department (DSD) on 18 September 2014 about the procedures and workflow for taking over the facilities built by the developer in Green Areas. Based on the discussion results, WSD devised the relevant procedures and workflow involving different departments. They were then presented to the LandsD on 17 December 2014 for review and follow-up actions. LandsD completed the review in May 2015 and issued the relevant internal guidelines. Based on the internal guidelines of LandsD, WSD is now drawing up its own internal guidelines on taking over of waterworks and fire service installations built by developers, covering the actions and measures to be taken before the issurance of CoC by LandsD, and the circumstances in which a case should be escalated to a more senior level for handling. In the interim, WSD has reminded the relevant staff members of the matters requiring attention in respect of the taking over of waterworks and fire service installations built by developers when handling applications for CoC.

973. LandsD accepted The Ombudsman's recommendation and has taken the following actions –

(a) when an application for CoC is received, LandsD will ask relevant departments to confirm that the green area has been completed to their satisfaction. LandsD will also remind the departments that, once CoC has been issued, they will be responsible for the maintenance of the green area, including the underground facilities; and

(b) when a lease contains a requirement to form a green area, upon execution of the lease, LandsD will remind the lessee to submit detailed formation proposals to relevant departments, i.e. HyD, the Transport Department, WSD and DSD, for approval.

Part III
– Responses to recommendations in direct investigation cases

Environmental Protection Department, Electrical and Mechanical Services Department, Fire Services Department and Labour Department

Case No. DI/320 – Safety Regulation of Eco-friendly Refrigerants

Background

974. In January 2013, an explosion occurred and a fire broke out when a technician was repairing the air-conditioning systems at a restaurant in Ma On Shan. More than 20 persons were injured and the restaurant was seriously damaged.

975. According to media reports, the incident was caused by improper use of flammable refrigerants. It was also reported that the refrigerants in question were not under government regulation or subject to any legislation.

976. In view of the importance of safe use of refrigerants to our daily lives, the Office of The Ombudsman (the Office) initiated this direct investigation.

The Ombudsman's observations

977. The traditionally used refrigerants, namely chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), were of low flammability but not eco-friendly. Under the "Montreal Protocol on Substances That Deplete the Ozone Layer" (the Montreal Protocol), CFCs had been phased out while HCFCs were being replaced gradually.

978. Currently, the most widely used refrigerants, i.e. hydrofluorocarbons (high global warming potential) (HFCs (high GWP)), were of low flammability but only semi-eco-friendly. The parties to the Montreal Protocol were discussing ways to replace or control such refrigerants.

979. New-generation refrigerants, including hydrocarbons (HCs) and hydrofluorocarbons (low to moderate global warming potential) (HFCs (low to moderate GWP)), were more eco-friendly but more flammable. While some flammable refrigerants were banned on certain uses, in some areas, they were introduced for use under restriction in an organised manner in other areas, such as the Mainland and Japan. In these areas, regulation of refrigerants may fall under the jurisdictions of different departments but usually there would be a leading or coordinating department.

980. In Hong Kong, the regulation of refrigerants involved at least four Government departments and four ordinances. There was no specific legislation enacted to regulate refrigerants. Nor was there any leading department responsible for coordination. The situation was set out below –

(a) Environmental Protection Department (EPD): to control or phase out the manufacture and use of ozone-depleting substances under the Ozone Layer Protection Ordinance;

(b) Electrical and Mechanical Services Department (EMSD): to regulate liquefied petroleum gas (LPG) refrigerants based on the Gas Safety Ordinance;

(c) Fire Services Department (FSD): to regulate non-LPG refrigerants that are classified as dangerous goods based on the Dangerous Goods Ordinance; and

(d) Labour Department (LD): to regulate responsibilities of employers and employees in respect of safety in the working environment based on the Occupational Safety and Health Ordinance.

981. Prior to the introduction of flammable refrigerants, there may not be any major problem with such regulatory arrangements. However, as shown by the Ma On Shan incident, the problem of insufficient regulation would emerge if flammable refrigerants were increasingly being used. The Office's investigation found the following six areas of concern.

I. Inadequate Regulatory Mechanisms

982. Depending on their composition, flammable refrigerants may be classified as LPG or non-LPG. The regulatory mechanisms for the two types of refrigerants were different, as explained below –

(a) If the composition of a refrigerant fell within the definition of LPG under the Gas Safety Ordinance, EMSD had the power to regulate its manufacture, storage, transport, use, import and supply, including its use in air-conditioning systems; and

(b) for refrigerants which were non-LPG dangerous goods, FSD could invoke the Dangerous Goods Ordinance to regulate their manufacture, storage, transport and general use but not their import or supply, nor their use in air-conditioning systems.

983. To put LPG and non-LPG refrigerants with similar flammability under different regulatory mechanisms might lead to problems, as could be seen from the following examples –

(a) The air-conditioning contractor involved in the Ma On Shan incident had, in 2011 at a premises in Tsim Sha Tsui, replaced a nonflammable refrigerant with a flammable LPG refrigerant in an air-conditioning system of a design not suitable for flammable refrigerants. Out of safety concern and in accordance with the Gas Safety Ordinance, EMSD ordered that operation of the system be stopped at once; and

(b) in the Ma On Shan incident, the same contractor used a flammable refrigerant that EMSD classified as non-LPG in three air-conditioning systems of a design not suitable for flammable refrigerants. After one of the systems exploded, the remaining two were allowed to continue operation without any control. This was because under current regulatory arrangements, all the three departments concerned considered such operation to be outside their jurisdictions, their views being –

    (i) EMSD: its jurisdiction did not include non-LPG refrigerants;

    (ii) FSD: its jurisdiction did not include the use of refrigerants in air-conditioning systems; and

(iii) LD: its jurisdiction did not include matters other than work procedures.

984. Were such regulatory arrangements sufficient or appropriate? The Office considered that the Government should review the issue.

II. Disagreement on Jurisdictions

985. There was disagreement between EMSD and FSD on who should be responsible for regulating certain types of flammable refrigerants (including R290, a highly flammable refrigerant the safe use of which was causing concern internationally). This disagreement emerged in 2010 and up to this date remained unresolved.

986. As the matter concerned public safety, the protracted disagreement could lead to serious problems. For instance –

(a) Those intending to import or use the refrigerants concerned in accordance with the law would be at a loss as to what to do. For example, an air-conditioning provider made an enquiry with EMSD in November 2014 as to the regulatory requirements for flammable refrigerant HR427A but till March 2015 was not given any answer. This was because EMSD and FSD could not agree on which department should be responsible for regulating HR427A; and

(b) some people might exploit this grey area to avoid regulatory controls, thereby posing a risk to public safety. For example, the initial findings of the investigations carried out by EMSD in late 2014/early 2015 showed that apart from Ma On Shan, other places (such as Tsim Sha Tsui and Tuen Mun) also saw flammable refrigerants being used to replace non-flammable refrigerants on unsuitable air-conditioning systems. The flammable refrigerant used was HR429, which both EMSD and FSD considered as outside their jurisdictions.

987. The Office considered that EMSD and FSD should work together to resolve the disagreement on their jurisdictions as quickly as possible.

III. Inadequate Monitoring

988. The Office's investigation found that none of the departments concerned was fully in the picture as to the development of refrigerants and their use in Hong Kong –

(a) EPD: did not hold information unrelated to environmental protection;

(b) FSD: learned from the industry that the use of flammable refrigerants had become more common as a result of active promotion of environmental protection worldwide in recent years; and

(c) EMSD: considered the use of flammable refrigerants highly risky under the present circumstances in Hong Kong but nonetheless repeatedly stressed to the Office that there was no information to suggest that flammable refrigerants would be increasingly used in Hong Kong, because it had been told by the major trade associations that Hong Kong had not imported any air-conditioning equipment suitable for the use of flammable refrigerants. This understanding of the situation was inadequate because –

   (i) air-conditioning equipment using flammable refrigerants were already being manufactured in Japan and the Mainland. Even if such equipment had not been imported by members of the major trade associations, they might have been imported by other members of the trade;

   (ii) Hong Kong had no control on the import of flammable refrigerants or air-conditioning equipment using such refrigerants. Even if no such equipment had so far been imported, there could be no guarantee that they would not be imported in future; and

   (iii) even if Hong Kong had not imported any equipment suitable for flammable refrigerants so far, the initial findings of EMSD's recent investigations already revealed that flammable refrigerants were being used to replace non-flammable refrigerants in existing

air-conditioning systems at various premises in Hong Kong.

989. Under the current circumstances, there was a need for the departments concerned to establish a comprehensive and forward-looking monitoring mechanism in order to effectively regulate the use of refrigerants and ensure public safety.

IV. Lack of Communication and Coordination

990. In Hong Kong, the regulation of refrigerants involved at least four ordinances under the purview of four different departments. None of the departments assumed a coordinating or leading role.

991. This lack of coordination had resulted in the following problems –

(a) The disagreement since 2010 between EMSD and FSD on their jurisdictions remained unresolved while public safety was at stake; and

(b) none of the departments involved was fully in the picture as to the up-to-date situation on use and development of refrigerants, nor was any one responsible for the comprehensive monitoring of the matter.

992. The Office considered effective coordination among the departments essential. In view of the complicated situation involving different legislation and jurisdictions, the Government should appoint one department to act as coordinator.

