

**Handling of on-pavement construction materials/demolition materials by
Food and Environmental Hygiene Department,
Lands Department and Highways Department**

Investigation Report

On 8 June and 7 July 2020, the complainant complained to us against the Food and Environmental Hygiene Department (“FEHD”), the Lands Department (“LandsD”) and the Highways Department (“HyD”).

The Complaint

2. Allegedly, a huge amount of construction waste was found on a pavement and the bus stop nearby (“the Problem”). In May 2020, the complainant lodged a complaint about the Problem with 1823 which then referred the case to FEHD, LandsD and HyD. On 21 May, the complainant emailed FEHD (“the May 21 Email”), raising queries about its failure to bring charge against the offender(s) under the Summary Offences Ordinance (“SOO”). On 8 June, FEHD replied via 1823 that temporary depositing of construction materials in public places constituted occupation of Government land but fell outside FEHD’s remit, and it had repeatedly referred the matter to LandsD.

3. The complainant considered:

- (1) FEHD, LandsD and HyD to have failed to take effective enforcement actions against the Problem and kept passing the buck; and
- (2) FEHD to have failed to bring charge against the offender(s) under the SOO and address his queries raised in the May 21 Email.

Our Findings

Relevant Legislation and Responsibilities of Relevant Departments

4. For cases involving unlawful occupation of unleased Government land, LandsD may post a statutory notice, under the Land (Miscellaneous Provisions) Ordinance (“L(MP)O”), requiring the occupier to cease occupying the land by a specified date. In case of non-compliance, law enforcement officers may evict the

occupier or take possession of the property or structure on the land in question, and prosecute anyone who occupies the land without reasonable excuse.

5. Circular Memorandum No. 1/2009 (“the Circular”) issued by the Environment Bureau in 2009 sets out the departmental responsibilities with respect to depositing construction and demolition materials (“C&D materials”) on Government land or private land.

6. The Circular states that:

- (1) C&D materials, as a general term, means any substance, matter or thing which is generated as a result of construction and demolition work. It is a mixture of materials arising from site clearance, excavation, construction, refurbishment, renovation, demolition and road works;
- (2) HyD has a responsibility to remove C&D materials illegally deposited on public roads under its purview, including pedestrian walkways, public rear lanes and roadside slopes; and
- (3) the Environmental Protection Department would enforce the Waste Disposal Ordinance against any person who illegally deposits C&D materials.

7. For division of responsibilities in handling scaffolding bamboo sticks deposited on public roads, LandsD, HyD, the Transport Department, 1823 and the Hong Kong Police Force (“HKPF”) held a joint departmental meeting in June 2018 (“2018 Meeting”) and agreed that if the bamboo sticks were construction materials and did not cause serious obstruction to traffic or pose immediate danger to the public, LandsD should post a statutory notice requiring the occupier to cease occupation of the land. When the notice expired, HyD would arrange for a contractor to remove any unclaimed bamboo sticks.

8. For cases involving miscellaneous articles causing obstruction to scavenging operations, FEHD may issue a “Notice to Remove Obstruction” and prosecute the offenders pursuant to the Public Health and Municipal Services Ordinance (“PHMSO”).

FEHD’s Response

9. FEHD's explanations were as follows.

10. Upon receipt of 1823's referral of the Problem on 6 May 2020, FEHD staff conducted four site inspections at the pavement and the bus-stop in question ("the Location") between 10 and 27 May. While no environmental hygiene problem was found, the inspections found a huge pile of tidily stacked-up construction materials consisting of tiles, cement, silt and brand-new wash basins, water closets and wooden doors at the Location. Between 25 May and 4 June, FEHD had thrice referred the issue of occupation of Government land by construction materials to LandsD.

11. On 6 July, FEHD received an email from 1823 that HyD suspected selling and construction-related hawking activities were involved at the Location and requested FEHD's follow-up action. Between 7 and 10 July, FEHD staff conducted several inspections and found a huge amount of construction materials deposited at the Location, but no unlicensed hawking activities were found. On 22 July, FEHD informed 1823 of the investigation results.

12. On 21 August, FEHD received a call from the local District Lands Office ("DLO") seeking its views on an inter-departmental clearance operation. After deliberation, the three departments decided to conduct a joint clearance operation.

