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Direct Investigation into Regulatory Measures and Enforcement Actions against Street Obstruction by Shops

The Ombudsman finds that the Government departments responsible for tackling the problem of street obstruction by shops have often acted with a compartmental mentality, being reluctant to take up total responsibility and not making serious efforts to solve the problem.

The enforcement actions taken by the Food and Environmental Hygiene Department ("FEHD") have little deterrent effect. The Department seldom prosecutes shop operators for their act of illegal hawking on the street, and rarely seizes their merchandise that is obstructing the street. In those localities where shops are granted "tolerated areas", for conducting their business outside their shops, FEHD fails to take rigorous enforcement actions against those shop operators further extending their business area well beyond the "tolerated areas".

The enforcement procedures of the Lands Department ("Lands D") for tackling continual illegal occupation of Government land by shops are cumbersome and futile. Moreover, the difference in enforcement priorities of Lands D and the Buildings Department ("BD") may sometimes lead to delay in the two departments' joint operation.

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The Ombudsman makes 9 recommendations to the departments concerned, including:

- 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 other departments to assist and cooperate with it;

- to devise a stringent enforcement strategy for the fixed penalty system proposed by the Administration, in order to maximise the effectiveness of the proposed system;

- to consider enhancing the "tolerated areas", mechanism by requiring the shop operators concerned to pay a reasonable fee, with their rights and obligations clearly laid down;

- FEHD to step up its enforcement actions, with more prosecutions for illegal hawking and more seizures of merchandise;

- Lands D to expedite Government's study and legislative amendments for enhancing the effectiveness of enforcement of the law against illegal occupation of Government land by shops;

- Lands D and BD to adjust their respective enforcement priorities for more efficient joint operations.

The executive summary of this investigation report is at **Annex 1**.

Direct Investigation into Management and Release of Patient Records by Hospital Authority

The Ombudsman has completed a direct investigation into the management and release of patient records by the Hospital Authority ("HA").

Our investigation revealed four main deficiencies in HA's management and release of patient records:

- failure to verify possibly corrupted records in a timely manner;
- insufficient publicity for doctor-to-doctor communication;
- ineffective communication with patients seeking release of their records; and
- ineffective communication between HA Headquarters and HA hospitals.

The Ombudsman has made four recommendations to HA.

The executive summary of this investigation report is at **Annex 2**.

Enquiries

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Annex 1

Executive Summary

Direct Investigation into Regulatory Measures and Enforcement Actions against Street Obstruction by Shops

Background

Display and sale of goods outside shops is common in Hong Kong. This often causes obstruction of streets and brings inconvenience and even danger to pedestrians as they are forced to walk on the carriageway. Moreover, the associated environmental hygiene problems are a cause for concern. Nevertheless, the regulatory measures and enforcement actions of Government departments are generally ineffective. Consequently, the problem of street obstruction by shops persists and is worsening.

2. This direct investigation aims to examine in depth any inadequacies in the Administration's regulatory measures and enforcement actions against street obstruction by shops and to make recommendations for improvement.

Our Findings

Government Measures for Tackling the Obstruction Problem

3. To tackle the various types of illegal activities relating to street obstruction by shops, the inter-departmental Steering Committee on District Administration ("SCDA"), chaired by the Permanent Secretary for Home Affairs, 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")

Illegal Activity	Relevant Legislation	Enforced by
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 ("Lands D")
Unauthorised structure projecting from external wall of building	Section 24(1) of the Buildings Ordinance	Buildings Department ("BD")

4. 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 would coordinate inter-departmental joint operations. As at December 2013, there were 45 "black spots" of street obstruction in the territory.

5. The Administration may exercise discretion to allow some shop operators to extend their business area 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 8 localities.

6. From the information that we have gathered, our case studies and site observations, we have identified the following inadequacies in the regulatory measures and enforcement actions of the departments concerned.

Compartmental Mentality and Lack of Accountability

7. The problem of street obstruction by shops is a street management issue. Currently, FEHD, Lands D and BD are responsible for taking enforcement actions within their own jurisdictions against different types of illegal activities relating to the problem. The departments tend to think that they are collectively accountable for the problem and hence to adopt a compartmental attitude. None of them seem to be

willing to actively take up total responsibility and to make serious efforts 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

8. FEHD usually applies the strategy of "warning before prosecution" in its enforcement actions against shops causing street obstruction. We consider FEHD's repetitive warnings to have no effect whatsoever on habitual offenders. Upon receiving warnings, the offenders will rectify their irregularities temporarily. But once the FEHD officers are gone, they relapse. By contrast, prosecutions may lead to penalties and, therefore, have a stronger deterrent effect. However, records revealed that prosecution:warning ratio of the FEHD is low- only about 1:6; and in some localities, the ratio is even as low as 1:49.