V. Inadequate Liaison and Publicity

993. The departments liaised mainly with the major trade associations in the industry. This was inadequate, as the major trade associations could not represent those operators who were not their members (such as the air-conditioning contractor in the Ma On Shan incident), nor could they represent the small operators in the industry.

994. The Office considered it necessary for the departments concerned to expand their liaison networks. They should also make greater use of publicity and education to reach out to small air-conditioning operators, servicing workers and the general public, so as to raise their awareness about the safe use of flammable refrigerants.

VI. Inadequate Training for Workers

995. The direct cause of the Ma On Shan incident was improper work procedures adopted by the technician concerned in recovering the flammable refrigerants. The accident highlighted the importance of worker training. Moreover, the Office noted that the guidelines issued by the United Nations Environment Programme (UNEP) and information from other jurisdictions all stressed that extra safety training was essential in the use of flammable refrigerants.

996. The current situation regarding training in Hong Kong was –

(a) air-conditioning workers in Hong Kong were not required to undergo training on air-conditioning;

(b) while the Vocational Training Council (VTC, the major provider of vocational training in Hong Kong) offered non-compulsory courses on air-conditioning, these did not cover training on the use of flammable refrigerants on air-conditioning systems; and

(c) a local air-conditioning workers association had expressed concern to EMSD that Hong Kong workers had insufficient knowledge of and were poorly equipped to handle flammable refrigerants. The association also pointed out that flammable refrigerants were increasingly being used on the Mainland.

997. The Office considered the Ma On Shan incident had raised the alarm for government departments to review the situation and to consider enhancing the training for air-conditioning workers.

998. The Ombudsman recommended that the Government should –

(a) enhance inter-departmental coordination and appoint one department to take up the coordinating and leading role in the regulation of refrigerants;

(b) resolve the differences between EMSD and FSD regarding their jurisdictions as quickly as possible;

(c) establish a comprehensive and forward-looking mechanism to monitor the development of refrigerants and their use in Hong Kong; and

(d) review the regulatory arrangements for refrigerants, in particular –

    (i) review whether it was proper to put LPG and non-LPG refrigerants that were equally flammable under different regulatory mechanisms;

    (ii) consider enhancing regulations on training for air-conditioning workers;

    (iii) consider strengthening liaison with the air-conditioning industry; and

    (iv) consider making greater use of publicity and education to increase public awareness of the safe use of refrigerants.

Government's response

999. For The Ombudsman's recommendations (a), (b), (c) and (d)(i), the relevant departments are taking reference from the opinions in the Office's report to jointly review the relevant arrangements as regards the regulation of refrigerants. In fact, EMSD, FSD and LD carried out joint operations in April and October this year concerning cases involving the use of flammable refrigerants or LPG for modified air-conditioning systems. They conducted site inspections to premises and met with the responsible persons to explain to them the relevant statutory requirements, the potential risks of using flammable refrigerants and the liabilities that might be incurred following any incident caused by the refrigerants.

1000. For The Ombudsman's recommendations (d)(ii) and d(iii), EMSD and FSD jointly met with VTC to have a better understanding of the content of its current training course for air-conditioning mechanics. VTC had kept itself abreast of the latest developments in the air-conditioning industry, and considered that flammable refrigerants were not commonly used in Hong Kong. In view of the safety concerns

over the use of flammable refrigerants, VTC has included some guidelines on safe handling of refrigerants in its training course. VTC has also reminded the air-conditioning mechanics not to use flammable refrigerants through its guidelines. In addition, the relevant departments have been working closely together to remind members of the public of the safety requirements of refrigerants during joint inspections.

1001. Under the current occupational safety and health (OSH) legislation, employers shall provide OSH training as may be necessary to ensure the safety and health at work of their employees. LD will continue to ensure compliance in this respect by employers undertaking air-conditioning works through enforcement and promotion to safeguard OSH of the employees involved. With a view to enhancing OSH performance of the air-conditioning sector and facilitating its compliance with OSH requirements, LD published in September 2015 the "Guidance Notes on the Work Safety of Air-conditioning Works" (GN), which provides practical guidelines to the industry in preventing work-related accidents when carrying out air-conditioning works (including the handling of flammable refrigerants). In collaboration with the trade unions and associations concerned, LD held a seminar on occupational safety of air-conditioning maintenance and repair works in February 2015 to strengthen the safety awareness of the management, safety practitioners and frontline workers of the industry. After the publication of the GN, LD collaborated with EMSD, FSD, trade unions and associations concerned to hold another seminar in November this year to explain occupational safety and the safety aspects of LPG and dangerous goods, with a view to enhancing the work safety awareness of members of the industry. LD will continue to engage the relevant stakeholders to promote OSH of workers engaged in air-conditioning maintenance and repair works.

1002. On The Ombudsman's recommendation (d)(iv), EMSD has stepped up publicity and education to the relevant trades. Seminars and sharing sessions have been conducted to promote their awareness of the safe use of LPG. FSD has produced and broadcast a set of announcement in the public interest to promote public awareness of the safe use of compressed gas cylinders.

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

Case No. DI/236 – Regulatory Measures and Enforcement Actions against Street Obstruction by Shops

Background

1003. Display and sale of goods outside shops often cause street obstruction and environmental hygiene problems. In recent years, such problems in various districts have persisted and been worsening. In this connection, the Office of The Ombudsman (the Office) conducted this direct investigation to examine any inadequacies in Government's regulatory measures and enforcement actions against street obstruction by shops.

The Ombudsman's observations

1004. To tackle the various types of illegal activities relating to street obstruction by shops, the interdepartmental Steering Committee on District Administration (SCDA) reached a consensus in 2009 regarding the exercise of enforcement powers under the relevant legislation by the departments concerned –

Illegal Activity	Relevant Legislation	Enforced by
Merchandise causing obstruction, inconvenience or danger to any person or vehicle in public place	Section 4A of the Summary Offences Ordinance (street obstruction provision)	Mainly the Food and Environmental Hygiene Department (FEHD)
On-street illegal hawking	Sections 83B(1) & (3) of the Public Health and Municipal Services Ordinance (PHMSO) (illegal hawking provision)	FEHD

Placement of articles, causing Obstruction to scavenging operations	Section 22(1)(a) or 22(2)(a) of PHMSO	FEHD
Structure (e.g. platform, ramp or steps) occupying government land	Section 6(1) of the Land (Miscellaneous Provisions) Ordinance (L(MP)O)	Lands Department (LandsD)
Unauthorised structure projecting from external wall of building	Section 24(1) of the Buildings Ordinance	Buildings Department (BD)

1005. For complicated cases that involve the jurisdictions of different departments and for "black spots" of street obstruction, the District Offices (DOs) under the Home Affairs Department (HAD) would coordinate inter-departmental joint operations.

1006. Government may exercise discretion to allow some shop operators to extend their business areas to designated areas in front of or adjacent to their shops (tolerated areas), provided that such areas have the agreement of the District Council (DC)/District Management Committee or that a consensus has been reached between FEHD, together with other relevant departments, and the shop operators. There are currently tolerated areas in eight localities.

Compartmental Mentality and Lack of Accountability

1007. Currently, FEHD, LandsD and BD are responsible for taking enforcement actions within their own jurisdictions against different types of illegal activities relating to the street obstruction problem. The departments tend to think that they are collectively accountable for the problem and hence adopt a compartmental attitude. None of them seem willing to actively take up total responsibility and endeavour to find a complete solution to the problem. Sometimes, they just procrastinate until inter-departmental joint operations are coordinated by DOs.

FEHD's Predominant Use of Warnings Proved Ineffective

1008. FEHD usually applies the strategy of "warning before prosecution" in its enforcement actions against shops causing street obstruction. However, FEHD's repetitive warnings have no effect whatsoever on habitual offenders. Upon receiving warnings, the offenders would rectify their irregularities temporarily, only to relapse as soon as FEHD officers are gone. By contrast, prosecutions may lead to penalties and, therefore, have a stronger deterrent effect. Nevertheless, records revealed that the prosecution-to-warning ratio of FEHD was only about 1:6, while in some localities the ratio was even as low as 1:49.

Illegal Hawking Provision Seldom Invoked and Merchandise Rarely Seized by FEHD

1009. For display and sale of merchandise outside shops, FEHD can in fact prosecute the shop operators by invoking the illegal hawking provision, which empowers FEHD to seize the merchandise. Yet, FEHD often applies the street obstruction provision instead, which does not empower FEHD to seize merchandise.

1010. FEHD indicated that according to legal advice, its enforcement officers must obtain substantive evidence, for example, cash transactions taking place outside the shop, before they can invoke the illegal hawking provision to initiate prosecutions. The Office considers that, even so, it should not be difficult for FEHD officers to collect such evidence since selling and buying of goods outside shops are very common. All it takes is close surveillance.

Long Lead Time for FEHD's Prosecution and Light Penalty

1011. In recent years, over 90% of FEHD's prosecutions against shops for street obstruction were instituted by invoking the street obstruction provision. With this kind of prosecutions, it normally takes several months before a summons can be issued and a court hearing held. Moreover, the average fine imposed by the court for the offences is only around $500 to $700, which has little deterrent effect.

1012. This has prompted Government to consider a fixed penalty system. The Office believes that such a system can help deal with street obstruction cases more quickly and effectively. However, the departments concerned must at the same time devise a stringent enforcement strategy to maximise the effectiveness of the fixed penalty system. They must not continue to be lax in enforcement.