13. On 1 September, DLO officers, accompanied by FEHD and HyD officers, posted a statutory notice at the Location requiring the owner of the construction materials to cease the unlawful occupation of Government land by 3 September. In the joint clearance operation conducted by the three departments in the afternoon on 3 September, LandsD confirmed that the unlawful occupation of Government land had persisted. Afterwards, HyD staff removed the construction materials and other articles at the Location. When all the articles had been removed, FEHD arranged for its contractors' sweeping and cleansing at the Location.

14. FEHD pointed out that according to the Circular, even though the articles deposited at the Location were construction waste, HyD should be responsible for their removal. In other words, irrespective of whether those articles were construction materials or construction waste, there was an established mechanism for handling them and FEHD was neither the leading department nor the responsible department. Invoking the SOO was not the proper handling method. Besides, the SOO has not given FEHD any power to seize or remove articles deposited at public places causing obstruction.

15. FEHD reiterated that a complaint would not be considered as involving obstruction to scavenging operations and handled in accordance with the PHMSO if its nature was ostensibly within the jurisdiction of other departments.

16. Concerning the May 21 Email, FEHD explained to the complainant via 1823 on 8 June that the cleanliness of the Location was acceptable and no mosquitoes or other pests were found. Nevertheless, FEHD had stepped up preventive measures. As construction materials occupying Government land was not within FEHD's remit, the case was referred to LandsD for follow-up.

HyD's Response

17. HyD's explanations were as follows.

18. Prior to 1823's referral of the Problem on 6 May 2020, HyD officers had already discovered the pile of materials at the Location during inspections and regarded them as construction materials and miscellaneous articles relating to commercial activities, not C&D materials that should be removed by HyD according to the Circular.

19. HyD held that depositing construction materials and other articles on public roads constituted occupation of Government land, hence an issue for LandsD to handle; while unauthorised commercial activities should be dealt with by FEHD. Upon receipt of 1823's referral of the Problem on 6 May, HyD wrote to the relevant enforcement departments (i.e. LandsD and FEHD) on the following day, with photos showing a pile of construction materials and a nearby wooden plank displaying the words「清拆工程」(demolition works), a telephone number and a shop name.

20. On 6 July, 1823 enquired of HyD and LandsD whether LandsD could first post a statutory notice to demand the occupier to cease occupying the land to facilitate HyD's removal of unclaimed construction materials upon expiry of the statutory notice. HyD proposed that 1823 should refer the case to FEHD due to the illegal hawking activities involved. Later on, upon 1823's referral of another complaint against the Problem, HyD emailed 1823 on 9 July to clarify that although it was not the responsible department, it would assist in removing the construction materials in a joint land control operation led by LandsD.

21. On 19 August, 1823 emailed HyD, FEHD and LandsD, requesting them to revisit the case. It also stated that FEHD had not found illegal hawking activities during its inspections. On 27 August, HyD informed 1823 that if LandsD would take enforcement action in accordance with the L(MP)O, it would assist in removing the construction materials at the Location upon expiry of the statutory notice.

22. On 3 September, HyD, LandsD and FEHD conducted a joint operation to remove unclaimed construction materials at the Location.

23. HyD considered that taking enforcement action against construction materials and other articles deposited on public roads and unauthorised display of commercial promotional materials was not within its remit. Nor was it responsible for taking enforcement action against illegal dumping of C&D materials. As such, it was not involved in ineffective enforcement or buck-passing.

LandsD's Response

24. LandsD's explanations were as follows.

25. On 6 May 2020, DLO got 1823's referral of the Problem. Since DLO staff had to work from home by shift owing to the COVID-19 pandemic, they could only conduct site inspections on 28 May and 2 June. During their inspections, they found some C&D materials and other articles placed on a public road section under HyD's purview. On 29 June, LandsD replied to 1823, pointing out that the Circular stated that HyD should be responsible for removing the C&D materials and other miscellaneous articles.

26. On 6 July, upon 1823's enquiry, DLO agreed to post a statutory notice at the Location to facilitate HyD's removal of the C&D materials. On the same day, HyD notified 1823 that it would not participate in the clearance operation because there were illegal hawking activities at the Location, and that the case should be referred to FEHD for follow-up.