Illegal Hawking Provision Seldom Invoked and Merchandise Rarely Seized by FEHD

9. For display and sale of merchandise outside shops, FEHD can in fact prosecute the shop operators by invoking the "illegal hawking provision", which empowers the Department to seize the merchandise. However, FEHD usually applies the "street obstruction provision" instead, which does not empower the Department to seize merchandise. FEHD has explained that seizure of merchandise requires more manpower and other resources, and can easily trigger confrontation between its enforcement officers and the shop operators. While we understand the difficulties involved, FEHD should not shy away from exercising its statutory power. The public would find it unacceptable if such an effective enforcement tool falls into disuse.

10. FEHD has also 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. We consider that, even so, it should not be difficult for the Department's officers to collect such evidence since selling and buying of goods outside shops are very common. All it needs to take is close surveillance.

11. By contrast, FEHD normally does not hesitate to prosecute itinerant hawkers for illegal hawking and seize their merchandise. However, when shop operators conduct their business on the Government land adjoining their shops, the

Department usually does not treat that as illegal hawking. FEHD's enforcement strategy is clearly inconsistent and unreasonable. It is particularly unfair to itinerant hawkers.

Long Lead Time for FEHD's Prosecution and Light Penalty

12. 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. Compared with the profits that can be gained by extending the business area of the shop, the penalty is negligible.

13. This has prompted Government to consider a fixed penalty system. We believe that such a system can help deal with cases of street obstruction 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 again come up with all sorts of excuses for lax enforcement.

Lands D's Cumbersome Enforcement Procedures

14. According to L(MP)O, before prosecuting a person who illegally occupies Government land, the District Lands Office ("DLO") concerned of Lands D must give him/her advance notice. At present, Lands D's enforcement procedures provide that if the person removes the articles occupying the Government land before the specified deadline, even though the articles are found occupying the land again afterwards, DLO should issue the person a fresh notice instead of removing the articles right away or instituting prosecution. Many shops take advantage of this limitation in Lands D's enforcement procedures. Upon receipt of DLO's notice, the shops 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. We consider that such enforcement procedures is against 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 occupies the land. Lands D'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 Lands D and BD

15. Lands D and BD are respectively responsible for dealing with shopfront 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, the Department will refrain from taking enforcement action and, therefore will not promptly conduct a joint operation with Lands D to remove the platform and the unauthorised structures concurrently.

Lax Regulation of "Tolerated Areas"

16. 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. DCs, which are familiarised with the knowledge of the districts, are well poised to advise the Administration in drawing up their respective enforcement strategies that would strike a balance between the interests of different stakeholders, taking into account such factors as traffic flow and safety and the business of shops. We agree in principle that the setting up of "tolerated areas" with the respective DC's support is a reasonable concessionary arrangement.

17. However, shops often break the rules by extending their business area well beyond the "tolerated areas", and yet FEHD adopts a very lax enforcement approach, with a prosecution:warning ratio as low as 1:49. Surely, 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".

18. Some people are of the opinion that setting up "tolerated areas" is conniving at the wrongs and the shop operators might take for granted that they can occupy public space outside their shops. Furthermore, allowing those shops to occupy such Government land at no cost amounts to preferential treatment and 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. We deem it advisable for the Administration 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 Government a reasonable

fee for enjoying the use of "tolerated areas", with the rights and obligations of the shop operators clearly laid down.

Recommendations

19. In the light of the above findings, The Ombudsman makes the following recommendations to the departments concerned:

SCDA

(1) 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;

(2) as a longer-term measure, to consider setting up a "one-stop" joint office for tackling the problem of street obstruction by shops;

(3) 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;

(4) to consider enhancing the "tolerated areas" mechanism such that besides having to obtain the DC's support, shops would need to pay Government a reasonable fee for enjoying the use of "tolerated areas";

FEHD

(5) 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;

(6) to step up efforts to collect evidence for more prosecutions and seizure of merchandise under the "illegal hawking provision" for stronger deterrent effect;

(7) to take strict enforcement action against those shops which extend their business area beyond the "tolerated areas" and to ensure that the extent of street obstruction is contained within the "tolerated areas";

Lands D

(8) 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

Lands D and BD

(9) to adjust their respective enforcement priorities for joint efforts to increase their efficiency in coping with cases of street obstruction; to consult the Development Bureau where necessary.