LandsD's Cumbersome Enforcement Procedures

1013. According to L(MP)O, before prosecuting a person who illegally occupies government land, the District Lands Office (DLO) concerned of LandsD must give him/her advance notice. At present, LandsD's enforcement procedures provide that if the person removes the articles occupying government land before the deadline specified by the Department, even though the articles are found occupying the land again afterwards, DLO should issue him/her a fresh notice instead of removing the articles right away or instituting prosecution. Many shop operators take advantage of this. Upon receipt of DLO's notice, the shop operators would temporarily remove the articles in question to meet DLO's requirement, only to put them back afterwards. That would not result in DLO's seizure of the articles or prosecution. The Office considers such enforcement procedures to be at odds with the spirit and intent of the provisions of L(MP)O, which state that the occupier must "cease occupation" of government land and not just temporarily remove the articles that occupy the land. LandsD's current enforcement procedures are too cumbersome and clearly unable to resolve the problem of continual illegal occupation of government land by shops.

Difference in Enforcement Priorities of LandsD and BD

1014. LandsD and BD are respectively responsible for dealing with shop front platforms occupying government land and unauthorised structures on the sides or at the top of shops. The two departments have their own considerations and different enforcement priorities. In particular, if the unauthorised structures on the sides or at the top of shops are within the dimensions tolerated by BD, BD would refrain from taking enforcement action and, therefore, would not promptly conduct a joint operation with LandsD to remove the platform and the unauthorised structures concurrently.

Lax Regulation of Tolerated Areas

1015. As local situations and public views vary from district to district, it may not be appropriate to apply the same enforcement strategy across the board. Fully acquainted with their districts, DCs are well poised to advise Government in drawing up their respective enforcement strategies that would balance the interests of different stakeholders, taking into account such factors as traffic flow and safety and the business of shops. The Office agrees in principle that the setting up of tolerated areas with the respective DC's support was a reasonable concessionary arrangement.

1016. However, shop operators often break the rules by extending their business areas well beyond the tolerated areas, and yet FEHD adopts a very lax enforcement approach, with a prosecution-to-warning ratio as low as 1:49. The Office believes that it is FEHD's duty to take strict enforcement action against all those who blatantly disregard the rules and to ensure that the extent of street obstruction is contained within the tolerated areas.

1017. Some people are of the opinion that setting up tolerated areas means conniving at the wrongs and the shop operators may take for granted that they can occupy the public space outside their shops. Furthermore, allowing those shops to occupy such government land at no cost amounts to preferential treatment and it is unfair to shops elsewhere that are subject to prosecution for street obstruction; this may even make it difficult for frontline staff to take enforcement action against the latter. The Office deems it advisable for the Government to take reference from overseas experience and consider enhancing the tolerated area mechanism such that besides having to obtain the DC's support, shops would need to pay the Government a reasonable fee for enjoying the use of tolerated areas, with the rights and obligations of the shop operators clearly laid down.

1018. The Ombudsman recommended –

SCDA

(a) to appoint one of the departments with enforcement powers as the lead department to tackle the problem of street obstruction by shops, and to instruct the other departments to assist and cooperate with it;

(b) as a longer-term measure, to consider setting up a "one-stop" joint office for tackling the problem of street obstruction by shops;

(c) when introducing the fixed penalty system, to require the departments concerned to devise a stringent enforcement strategy to maximise the effectiveness of the new system;

(d) to consider enhancing the tolerated area mechanism such that besides having to obtain the local DC's support, shops would need to pay the Government a reasonable fee for enjoying the use of tolerated areas.

FEHD

(e) to adjust its enforcement strategy for stronger deterrent effect, taking rigorous enforcement actions against habitual offenders, who should be prosecuted immediately for non-compliance, rather than being warned again and again;

(f) to step up efforts to collect evidence for more prosecutions and seizure of merchandise under the illegal hawking provision for stronger deterrent effect;

(g) to take strict enforcement actions against those shops which extend their business areas beyond the tolerated areas and to ensure that the extent of street obstruction is contained within the tolerated areas;

LandsD

(h) to expedite Government's study and legislative amendments for stepping up enforcement actions and strengthening the deterrent effect of the law against continual illegal occupation of government land by movable articles, with a view to plugging the existing loophole in the enforcement procedures; and

LandsD and BD

(i) to adjust their respective enforcement priorities for joint efforts to increase their efficiency in coping with cases of street obstruction and to consult the Development Bureau where necessary.

Government's response

SCDA

1019. During the public consultation exercise held from March to July 2014, the majority of respondents were supportive of the introduction of a fixed penalty system against shop front extensions (SFE). Having regard to the views collected and other considerations, SCDA chaired by the Permanent Secretary for Home Affairs decided to set up a fixed penalty system as an additional measure to the existing summons system to step up efforts to tackle the problem of SFE. The legislative proposals will be introduced to the Legislative Council in the 2015/16 legislative session.

1020. Having considered The Ombudsman's recommendations, SCDA accepted the recommendation on devising an effective enforcement strategy to maximise the effectiveness of the system (recommendation (c)). SCDA has worked with the major enforcement departments, i.e. the Police and FEHD to design stringent enforcement strategy since early 2015 in order to fully utilise the proposed fixed penalty system.

1021. As regards The Ombudsman's recommendation on appointing an enforcement department as lead department (recommendation (a)), SCDA considers it not practicable to task one single enforcement department for this role given the vastly diverse nature of SFE activities. SCDA is of the view that enforcement departments should take relevant actions in accordance to the power vested under different ordinances based on the individual SFE circumstances.

1022. Nevertheless, enforcement departments including FEHD, the Police, LandsD and BD, also agreed to co-operate more closely and mount small-scale joint operations among themselves more frequently and to render more effective support for each other. An enhanced enforcement strategy has been mapped out and is being implemented by these departments.

1023. As for The Ombudsman's recommendation on setting on a "one-stop" joint office for tackling the problem of street obstruction by shops as longer term measure (recommendation (b)), SCDA will keep in view the need for and the feasibility of setting up such office as a long-term measure upon the implementation of more stringent enforcement strategy and the fixed penalty system.

1024. Regarding recommendation (d), The Ombudsman suggests that SCDA should consider regularising the mechanism of tolerated areas by asking those shops enjoying the use of tolerated areas to pay the Government a reasonable fee. Currently, the tolerated areas exist depending upon the precondition that the shop operators could abide by the agreement with self-discipline. It is a temporary arrangement proposed after the consensus between the law enforcement agencies, other departments concerned and shops.

1025. Adopting a fee charging system for these few temporary tolerated areas is tantamount to legalising the SFE in question. Shops paying a fee will arguably have a more legitimate expectation that the toleration will be more permanent in nature. SCDA therefore did not accept this recommendation and will continue to urge relevant departments to conduct regular review on the arrangement.

1026. The Office has noted SCDA's position in respect of recommendations (a), (b) and (d).

FEHD

1027. FEHD accepted The Ombudsman's recommendations. Apart from taking actions to review and revise the relevant working guidelines, FEHD has instructed its district offices to implement The Ombudsman's recommendations by stepping up enforcement actions and adjusting the enforcement strategy for dealing with street obstruction by shops as follows –

(a) Habitual offenders in cases of street obstruction by shops will be prosecuted immediately without prior warnings;

(b) for case of street obstruction by shops involving illegal hawking, FEHD would step up its efforts to collect evidence, so that there would be sufficient evidence to invoke the illegal hawking provision under section 83B of PHMSO and to seize the paraphernalia and commodities used by offenders for the purpose of hawking under section 86 of PHMSO; and

(c) enforcement actions against shops which extend their business areas beyond the tolerated areas have been stepped up.

1028. In mid-June this year, FEHD set up three additional teams of Task Force (Shop Front Extension Control) with a total of 39 officers to further intensify efforts against the non-compliant shop operators at blackspots of street obstruction in various districts.

LandsD

1029. LandsD accepted The Ombudsman's recommendations. As regards recommendation (h), LandsD has set up a working group with representatives from the Department of Justice to follow up. It was the working group's view that depending on the situation on site and evidence available, the requirement to cease occupation as stated in the notice posted under L(MP)O could be considered as not being complied with if the occupier merely ceased occupation temporarily but subsequently re-occupy the same government land. In accordance with the working group's recommendation, LandsD is proceeding with the prosecution of such repeated occupation cases. Besides, the amendments of L(MP)O, which were mainly to increase the penalties for unlawful occupation of government land, were passed in the Legislative Council in January 2015. The new penalties came into effect on 6 February 2015.

1030. In respect of recommendation (i), LandsD and BD have adjusted their respective enforcement priorities to accommodate the priorities of the other department. Efforts have been made to maintain a consistent enforcement approach as far as practicable. The two departments have also strengthened their coordination by proactively informing the other of its enforcement action in advance and by taking joint operations where necessary.

BD

1031. BD accepted The Ombudsman's recommendation and has taken the following actions –

(a) BD has reviewed the enforcement policy against shopfront unauthorised building works (UBWs) and revised the relevant guidelines, stipulating more stringent enforcement criteria and closer liaison with LandsD;

(b) BD has sent the revised guidelines and the lists of target buildings selected for Large Scale Operation for the comprehensive removal of UBWs (including shopfront UBWs) to LandsD to facilitate joint enforcement actions; and

(c) in accordance with the revised guidelines, BD has been taking joint enforcement actions with other government departments (including LandsD) against the shopfront UBWs at selected "Black Spots" in Yuen Long.