27. On 27 August, LandsD learned from 1823 that HyD would participate in the joint operation. The three departments subsequently discussed and agreed to conduct a joint operation on 3 September. Upon LandsD's confirmation that the statutory notice had expired, HyD assisted to clear the articles at the Location.

Our Comments

28. FEHD, LandsD and HyD held different views initially on the nature of the articles placed at the Location, i.e. whether they were **construction materials** or **C&D materials** as defined in the Circular. FEHD and HyD regarded them as construction materials and therefore, they should be tackled in accordance with the consensus reached at the 2018 Meeting, i.e. LandsD should first post a statutory notice before removing any unclaimed articles upon expiry of the statutory notice. LandsD, on the other hand, asserted that such articles were C&D materials which, according to the Circular, should be removed by HyD right away without LandsD's posting of a statutory notice in advance. We had examined the photographs of the materials in question and found that there were tidily stacked-up construction materials such as bricks and sandbags, C&D materials like wooden doors and wooden planks, as well as other miscellaneous items such as push carts and wooden ladders. Hence, it was inappropriate to treat them under a single category.

29. Following 1823's coordination on 6 July, LandsD agreed to post a statutory notice at the Location to facilitate removal of the articles by HyD. Nevertheless, HyD found suspected illegal hawking activities there while following up on the case, so it asked FEHD via 1823 to look into it. The case was, therefore, turned over to FEHD again. FEHD did not find illegal hawking activities at the Location in its subsequent inspections and notified 1823 of the result. 1823 then relayed FEHD's findings to HyD and LandsD. On 27 August, LandsD learned from 1823 that HyD would take part in the joint operation. Eventually, the three departments conducted a joint operation on 3 September to resolve the Problem.

30. We noticed that the communication and discussions among the three departments were largely the results of 1823's coordination rather than their proactive actions to solve the Problem raised by the complainant. In our view, the complainant formed the perception that they were passing the buck because the matter could only be clarified after multiple referrals back-and-forth by 1823 owing to their quibbles over the Problem. Furthermore, the three departments failed to act early by identifying solutions directly among themselves upon receipt of the complaint on 6 May 2020. As a result, they took almost four months for a decision to resolve the Problem by way of a joint operation - a lack of initiative in evidence.

31. FEHD contended that irrespective of whether the articles placed at the Location were construction materials or C&D materials, it was not the leading

department nor the responsible department to tackle the problem. We must, however, point out that under the PHMSO, FEHD may issue a “Notice to Remove Obstruction” and bring charge against the offender if miscellaneous articles placed on a street are causing obstruction to scavenging operations. Actually, the articles piled up at the Location were occupying a large part of the road and seriously obstructed scavenging operations. Instead of staying aloof by reason of the Problem falling under another department’s remit, FEHD should have proactively liaised with those departments for quick removal of the articles, so that it could continue to discharge its street cleansing duty properly.

32. On the other hand, while HyD is not the enforcement authority against illegally dumped C&D materials and construction materials deposited on public roads, the Circular and the consensus reached at the 2018 Meeting already defined its role in handling the Problem. It, therefore, should not have stayed on the sidelines, either. In addition, the materials placed at the Location did occupy Government land, LandsD could have taken action pursuant to the L(MP)O.

33. This case involved the jurisdiction of several Government departments and could never be properly resolved if individual departments just pointed out why it should be under another department’s remit and kept passing it around. We reckoned that if the three departments had come from a solution-based perspective and held inter-departmental discussions proactively and promptly, their actions could have been much more effective and the impression of buck-passing avoided.

34. Concerning the complainant’s dissatisfaction with FEHD’s failure to invoke the SOO to prosecute the offender, we considered FEHD’s explanation not unreasonable and accepted it. Besides, FEHD had largely addressed the complainant’s queries in the May 21 Email by giving him an explanation via 1823 on 8 June 2020.

35. To conclude, The Ombudsman considered this complaint against FEHD, HyD and LandsD **partially substantiated**.

Recommendation

36. FEHD, HyD and LandsD should learn from the incident. When caught in grey areas in a problem in the future, they should adopt a solution-based perspective, take proactive action and hold inter-departmental discussions promptly to eliminate disagreements and resolve the problem as soon as possible.

Office of The Ombudsman
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