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Annex 2

EXECUTIVE SUMMARY

Direct Investigation
Management and Release of Patient Records by Hospital Authority

Background

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 to access the HA medical records of patients subject to their consent. Expected processing time of applications for patient enrolment in the project is 14 days. This is indicated in the application documents.

(b) Data Access Request ("DAR scheme"): This is a scheme under which HA releases hard copies of a patient's records to the patient upon his request or to a third party subject to his consent, subject to and in accordance with the Personal Data (Privacy) Ordinance, Cap. 486 ("the PDP Ordinance"). Under the PDP Ordinance and subject to its provisions, HA is required to comply with such requests within 40 days. However, the DAR application documents do not give any mention of this requirement or any information about expected processing time.

2. A complaint case showed that an HA patient who applied in 2011 under the PPI-ePR project for his HA 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 us to investigate into the magnitude of the problem and the improvements that can be made.

HA's patient record system

3. 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 becomes part of the records in his account, and should not be re-used for any other patient. Guidelines to this effect were issued in 1995 by HA Headquarters to HA hospitals.

4. However, in actual fact, there are a number of circumstances under which an Episode No. may 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. Upon detection of the anomaly, HA will move the Episode(s) involved from the wrong account to the correct one.

(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. As in (b), upon detection of the anomaly, HA will move the Episode(s) involved from the wrong account to the correct one.

5. 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. Until October 2006, the Yellow Flags were not connected to any mechanism that would set in motion any rectification action. Two cases studied in our investigation illustrated the problems in the system.

Case 1

6. In this case a PPI-ePR application for patient enrolment took 70 days. The long time taken was due to the following sequence of events:

- Back in June 2006, when Mr C failed to show up for an appointment at HA Hospital C, the hospital re-used his Episode No. for another patient. This triggered a Yellow Flag on Mr C's account.

- Five years later, when Mr C applied for his records under the PPI-ePR project in April 2011 for the purpose of a surgical operation, they were barred from being released by the Yellow Flag placed on his account.

- Only then did HA start to take action to verify his records.

- During April to July 2011, while HA was verifying his records, Mr C and his family sent numerous reminders to HA, including a letter dated 7 May 2011. However, he did not receive any useful feedback from HA. His son's letter dated 7 May 2011 was not answered. In terms of explanation, HA offered little more than "records under review", "system under maintenance" and "records under vetting process".

- Finally, HA completed verification and approved Mr C's application in July 2011.

7. We had the following observations:

- Re-use of Episode No. was banned under HA guidelines issued in 1995, but was still the general practice in Hospital C until 2007/08.

- A Yellow Flag raised in 2006 was not cleared until 2011.

- HA failed to communicate effectively with a patient and his family, causing them anxiety and distress.

Case 2

8. In this case a PPI-ePR application took five months. The sequence of events was as follows:

- Early November 2011 – Mr X submitted a PPI-ePR application to HA.

- 24 November 2011 – Noting that there was a Yellow Flag on Mr X's records, HA Headquarters requested Hospital Y to verify the data before processing the PPI-ePR application.

- 19 December 2011 – After three reminders Hospital Y replied to HA Headquarters that "data cannot be verified as the medical record has already been disposed".

- 21 December 2011 – In response, HA Headquarters asked Hospital Y to "advise if the 'Move from' and 'Move to" accounts belong to the same patient, and are there any electronic data involved".

- 27 March 2012 – After several reminders Hospital Y checked the electronic records and confirmed that only one patient was involved.

- 28 March 2012 – HA Headquarters cleared the Yellow Flag and approved the PPI-ePR application.

9. We had the following observations:

- Throughout the verification process Hospital Y demonstrated no sense of urgency, a complete disregard of the 14-day service target for PPI-ePR applications and little consideration for the interest of the patient involved.

- Hospital Y appeared to be ignorant of what was required in the verification process.