Government Secretariat – Education Bureau

Case No. DI/365 – Education Bureau's Refusal to Disclose Teachers' Registration Status

Background

1032. Under the Education Ordinance (EO), any person who intends to teach in a school must first apply to the Education Bureau (EDB) for teacher registration. Accordingly, EDB holds the list of registered teachers (the List). On grounds of protecting teachers' privacy, EDB has all along rejected requests from the public for access to the List. However, media reports revealed that certain parents' associations and some teachers' organisations had postulated that EDB should open up the List for public inspection. The Office of The Ombudsman (the Office), therefore, conducted a direct investigation into EDB's handling of public requests for information on teachers' registration status, with a view to identifying room for improvement.

The Ombudsman's observations

<u>*EDB's Reasons for Refusal*</u>

1033. EDB gave the following reasons for its refusal to disclose the List or information on individual teachers' registration status –

(a) according to Principle three of the Data Protection Principles under the Personal Data (Privacy) Ordinance (PDPO), personal data shall only be used for the purpose stated at the time of data collection, unless the consent of the data subject has been given. EDB considered disclosure of teachers' registration status to be not in line with the original purposes for which such information was collected;

(b) the EO does not empower EDB to disclose information on teachers' registration status;

(c) there is already a system under which EDB and schools can adequately guard against the employment or continued employment of people not fit or proper as teachers in schools;

and

(d) disclosure of information on teachers' registration status might lead to the following problems: lawsuits; indirect disclosure of teachers' employment status; and public misunderstanding that some school employees (such as non-teaching staff who are not required to register with EDB anyway) are "unlicensed teachers".

EDB Should Explore How to Make Teachers' Professional Status Open and Transparent

1034. In refusing to disclose the List for public inspection, EDB was acting in accordance with the law. However, the aim of the teacher registration system is to ensure that schools employ only teachers who have acquired the necessary professional status to provide education with quality assurance to students. Whether teachers are registered is indeed of interests to all schools, students and parents. Therefore, the Office considers that based on the broad principle of open and transparent public administration, EDB should strive to open up the List.

1035. Moreover, EDB's existing system cannot completely prevent people who are not fit and proper from being employed as school teachers. For example, some schools may –

(a) employ people whom they know but who are not registered with EDB as temporary teachers when there is a shortage of teachers; and

(b) choose not to report to EDB cases of crime or misconduct involving their teachers to avoid bringing the schools into disrepute, in which case EDB would have no basis to consider deregistering the teachers in question.

1036. The best way, therefore, is to open up the List so that the public can help monitor teachers and report suspicious cases to further safeguard public interests.

1037. As regards the concerns raised by EDB and some people opposed to disclosure of the List (e.g. teachers have not given consent for EDB to disclose their personal data; the public may further request disclosure of teachers' other information; and disclosure of the List may cause public misunderstanding that some school employees are

"unlicensed teachers"). The Office believes that those problems are not insurmountable. Besides, such concerns are no good reason for denying the public of their right to information.

1038. Moreover, while EDB was aware of the reservations of some members of the profession about disclosure of the List, it had neglected the views of the public at large, particularly those of parents. In fact, some had already pointed out that many other professions in Hong Kong (including medical practitioners, lawyers and social workers) do make their lists of registered members open for public inspection. Hence, keeping the identity of registered teachers secret is unwarranted. EDB, therefore, should conduct an extensive public consultation exercise or opinion poll to confirm the public's aspirations; then consider what to do next as to how to open up the List.

EDB Should Adopt a More Accommodating Approach in Considering Information Requests Made by Those Whose Vital Interests are Affected

1039. According to the relevant provisions of Principle three of the Data Protection Principles under PDPO and the view offered by the Office of the Privacy Commissioner for Personal Data, EDB's disclosure of only the registration status of a teacher to individual persons may not amount to a breach of PDPO, so long as the purpose of such disclosure is directly related to the purposes for which the information was to be used at the time the information was collected.

1040. The Office considers that the registration status of a teacher certainly concerns vital interests of the students' parents and the school which intends to employ the teacher. Requests made by those parents/school authorities to access the information on teachers' registration status are reasonable. Disclosure of such information by EDB to them could be deemed as directly related to the original purposes of collecting such data (which include "teacher registration" and "provision of education services"). Therefore, the Office believes that it may not amount to a breach of PDPO if EDB is to disclose information on the teachers' registration status under these circumstances.

1041. It is imperative for EDB to review its practice relating to handling requests from individuals and schools to access information on the registration status of individual teachers. If requests of the individuals/organisations are related to their vital interests, EDB should adopt a more accommodating approach in considering such requests and, in particular, should as far as possible give definite replies to the

enquiries of schools/parents.

1042. The Ombudsman urges EDB to –

(a) review its practice relating to handling of requests from individuals/organisations to access information on the registration status of individual teachers, with a view to adopting a more accommodating approach in considering requests made by those whose vital interests are affected; and

(b) conduct an extensive public consultation exercise or opinion poll to confirm the public's aspirations for disclosure of the List; if the results indicate wide public demand for disclosure, EDB should expeditiously consider amending the relevant procedures and legislation to implement the measure.

Government's response

1043. The EDB accepted The Ombudsman's recommendations and has been actively examining the feasibility of these recommendations. The details are set out below.

Recommendation (a)

1044. The EDB has sought the advice of the Department of Justice (DoJ) on how to adopt a more accommodating approach to disclose the registration information of teachers to those whose vital interests are affected within the ambit of the related legislations. The EDB will continue to discuss the matter with DoJ.

Recommendation (b)

1045. The EDB consulted the Legislative Council Panel on Education on the disclosure of teachers' registration information in early June this year. Besides, a consultation document was released on EDB's website in July for a two-month public consultation and a number of consultation sessions were held to solicit the views of the sector and the public. The EDB will also meet with the Committee on Home-School Co-operation at the beginning of the 2015/16 school year to gather the views of parent representatives. The EDB will gauge the views of various stakeholders and assess the various possible ways of disclosing teachers' registration information.

Home Affairs Department

Case No. DI/354 – Government's regulation of guesthouses

Background

1046. Operation of guesthouses is regulated by the Office of Licensing Authority (OLA) under the Home Affairs Department (HAD) pursuant to the Hotel and Guesthouse Accommodation Ordinance (HGAO).

1047. The Office of The Ombudsman (the Office) received from time to time public complaints about OLA loosely issuing licences to guesthouses in multi-storey buildings without taking into account the nuisances and even dangers that such guesthouses may cause to people living in the same building. Other complainants reproached OLA for its ineffective enforcement against unlicensed guesthouses, which had resulted in the proliferation of such unlicensed establishments.

1048. Against this background, the Office initiated a direct investigation to probe into the inadequacies in the Government's regime for regulation of guesthouses.

The Ombudsman's observations

Licensing Regime Failed to Keep up with the Times

1049. The legislative intent of HGAO was to ensure, through a licensing regime, that the premises used as guesthouses would meet the prescribed standards in respect of building structure and fire safety so as to protect the lodgers and the public. The licensing requirements prescribed in HGAO do not include compliance with the provisions of the land lease or the deed of mutual covenant (DMCs), or the views of people residing in the building.

1050. Given the limitations of HGAO, the Office considered HAD to be acting in accordance with the law when it did not take into account the provisions of the land lease or DMC, or the residents' views, in processing applications for guesthouse licence. From an administrative point of view, the Office could not say that there was impropriety. Nevertheless, the number of guesthouses has been continuously on the

rise in recent years. Understandably, some residents feel that their daily lives have been affected by the operation of guesthouses in their buildings (e.g. increased maintenance costs for the buildings). They expect that the Government's regulation of guesthouses should address not only safety concerns, but also the impact of such operations on their daily lives. The Office considered that HAD should have reviewed long ago the licensing regime for guesthouses and introduced improvement measures or even legislative amendments, so as to address the community's concerns.

Ineffective Enforcement Measures against Unlicensed Guesthouses

1051. OLA had in recent years increased manpower and stepped up inspections and investigations to combat the rapid increase of unlicensed guesthouses. However, the prosecution rates remained exceedingly low because –

(a) as advised by the Department of Justice, the Government could not institute prosecutions merely based on "circumstantial evidence" (such as the layout and setting of the premises) under the existing legislation;

(b) uncooperative owners/operators of guesthouses had made it difficult for OLA officers to enter the premises for investigation;

(c) the penalties were light; and

(d) there had not been enough decoy operations for collecting evidence.

1052. The Office considered that in face of such an unsatisfactory situation, HAD should have sought to change its enforcement strategy long ago (e.g. redeploying resources to conduct more decoy operations for collecting evidence) in order to achieve better results.

Public Consultation by HAD

1053. After the Office declared the commencement of this direct investigation, HAD, in view of the concerns of different sectors of the community about the existing regulatory regime for guesthouses, launched in July 2014 a public consultation exercise on review of HGAO. In its consultation paper, HAD proposed a number of legislative amendments, including –

(a) to empower HAD to refuse to issue/renew licences or cancel existing licences on the grounds that the DMC provisions of the building concerned explicitly prohibit the operation of guesthouses;

(b) to empower HAD to take into account residents' views collected through local consultation;

(c) to add "deeming provisions" to HGAO for admission of "circumstantial evidence", such that the standard of proof by OLA can be lowered to facilitate prosecution against owners/operators of unlicensed guesthouses;

(d) to empower OLA to apply for a court warrant for entry into, and breaking in if necessary, any suspected unlicensed guesthouses for inspection; and

(e) to increase the maximum penalty for operating unlicensed guesthouses to a fine of $500000 and imprisonment for three years, in the hope that the court would impose heavier sentences in future.

1054. The Ombudsman recommended HAD –

(a) if it decides to conduct local consultation during the licensing process, to draw up a set of workable and reasonable criteria for assessing residents' objections;

(b) to consider including compliance with land lease conditions as a licensing requirement; and

(c) further enhance OLA's investigation of unlicensed guesthouses by conducting more decoy operations to obtain evidence in order to increase the effectiveness of its enforcement actions.

Government's response

Recommendation (a)

1055. HAD accepted The Ombudsman's recommendation (a). Regarding the conduct of local consultation during the licensing process, HAD will draw up a set of criteria that is clear and reasonable with reference to the established practices of other licensing authorities so that licence application will be fairly assessed.

Recommendation (b)

1056. HAD is drafting the Hotel and Guesthouse Accommodation (Amendment) Bill. The Office is aware that HAD will carry out an in-depth examination on the feasibility and need of recommendation (b).

Recommendation (c)

1057. HAD in principle agreed with The Ombudsman's recommendation (c). OLA will arrange decoy operation against suspected unlicensed guesthouses. HAD will continue to deploy resources proactively to meet the enforcement needs.

Hospital Authority

Case No. DI/308 – Management and Release of Patient Records by the Hospital Authority

Background

1058. It is the policy of the Hospital Authority (HA) to keep patient records for the purpose of providing patient care, and to release such records in a timely manner upon the patient's request. There are two main ways in which HA releases patient records –

(a) Public-Private Interface – Electronic Patient Record Sharing Pilot Project (PPI-ePR project): this is a project under which HA provides an electronic platform to enable enrolled private healthcare practitioners with the consent of a patient to access the latter's electronic medical records kept by HA. Expected processing time of applications from patients for enrolment in the project is two weeks; and

(b) Data Access Request (DAR scheme): this is a scheme under which HA releases, subject to and in accordance with the Personal Data (Privacy) Ordinance (PDPO), hard copies of a patient's records to the patient upon his request or to a third party subject to his consent. Under PDPO and subject to its provisions, HA is required to comply with such requests within 40 days. However, DAR application documents did not mention this requirement or any information about expected processing time.

1059. A complaint case showed that a patient (Mr A) who applied in 2011 under PPI-ePR project for his electronic records to be released to his private sector doctor before a surgical operation had to wait for more than 70 days before their release. This prompted the Office of The Ombudsman (the Office) to investigate the magnitude of the problem and identify the improvements that could be made.

The Ombudsman's observations

1060. For keeping of patient records in HA's computerised record system, each patient is given an account identified by the number of his identity document. When a patient visits or is admitted to HA hospitals/clinics, these are recorded in his account as Episodes and given Episode numbers (Episode No.). An Episode No., once created, is connected to a patient and, under normal circumstances, should not be used for any other patient.

1061. However, there are a number of circumstances under which an Episode No. may be, or may need to be, moved from one account to another, including the following –

(a) A hospital re-using a patient's Episode No. for another patient by mistake;

(b) a patient using different identity documents at different times to obtain treatment at HA hospitals, e.g. at one time using his One Way Permit and at another his Hong Kong Identity Card; and

(c) a patient using another person's (usually a relative's) Hong Kong Identity Card by mistake when seeking urgent treatment at the Accident and Emergency Department.

1062. Under HA's system, whenever an Episode No. is moved from one patient account to another, Yellow Flags will be automatically triggered on both the "Move from" and "Move to" accounts. The Yellow Flags serve to indicate that the records may be corrupted and should be used with extra caution. Also, the Yellow Flags will bar the patient records concerned from being released under the PPI-ePR project. However, until October 2006, the Yellow Flags were not connected to any mechanism that would set in motion any rectification action.

1063. In the case of Mr A, the long time taken in the processing of his PPI-ePR application was due to the following sequence of events –

(a) Back in June 2006, Mr A failed to attend an appointment at an HA hospital, Hospital A. In contravention of HA guidelines, Hospital A re-used the Episode No. allotted to him for another patient. This triggered a Yellow Flag on Mr A's account;

(b) five years later, when Mr A applied for his records under the PPI-ePR project in April 2011, they were barred from being released by the Yellow Flag placed on the records; and

(c) only then did HA start to take action to verify his records, which were eventually released to him in July 2011, five weeks beyond the expected processing time of two weeks.

1064. The Office's investigation revealed four main deficiencies in HA's management and release of patient records, as detailed below.

I. Failure to Verify Possibly Corrupted Records in a Timely Manner

1065. In Mr A's case, the lack of any action to verify possibly corrupted records for five years from 2006 to 2011 was due to a systemic deficiency when the Yellow Flag mechanism was created in early 2006, i.e. it was not connected to any mechanism to set in motion verification and rectification action. This deficiency was remedied in October 2006 when HA improved the system to enable Yellow Flags to trigger verification and rectification action. However, no action was taken on Yellow Flags raised before October 2006, as shown in Mr A's case. Nor was any deadline set for verification and rectification action.

1066. As the Office's investigation proceeded, HA took steps in tandem to further improve the system, as follows –

(a) in January 2013 HA introduced deadlines for clearing Yellow Flags; and

(b) in March 2013 HA further set up a Task Force to coordinate and monitor the clearing of Yellow Flags.

1067. A total of more than 20000 Yellow Flags had been raised since the introduction of the Yellow Flag mechanism in 2006. Under the Task Force, HA made progress in clearing them. As at October 2013, there were 2233 Yellow Flags, comprising 2122 cases substantially verified and ready to be cleared, and 111 cases on which further verification was necessary.

1068. The Office considered that HA should keep up its work in this regard. For the more complicated cases the verification of which was expected to take a long time, HA should give consideration to practical stopgap measures such as releasing the records upon request with an

appropriate remark pointing out the areas of uncertainty.

II. Insufficient Publicity for Doctor-to-doctor Communication

1069. In the course of this investigation, the Office noticed that some of HA's service targets for processing release of patient records might not be able to meet the demand of patients in urgent need, such as those wanting to seek a second medical opinion before an operation. The service targets causing particular concern were –

(a) processing of DAR applications: 40 days; and

(b) clearing of Yellow Flags involving different patients (which would impact on the processing of PPI-ePR applications): six weeks.

1070. When the Office put the concern to HA, HA pointed out that in cases of urgent need, the patient's doctor in the private sector should contact the patient's HA doctor direct for information, i.e. doctor-to-doctor communication should be adopted. According to HA, as a matter of professional practice, such requests for information would be processed by HA doctors as soon as possible having regard to the circumstances of the case.

1071. While the Office noted HA's position that doctor-to-doctor communication would be able to serve patients in urgent need, the Office observed that it was not sufficiently known among patients and members of the public. The Office recommended HA giving publicity to doctor-to doctor communication, such as on its website and in its application documents for PPI-ePR and DAR.

III. Ineffective Communication with Patients Seeking Release of Their Records

1072. The Office's investigation revealed deficiencies in HA's communication with patients seeking release of their records. This was illustrated in the following –

(a) in Mr A's case, during the patient's long wait for his PPI-ePR approval, HA gave him little information that was useful or helpful, despite repeated requests from him and his sons. A letter from the patient's son was even left unanswered; and

(b) DAR applicants were given no information about the possible processing time, nor the statutory requirement for HA to process DAR applications within 40 days.

1073. The Office recommended that HA should adopt a more patient-oriented mindset in processing applications for release of patient records, including provision of clear information to patients on the expected processing time and advice on any alternative means of obtaining information for those in urgent need.

IV. Ineffective Communication between HA Headquarters and HA Hospitals

1074. The Office investigation revealed deficiencies in the internal communication between HA Headquarters and HA hospitals. This was illustrated in the following –

(a) in Mr A's case, despite HA Headquarters, guidelines issued in 1995, until 2007/08 it was Hospital A's practice to re-use Episode Nos. for different patients, leading to patient records being corrupted; and

(b) in other cases the Office studied, despite procedures introduced by HA Headquarters in 2006, until 2012 many HA hospitals were unclear of what was required when HA Headquarters asked them to verify data in connection with PPI-ePR applications. It was only in May 2012 that HA introduced measures to rectify this problem.

1075. The occurrence of these problems suggested that guidelines issued by HA Headquarters were not always observed by individual hospitals, procedures laid down by HA Headquarters not always understood, and deadlines not always met. The Office recommended that HA should consider reviewing its internal communication network/channels with a view to enhancing communication between HA Headquarters and individual hospitals.

1076. The Ombudsman recommended that HA should –

(a) keep up its work in speeding up and monitoring the clearance of Yellow Flags and verification of patient records;

(b) give publicity to doctor-to-doctor communication as a means for patients in urgent need of obtaining their records;

(c) adopt a more patient-oriented mindset in processing applications for release of patient records, including provision of clear information to patients on the expected processing time, any alternative means of obtaining information for those in urgent need, and where there is a delay, the reasons for delay; and

(d) consider reviewing the operation of its internal communication network/channels with a view to enhancing communication between HA Headquarters and HA hospitals.