- Our study into other cases showed that this was a common failure of many HA hospitals at that time. Considering that procedures for data verification were introduced in 2006, the ignorance of HA hospitals of such procedures in 2012 was a serious deficiency. This deficiency was only remedied in May 2012 when HA Headquarters introduced a standard form setting out its verification requirements for HA hospitals to fill in.

Deficiencies and recommendations

10. Our investigation revealed four main deficiencies in HA's management and release of patient records, as discussed below.

I Failure to verify possibly corrupted records in a timely manner

11. Case 1 showed that corrupted patient records in HA's system were left unverified for five years. This was due to a deficiency in the system when the Yellow Flag mechanism was created in early 2006, i.e. although the Yellow Flag served to bar possibly corrupted records from being released, it was not connected to any mechanism to trigger rectification action.

12. This deficiency was partially remedied in October 2006 when HA improved its system to enable Yellow Flags to trigger rectification action. However, no action was taken on Yellow Flags raised before October 2006, as shown in Mr C's case. Nor was any deadline set for rectification action.

13. As we carried on this investigation, HA took steps in tandem to further improve the system, as follows:

- In January 2013 HA introduced deadlines for clearing Yellow Flags:

  - For cases involving one patient: two weeks
  - For cases involving more than one patient: six weeks

- In March 2013 HA went a step further and set up a Task Force to coordinate and monitor the clearing of Yellow Flags.

14. A total of more than 20,000 Yellow Flags were 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 2,233 outstanding Yellow Flags, comprising 2,122 cases substantially verified and ready to be cleared, and 111 cases which were relatively complicated and on which further verification was necessary.

15. We consider that HA should keep up its work in this regard. For the more complicated cases the verification of which is expected to take a long time, instead of allowing them to drag on, 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

16. In the course of this investigation we noticed that some of HA's service targets for processing release of patient records may 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 us particular concern are:

- Processing of DAR applications: 40 days

- Clearing of Yellow Flags involving different patients (which will impact on the processing of PPI-ePR applications): six weeks

17. When we put our concern to HA, HA said that in cases of urgent need, the patient's doctor in the private sector should contact his HA doctor direct for information – this mode of communication was called doctor-to-doctor communication. HA explained that doctor-to-doctor communication was "a universal well-established professional communication means to facilitate a doctor during the care process of a patient to obtain more information about the patient from another doctor who had previously rendered clinical management to the patient". 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. In reply to our query on whether doctor-to-doctor communication would be workable in cases with Yellow Flags, HA said that in such cases the HA doctor would

verify the data to ensure its accuracy before release, and if the data cannot be verified in time, he would mention any relevant areas of uncertainty in his reply to the private doctor.

18. While we note HA's position that doctor-to-doctor communication will be able to serve patients in urgent need, we are concerned that it is not sufficiently known among patients and even some doctors, such as the private doctor in Case 1. We recommend HA to give 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

19. Our investigation has shown deficiencies in HA's communication with patients seeking their records. This is illustrated in the following:

- In Case 1, 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.

- DAR applicants are given no information about the possible processing time, nor the statutory requirement for HA to process DAR applications within 40 days.

20. We recommend 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, any alternative means of obtaining information for those in urgent need, and where there is a delay, the reasons for delay.

IV Ineffective communication between HA Headquarters and HA hospitals

21. Our investigation has shown deficiencies in the internal communication between HA Headquarters and HA hospitals. This is illustrated in the following:

- In Case 1, despite HA Headquarters guidelines issued in 1995, it was Hospital C's practice until 2007/08 to re-use Episode Nos. for different patients, leading to patient records being mixed up.

- In Case 2 and other cases studied by us, 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. Nor did they pay attention to the 14-day target for processing such applications. It was only in May 2012 that HA introduced measures to rectify this problem.

22. The occurrence of these problems suggests that guidelines issued by HA Headquarters are not always observed by individual hospitals, procedures laid down by HA Headquarters not always understood, and deadlines not always met. HA is a large organisation and extra efforts need to be made if internal communication is to be efficient and effective. We recommend that HA should consider reviewing its internal communication network/channels with a view to enhancing communication between HA Headquarters and individual hospitals.

Conclusion

23. HA should be given credit for taking measures to address deficiencies as problems surfaced in its Yellow Flag mechanism. However, there is room for improvement, particularly in respect of enhancing communication with patients and in giving wider publicity to doctor-to-doctor communication as a means of obtaining records in cases of urgent need.

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