Government's response

1077. HA accepted The Ombudsman's recommendations and has adopted the measures set out below.

Recommendation (a)

1078. To speed up the verification of patient records and to ensure a timely clearance of Yellow Flags, HA has established a registry at the Head Office level to monitor the progress of clearing Yellow Flags at various hospitals. The relevant parts of HA's 'Manual of Good Practices in Medical Records' was updated to enhance alertness and to facilitate compliance of hospital frontline staff on the handling of "moved episode record" and management of yellow-flagged medical record.

Recommendation (b)

1079. HA has added a supplementary clause about seeking doctor-to-doctor communication to the Points to Note of PPI-ePR Application Form, DAR Form, as well as PPI-ePR publicity material and relevant websites. The frontline staff members of all PPI-ePR enrolment centres and participating healthcare providers have been updated on this measure.

Recommendation (c)

1080. HA has reminded the frontline staff of PPI-ePR enrolment centres to advise the applicants/patients of the possible delay in processing PPI-ePR application beyond normal processing time, and the alternative means of obtaining information in case of urgent need.

Recommendation (d)

1081. HA Head Office has set up a designated team to communicate with hospitals with a view to monitoring the performance and progress on clearance of Yellow Flags as well as to provide a timely support on a need basis.

Housing Department and Hong Kong Housing Society

Case No. DI/331 – Mechanisms used to review and monitor eligibility of existing tenants in subsidised public housing

Background

1082. The Hong Kong Housing Authority (HKHA) and the Hong Kong Housing Society (HKHS) are two independent organisations providing public rental housing (PRH) units. They have their own mechanism to vet the eligibility of applicants. There is also a coordination system between the two organisations to prevent existing PRH tenants from obtaining double housing subsidies.

1083. Nevertheless, the Office of The Ombudsman (the Office) noted from complaints received that some families have simultaneously occupied two PRH units under the Housing Department (HD) (the executive arm of HKHA) and HKHS respectively, but both organisations have failed to take prompt action to rectify the problem. Furthermore, some tenants who should have vacated their units under existing regulations for various reasons (such as divorce or transfer) were allowed to stay. Those loopholes, if not plugged, will compromise the fair allocation of valuable PRH resources and prolong the waiting time of those applicants on the Waiting List. Against this background, the Office initiated a direct investigation into the issue.

The Ombudsman's observations

Improvement Needed in HD's and HKHS's Reporting and Coordination System

1084. HD indicated that, to address the problem of dual tenant status, it would issue a monthly statement to inform HKHS of any double housing benefit cases involving HKHS tenants. However, after examining a number of cases, the Office found that HKHS had failed to detect the problem of dual tenant status for months, if not years. Even where HKHS had been notified of such cases, the problem still persisted for years because HKHS did not take timely action to follow up. Since the two organisations had no written agreement to delineate their respective responsibilities in dealing with different situations, neither HD nor HKHS

took any positive steps to monitor the progress of the cases. Their coordination system had therefore failed to achieve the desired results.

HD and HKHS Too Tolerant in Handling Cases

1085. In a number of cases, the Office found that HD and HKHS officers were too lax in handling cases of dual tenant status. During the investigation, both organisations expressed that they needed to handle the tenancy issue in a more "humane" manner. The Office has no objection to that. However, this should not mean that the two organisations should tolerate dual tenant status or allow tenants to continue to occupy PRH units against the rules for an extended period. The Office's investigation revealed that some cases actually took six to eight years to resolve, and any follow-up actions in the interim were few and far between. As a result, ineligible tenants were not removed from their PRH units, and some households were allowed to occupy PRH units with a size larger than their entitlements. Such cases reflected the lack of determination on the part of HD and HKHS in tackling irregularities, thereby indirectly condoning the abuse of PRH resources.

HD's Failure to Carefully Enforce Policy on Granting of New Tenancy (GNT)

1086. According to HKHA's website, the GNT Policy is mainly for allowing the surviving spouse to take over the tenancy of a PRH unit unconditionally upon the death of a principal tenant. Where there is no surviving spouse, a new tenancy may be granted to an authorised household member who has passed the Comprehensive Means Test. Nonetheless, HD informed the Office subsequently that under GNT Policy, tenants may also request HD to grant a new tenancy on grounds "other than death of the principal tenant", such as emigration or transfer of the principal tenant. However, the Office noted that HD neither clearly defined the scope of those "other grounds", nor set out any guidelines for staff in examining applications for GNT on "other grounds".

1087. In a number of cases cited in the Office's investigation report, HD granted a new tenancy to other household members when the principal tenant was still alive, resulting in household splitting. One of the principles under the policy on household splitting is indeed aimed at preventing tenants from obtaining extra PRH resources without sufficient compassionate grounds. The Office took the view that a GNT policy which allows a principal tenant who is very much alive to transfer to

another PRH unit through other means while a new tenancy for the original unit would be granted to the remaining household members, would create unfair situations. It was imperative for HD to scrutinise carefully those grounds "other than death of the principal tenant" before considering any GNT, so as to prevent existing tenants from abusing the GNT Policy to effectively achieve household splitting.

HKHS Lacking Concrete Measures to Ensure PRH Serving Only People of Low-income/assets

1088. In 2002, HKHS had studied the feasibility of implementing a Well-off Tenants Policy. The idea was, however, eventually scrapped owing to, *inter alia*, HKHS's lack of statutory powers to check the household income of its tenants. This hardly conformed to HKHS's objective of providing PRH to low-income/assets families. In fact, HKHS tenants would not violate the tenancy agreement even if they owned private properties or huge assets. HKHS could only "advise" such tenants to vacate their units. That clearly was inadequate in terms of efficacy.

1089. HKHS took no effective measures (such as adding suitable clauses to the tenancy agreement) to restrict well-off tenants or those with private properties from occupying PRH units indefinitely. This ran counter to HKHS's objective and original intent of providing PRH to those of low income/assets levels, and was unfair to those in genuine need of subsidised housing.

Government Lacking Mechanism to Monitor HKHS's PRH Operations

1090. The Transport and Housing Bureau (THB) indicated that Government had neither the statutory powers nor a mechanism to monitor the operations of HKHS. Nor did THB have any policy documents relating to the monitoring of PRH provision by HKHS. The Office had reservations about such attitude of THB. The Government has granted land on concessionary terms to HKHS for building PRH, such that HKHS could fulfil its mission of providing affordable housing for the low-income/assets households in line with the Government's housing policies. Therefore, the Government has the responsibility to ensure proper use of the land thus granted to HKHS. The Office considered THB to have a duty to discuss with HKHS, with a view to drawing up a written agreement to ensure that the objective of granting land on concessionary terms is achieved.

Application by PRH Principal Tenants for Another PRH Unit and the GNT Policy

1091. Both HKHA and HKHS allowed an existing principal tenant of PRH to apply for another PRH unit, either on his/her own or jointly with other household members listed in the tenancy agreement. The Office took the view that, since existing principal tenants (usually the original PRH applicants) have basically been allocated a PRH unit, they should not have any genuine or urgent need for housing. Furthermore, if a principal tenant was no longer suitable to live in the current unit due to special societal or health reasons, they could apply for transfer based on such grounds. They could also apply to have a son/daughter and his/her spouse added to the tenancy to take care of them, if they so desired. With the current acute shortage of PRH, the Office considered such practices of HKHA and HKHS questionable, as it would affect the chance of getting an early allocation for those PRH applicants on the Waiting List who are in genuine and urgent need of housing.

1092. As for HKHS, it allowed an authorised family member of the tenancy over 18 years old who could pass the assets test to become the principal tenant, without having to wait for their turn for an allocation like other PRH applicants. This was also unfair to those registered on the Waiting List.

Means Test under GNT Policy

1093. Under GNT Policy, a household due to inherit the tenancy right of a PRH unit, despite their owning a property or huge assets, would still be granted a new tenancy so long as its household income does not exceed three times the Waiting List Income Limit (WLIL). Similarly, a household with an income more than three times the WLIL would still be granted a new tenancy if its net assets value does not exceed 84 times the WLIL. This seemed to deviate even further from the original intent that subsidised housing should be provided to those who cannot afford private accommodation. The Office considered that the Government should thoroughly review whether those tenants with private properties should, both as a matter of principle and a policy requirement, surrender their PRH units to HD for re-allocation to families with genuine housing need.

1094. The Ombudsman recommended that –

(a) HD and HKHS should enhance their reporting mechanism regarding double housing subsidies. Apart from regular reports of cases of dual tenant status involving both organisations, HD should draw up a written agreement with HKHS to open a channel for communication such as regular meetings or update reports so that demarcation of responsibilities for various types of cases can be defined. Where necessary, HD and HKHS can examine together complicated cases that warrant immediate follow-up actions (e.g. serious delay in recovering the units) to determine the timeframe in resolving the cases and the schedule to bring them up;

(b) HD and HKHS should step up staff training and educate their staff to adhere to the principles while giving consideration to the difficulties faced by tenants who have contravened the rules. They should stop being too tolerant, and firmly acknowledge that they are accountable to applicants still on the Waiting List awaiting allocation of PRH units. Moreover, HD and HKHS should enhance their staff's knowledge about the guidelines relevant to cases involving irregularities and improve their skills in handling complicated cases, thus ensuring timely and proper handling of such cases;

(c) for approved transfer cases and confirmed cases of duplicated tenancy, HD should take the initiative to delete the tenants concerned from the old tenancies, instead of waiting for them to submit their applications for deletion;

(d) HD and HKHS should set out clearer guidelines and notices to tenants to explain that there will be pre-set timeframes for actions after repeated warnings are issued (e.g. notice of termination of tenancy). The two organisations should also ensure that their staff will strictly comply with those guidelines;

(e) except in special circumstances, HKHA and HKHS should consider not allowing principal tenants to apply for another PRH unit in order to prevent existing PRH tenants from unfairly getting another unit through other channel to circumvent the general Waiting List application procedures;

(f) in enforcing HKHA's GNT Policy, HD should carefully examine cases where the principal tenant is still alive. Clear guidelines should be given to its staff to prevent tenants from abusing the policy for the purpose of household splitting;

(g) although HKHS has no statutory powers to vet tenants' household income, it can consider adopting administrative measures by adding to the tenancy agreement a requirement of income and assets declaration and requiring tenants whose assets and income exceed the prescribed limits after moving into the unit to pay the well-off-tenant rent;

(h) THB should take the initiative to discuss with HKHS feasible measures and draw up a written agreement to ensure that HKHS is providing PRH units in a way which is in line with the Government's original intent of concessionary land grant and complies with the relevant requirements in the land lease; and

(i) HD should collect and maintain the data on tenants whose income and assets have exceeded the prescribed limits and recommend HKHA to review its GNT Policy, including considering the need to require household members who inherit the tenancy to be subject to both the income and asset limits.

Government's response

Recommendation (a)

1095. HD and HKHS accepted The Ombudsman's recommendation (a) and adopted the enhancement measures as set out below.

1096. To improve communication and workflow, HD met with representatives from HKHS head office in March and April of 2015, and provided HKHS with a list of contact persons at headquarters and estate offices so that both organisations could work together to handle tenancy duplication cases promptly. Regarding the enhancement of the reporting and coordination mechanism for such cases, at the end of June 2015, HD enhanced the existing monthly computer reports provided for HKHS by adding the number of months the cases have been left outstanding. Moreover, HD started to deliver the computer reports to HKHS by electronic means from July 2015 to expedite the handling of the tenancy duplication cases by HKHS.

Recommendation (b)

1097. HD and HKHS accepted The Ombudsman's recommendation (b) and agreed that staff training should be stepped up. In the past year, HD and HKHS organised 17 and 8 courses respectively on estate management and tenancy matters. In the future, HD and HKHS will continue to organise similar courses to step up staff training. Meanwhile, HD and HKHS have adopted new administrative measures to strengthen the handling of duplication cases.

1098. The staff of HD's Estate Management Division (EMD) will report actions taken and the progress on resolving the cases in the monthly EMD Senior Staff Meetings, sub-divisional meetings and regional meetings. Some complicated cases will be chosen for experience-sharing purpose to enable the staff to better understand the ways in handling the problems. In addition, EMD regional staff will select cases that are more complicated and upload them to HD intranet for the reference of front line management staff. Moreover, HD is developing a new monthly computer report for the senior officers of EMD to monitor the progress of handling duplication cases by front line staff.

1099. Estate managers of HKHS will have to report the actions taken as well as progress on resolving the cases to the Head Office via email on a monthly basis. Any case would have to be reported to the Senior Manager and General Manager if it could not be resolved within 90 days; if beyond 120 days, the case would be brought up for the Director's attention. These measures assist the management to monitor the progress of the handling of cases by frontline staff.

Recommendation (c)

1100. HD accepted The Ombudsman's recommendation (c) and had reviewed its internal guidelines and decided to maintain the existing procedures in handling cases involving household members with duplicated tenancy. In cases where a family member has moved out and the principal tenant does not cooperate by applying for deletion of the family member from the tenancy, HD can unilaterally amend its internal record by deleting the family member concerned from the tenancy. In cases where the principal tenant has moved out and the remaining family members in the tenancy do not apply for granting of new tenancy as required, HD will issue a notice-to-quit to the household concerned to terminate the tenancy.

Recommendation (d)

1101. HD and HKHS accepted The Ombudsman's recommendation (d) and have conducted reviews. HD and HKHS reminded its front-line staff via email to strictly adhere to the existing guidelines on the procedures of handling duplication.

1102. As regards the estates under HD, if a family member in the tenancy has moved out, HD will issue a letter to invite the principal tenant to the estate office for the deletion procedures. If no response is received from the principal tenant two weeks after the appointed date, HD will issue a letter again to remind the principal tenant to complete the deletion formalities and notify him/her that HD will amend its internal record to accurately reflect the changes in the tenancy. If the principal tenant of the tenancy has moved out, HD will issue a letter to the remaining family members in the tenancy, stating that if he/she/they wish to stay in the rental unit concerned, he/she/they should submit an application for granting of new tenancy within two months from the issue date of the letter. If HD has not received any response from the family member(s) concerned two weeks before the deadline, a reminder letter will then be sent. If there is still no response from the family member(s) concerned upon the lapse of the deadline, HD will issue a notice-to-quit to the household in question to terminate its tenancy. Regarding the handling of the more complicated cases, as stated in the response to recommendation (b), EMD staff will report actions taken and the progress on resolving the cases in the monthly EMD Senior Staff Meetings, sub-divisional meetings and regional meetings. Some complicated cases will be chosen for experience-sharing purpose to enable its staff to better understand the ways in handling the problems so that such cases can be resolved promptly and properly.

1103. As regards the estates under HKHS, if a family member in the tenancy has moved out, HKHS will issue a letter to invite the principal tenant to the estate office for the deletion procedures. If no response is received from the principal tenant two months after the appointed date, HKHS will issue a letter again to remind the principal tenant to complete the deletion formalities and notify the occupant concerned that HKHS will amend its internal record to accurately reflect the changes in the tenancy after 14 days from the issuance of the letter. If the principal tenant of the tenancy has moved out/passed away, HKHS will contact the remaining family members in the tenancy, stating that if he/she/they wish to stay in the rental unit concerned, HKHS will provide them with the

relevant notes and application form for taking over tenancy and request them to complete the relevant procedures within two months from the issuance of the letter. The concerned notes state clearly that HKHS may terminate the tenancy and recover the unit. If HKHS has not received any response from the family member(s) concerned two weeks before the deadline, a reminder letter will then be sent. If there is still no response from the family member(s) concerned upon the lapse of the deadline, HKHS will issue a notice-to-quit to the household in question to terminate its tenancy.

Recommendation (e)

1104. HD and HKHS accepted The Ombudsman's recommendation (e) and passed the Office's opinions to HKHA's Subsidised Housing Committee (SHC) for consideration. SHC discussed the "Policy on Allowing Principal Tenants of Public Rental Housing to Apply for Public Rental Housing" on 17 March 2015. After deliberation, SHC endorsed that the principal tenant of a PRH flat, either alone or together with some family members, would still be allowed to apply for another PRH unit. In addition, HD and HKHS agreed that with effect from 10 April 2015, whole households (including one-person households) living in HKHS units would not be allowed to apply for PRH provided by HKHA.

Recommendation (f)

1105. HD accepted The Ombudsman's recommendation (f) and had conducted a review. HD updated the general information on housing policies in January 2015 and uploaded the information on GNT Policy to HKHA/HD website for the reference of HD staff and the general public. Under the existing policies and internal guidelines on the procedures for handling GNT cases, a new tenancy can be granted to an authorised family member living in the PRH unit upon the death or moving out of the principal tenant provided that the family member concerned can meet the eligibility criteria. The reasons for the moving out of the principal tenant include admission to residential care homes for the elderly, joining the Portable Comprehensive Social Security Assistance Scheme for Elderly Persons Retiring to Guangdong and Fujian Provinces or the Guangdong Scheme etc.. Furthermore, as mentioned in the response to recommendation (b) above, courses on estate management and tenancy matters were organised by HD to step up staff training in handling GNT cases.

Recommendation (g)

1106. HKHS accepted The Ombudsman's recommendation (g) and it would further explore the implementation of Well-off Tenants Policies as well as submit the matter to HKHS's Executive Committee for discussion by the end of the year.

Recommendation (h)

1107. THB did not accept The Ombudsman's recommendation (g). HKHS is a financially autonomous, non-profit-making housing organisation operating independently on a self-financing basis without any direct subsidy from the Government, nor is it subject to Government supervision. HKHS was incorporated under the Hong Kong Housing Society Incorporation Ordinance. The legislation does not confer the Government any powers to supervise the operation of HKHS. Sites have been granted to HKHS by the Government at a concessionary land premium, with restrictions imposed on land use, for the development of subsidised public housing. The Government will prescribe different terms and conditions or requirements in the Conditions of Grant according to the nature of the housing projects. How the conditions are enforced and implemented is a matter of internal operation of HKHS. Given that HKHS is an independent organisation, THB has no power to intervene directly in its operation and policy, not to mention the fact that such intervention is inappropriate.

1108. HD has explained its position in the progress report submitted to the Office. In response to the request of the Office, HD will submit the second progress report in February 2016.

Recommendation (i)

1109. HD accepted The Ombudsman's recommendation (i) and passed the Office's opinions to HKHA for consideration. SHC discussed GNT Policy on 17 March 2015. After deliberation, it endorsed that the income and asset limits set under the "Well-off Tenants Policies" would continue to be adopted in assessing the eligibility of tenants applying for a new tenancy. Besides, HD is studying ways to enhance its IT system with a view to maintaining data on tenants whose income and assets have exceeded the prescribed limits for reference purpose in future policy reviews.

Working Family and Student Financial Assistance Agency

Case No. DI/305 – Procedures for Approval of Loan Applications and Recovery of Debts under the Non-means-tested Loan Scheme

Background

1110. The Non-means-tested Loan Scheme (the Loan Scheme) administered by the Working Family and Student Financial Assistance Agency (WFSFAA) serves to provide the public with financial assistance for continuing education. The total amount of loans granted is huge, as much as $1.3 billion per academic year, while the total amount in default has at some point reached $170 million. Some members of the public had complained to the Office of The Ombudsman (the Office), alleging that WFSFAA was lax in its debt recovery action against loan borrowers, such that the indemnifiers, as guarantors for the borrowers, were inflicted with the burden of paying the accumulated interests and the associated legal fees. In addition, media reports had revealed the following two problems –

(a) some borrowers had allegedly stolen the identity of others and named them as indemnifiers in loan applications; and

(b) the staff/agents of some education institutions had conspired with loan applicants/indemnifiers/witnesses to obtain loans by fraud using false information and documents.

1111. In view of the above, the Office conducted this direct investigation to examine the procedures for approval of loan applications and recovery of debts under the Loan Scheme, with a view to identifying inadequacies.

The Ombudsman's observations

1112. The Office's findings are set out below.

Loan Schemes

1113. There are three schemes under the Loan Scheme to cater for the needs of different categories of students, namely –

(a) Non-means-tested Loan Scheme for Full-time Tertiary Students (the Full-time Tertiary Students Scheme) for full-time students pursuing publicly-funded tertiary programmes;

(b) Non-means-tested Loan Scheme for Post-secondary Students (the Post-secondary Students Scheme) for students pursuing full-time accredited self-financing post-secondary programmes offered by various institutions; and

(c) extended Non-means-tested Loan Scheme(the Extended Scheme) for students pursuing specified part-time or full-time post-secondary/continuing and professional education courses.

Failure to Properly Manage the Default-prone Extended Scheme

1114. Among the above three schemes, the Extended Scheme involves the highest management risks and has the most serious problem of default on loan repayment, partly because it covers a particularly wide range of education institutions and courses. Statistics of the 2011/12 to 2013/14 academic years showed that the Extended Scheme accounted for about 70% of all the default cases under the three schemes. Also, the amount in default under the Extended Scheme, standing at about $100 million, persistently exceeded half of the total amount overdue.

1115. The Extended Scheme caters for students pursuing part-time or full-time post-secondary/continuing and professional education courses. With many of the students actually in employment and hence having the ability to repay their loans, it was astonishing that the Scheme should have recorded such a serious default problem. WFSFAA should face this problem squarely by devising measures to reduce the credit risk of the Extended Scheme.

Lack of Effective Deterrent Measures

1116. Under the current system, loan defaulters are asked to repay their debts with interests (their obligation anyway) and an administrative charge only. The deterrent effect is very weak.

1117. The Office noted that WFSFAA had considered forwarding the negative credit data of serious defaulters to credit reference agencies for greater deterrent effect, the implication being that such defaulters would have to face difficulties in obtaining loans from banks or other financial institutions in future.

1118. In principle the Office strongly supported WFSFAA's implementation of the above measure for the following major reasons –

(a) it is a long established and lawful practice for private financial institutions to forward the negative credit data of their loan defaulters to credit reference agencies. WFSFAA's function of granting loans to students is no different in nature from the business of private financial institutions in advancing credit to borrowers. The deterrent measure proposed by WFSFAA is indeed in line with the practice of private financial institutions and would not be unfair to loan applicants; and

(b) the granting of non-means-tested loans to the public under the WFSFAA Loan Scheme is already very generous. The Office would not consider it harsh at all if WFSFAA was to require loan applicants to give it consent to forward their negative credit data to credit reference agencies in the event of their default on repayment.

1119. Therefore, the Office hoped that WFSFAA could secure the agreement of the Privacy Commissioner for Personal Data (PCPD) for putting the above measure into effect.

Failure to Fully Verify Indemnifiers' Intention

1120. Applicants under the Loan Scheme are not subject to any income and assets assessment, nor are they required to provide any assets as collateral. The credit risk is rather high. If a borrower intentionally defaults on loan repayment or becomes insolvent, the Government can only resort to recovering the debt from his/her indemnifier.

1121. WFSFAA can contact indemnifiers by telephone or face-to-face interview to verify their intention to act as indemnifiers as well as the loan amounts against which they agree to indemnify. However, in practice, WFSFAA contacted just a small percentage of the indemnifiers by telephone or face-to-face interview. For the loan applications under the Full-time Tertiary Students Scheme and the Post-secondary Students

Scheme, WFSFAA randomly selected only 10% and 5% respectively of the indemnifiers and contacted them by telephone. As for the Extended Scheme, WFSFAA telephoned nearly all the indemnifiers, but interviewed only a small percentage of them due to staff constraint. Although the number of indemnifiers interviewed in the 2013/14 academic year was higher than before, there were still only 391 of them, representing a scanty 5.42% of the loan applications received in the same year.

Need to Ensure Careful Vetting

1122. The database in WFSFAA's computer system contains the details of each Loan Scheme account. Staff are required to extract information from the database and then check whether a loan applicant/ indemnifier is the loan applicant/indemnifier of other scheme accounts and whether he/she has ever been a defaulter or a defaulter's indemnifier, thereby identifying cases of higher management risks. It can be seen that the checking process is not fully computerised and human errors are possible.

1123. The Ombudsman recommended WFSFAA to –

(a) devise measures to reduce the credit risk of the Extended Scheme, such as suitably limiting the number of courses that a loan borrower may take and the number of loan applications that he/she may make in any academic year;

(b) further deliberate with PCPD, with a view to implementing as soon as possible the measure of forwarding the negative credit data of the more serious defaulters to credit reference agencies in order to increase deterrence against loan default;

(c) deploy or increase staff to raise the percentage of indemnifiers contacted by telephone and interview, so as to reduce credit risks;

(d) consider fully computerising its process of checking loan applicants/indemnifiers in order to ensure effective vetting of loan applications; and

(e) before full computerisation of the process, supervise staff closely to ensure that they conscientiously check whether loan applicants/indemnifiers are playing multiple roles and whether

they have ever been defaulters or defaulters' indemnifiers.

Government's response

1124. WFSFAA examined recommendation (a) and the Office has subsequently accepted WFSFAA's view that this recommendation needs not be implemented under the current situation. Upon completion of the review of the Loan Scheme in 2012, a series of targeted improvement measures (including tightening the regulation on eligible courses and imposing a life-time loan limit under the Extended Scheme, etc.) were introduced to improve the operation and reduce the credit risk of the Extended Scheme. This, together with the implementation of other measures under the Loan Scheme to alleviate the repayment burden of loan borrowers, has effectively reduced the default risk.

1125. The number of default cases and the default rate under the Extended Scheme has been dropping over the past few years, reflecting a marked improvement in the credit risk of the Scheme. Besides, data in the past three academic years show that as high as 97% of the loan applicants under the Extended Scheme submitted applications for one eligible course only in the same academic year. Only 2% to 3% of the total number of applicants submitted applications for two or more eligible courses in the same academic year, and among them, over 85% made such applications for meeting the programme requirements or administrative arrangements of the institutions (for instance, some applicants pursued eligible advanced certificate/advanced diploma courses of the same institution in the same academic year after completion of a course at the certificate level with a course duration of fewer than six months). Upon review, WFSFAA is of the view that limiting the number of courses that a loan borrower may take and the number of loan applications that he/she may make in the same academic year may not help reduce the credit risk of the Extended Scheme, but may affect the employment and further development of the applicants. In this connection, the Office has accepted WFSFAA's review findings.

1126. WFSFAA accepted recommendation (b). WFSFAA recognises that the proposed measure of forwarding the negative credit data of the more serious defaulters to a credit reference agency can prevent default of government loans (i.e. public money), deter student loan borrowers from default in repayment and convey a positive message to students about their responsibility for proper management of their finance. WFSFAA will continue to discuss with PCPD with a view to addressing PCPD's concerns on the proposed measure and implementing the measure in compliance with the law.

1127. WFSFAA accepted recommendation (c). WFSFAA has agreed to suitably deploy existing manpower resources to raise the percentages of checking indemnifiers by phone under the Post-secondary Students Scheme and by interview under the Extended Scheme in order to further reduce fraud cases and minimise the credit risk of the two schemes.

1128. WFSFAA accepted recommendations (d) and (e). WFSFAA is developing the Integrated Student Financial Assistance System (ISFAST), under which all applications received under different financial assistance schemes will be centrally processed by a single system. ISFAST can also facilitate information flow, data exchange and report generation among different schemes, further enhancing the efficiency and effectiveness in checking the applicants and indemnifiers, and in turn achieving better risk management. ISFAST will be developed and implemented by phases. Before its full implementation, WFSFAA will continue to refine and upgrade the existing systems to facilitate related vetting work and supervise staff to vet loan applications conscientiously with the use of the existing systems.