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*Direct Investigation Report
Education Bureau's Regulation of Kindergarten Application Fees*



A direct investigation by the Office of The Ombudsman has found that the Education Bureau (“EDB”) does not have specific criteria for vetting and approving kindergartens’ applications for collecting application fees above the ceiling. EDB has been lax in processing such applications. It fails to scrutinise whether the kindergartens are using various pretexts to make a profit through collection of application fees. It also fails in its duty as a gatekeeper for parents.

The Ombudsman has made five recommendations to EDB, urging it to adopt strict criteria for vetting and approving kindergartens’ applications for collection of application fees above the ceiling and to prevent unfairness to parents.

The investigation report is at **Annex 1**.

***Summary of Investigation Reports
Complaints against Buildings Department for
Defective Follow-up Actions on Removal Orders***

Unauthorised building works (“UBW”) may pose structural or fire safety risks, as well as environmental nuisance. They may also hinder the maintenance works of buildings. The Buildings Ordinance empowers the Buildings Department (“BD”) to take enforcement action against UBW.

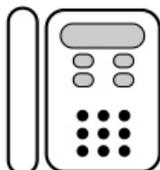


Two complaint cases, recently investigated by the Office of The Ombudsman, reveal that BD, after issuing a removal order against a UBW item, had failed to take decisive enforcement action within a reasonable time, causing distress to the Owners’ Corporation of the concerned building; and had not registered at the Land Registry a removal order against a certain property, thus injuring the interests of the prospective buyer of the property.

In the light of the above problems, The Ombudsman has made four recommendations to BD for improvement.

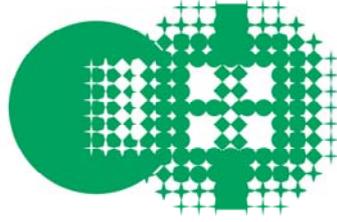
The case summary of the investigation reports is at **Annex 2**.

Enquiries



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**Office of The Ombudsman
19 December 2016**



Office of The Ombudsman

Direct Investigation Report

Education Bureau's Regulation of Kindergarten Application Fees

19 December 2016

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1

INTRODUCTION

BACKGROUND

1.1 According to the Profile of Kindergartens and Kindergarten-cum-Child Care Centres for the 2015/16 School Year published by the Education Bureau (“EDB”), 36 kindergartens in Hong Kong have the Bureau’s approval for collecting an application fee that exceeds the \$40 ceiling. In response to media reports about some kindergartens charging very high application fees, EDB stated that before giving its approval, it always examines the justifications given by the kindergartens for charging an application fee above the ceiling. Nevertheless, there are voices in the community that the cases of some kindergartens charging an application fee way above the ceiling may be attributed to EDB’s laxity in its approval mechanism and connivance at the collection of unreasonable application fees by kindergartens.

1.2 Once application fees are paid, kindergartens will not refund them irrespective of whether the children eventually get admitted. Many parents make applications for their children to more than one kindergartens so as to increase their chance of gaining admission; some parents are willing to pay, no matter how high the application fees are, just to get their children into their preferred kindergarten. Hence, if application fees are unreasonably high, that would mean a heavy and unfair burden on parents. We are very concerned about the effectiveness of EDB’s regulation of kindergarten application fees that exceed the ceiling. Therefore, The Ombudsman initiated this direct investigation on 12 May 2016, pursuant to section 7(1)(a)(ii) of The Ombudsman Ordinance, into EDB’s current approval mechanism and regulatory system to identify any inadequacies.

PROCESS OF INVESTIGATION

1.3 This Office has scrutinised the documents and files provided by EDB, including those relating to the Bureau's approval of the aforesaid 36 cases of application fees exceeding the ceiling. In the course of our investigation, we have held meetings with EDB to exchange views and also invited members of the public to provide information/views for our reference.

1.4 On 25 October 2016, we issued our draft investigation report to EDB for comments. This final report, incorporating the Bureau's comments, was completed on 14 December 2016.

2

EDB'S APPROVAL MECHANISM AND REGULATORY SYSTEM

OVERVIEW OF KINDERGARTENS

2.1 Kindergartens provide educational services for children three to six years old. Under the Education Ordinance, all kindergartens are required to be registered with EDB and be subject to the Bureau's oversight. In Hong Kong, all kindergartens are privately run, either operated by non-profit-making bodies or private enterprises. In terms of curriculum, there are two types of kindergartens, local and international.

RESTRICTIONS ON APPLICATION FEES

2.2 The Education Regulations stipulate that all schools including kindergartens must obtain prior written approval from the Permanent Secretary for Education ("Perm Sec") before collecting any fees (including application fees and tuition fees). Perm Sec assigns officers at supervisory levels the task of approving/reviewing applications from schools.

2.3 Prior to 2000, any kindergarten intending to collect an application fee or adjust the amount of such fee must first obtain approval from the Education Department ("ED"), the predecessor of EDB. Information on the applications processed then showed that kindergartens usually charged an application fee between \$10 and \$30. Taking reference from such information, ED issued Administrative Circular No. 44/2000 to streamline kindergartens' administrative work and procedures: a ceiling of

\$30 was set, such that kindergartens charging an application fee below that amount would not need to seek ED's prior approval.

2.4 According to EDB, setting a ceiling on the amount of application fee is based on the following fundamental principles:

- (1) kindergartens are allowed to collect application fees to cover their expenses on arrangements relating to applications and admission; and
- (2) application fees should be set at a reasonable level, to avoid creating an excessive burden on parents.

2.5 In 2005, EDB reviewed the aforesaid ceiling and decided that it should remain unchanged, after taking into consideration the changes in the Composite Consumer Price Index ("Composite CPI"). In 2014, having taken into account the yearly changes in the Composite CPI between 2005 and 2014, EDB raised the ceiling of application fees from \$30 to **\$40**, and issued Administrative Circular No. 4/2014 to inform all kindergartens. The Circular specified that: any kindergarten intending to collect an application fee exceeding the ceiling shall obtain prior approval from Perm Sec; but once the kindergarten has obtained Perm Sec's approval, it is not required to submit an application again in subsequent years.

2.6 As at October 2016, 36 kindergartens in Hong Kong have obtained approval for collecting an application fee above the ceiling. These kindergartens account for 4% of the kindergartens in Hong Kong (about 1,000) and the application fees they charge range from \$50 to \$3,700 (which is 92.5 times the ceiling). Of those 36 kindergartens, 17 are charging an application fee of \$1,000 (25 times the ceiling) or above. 30 of those kindergartens are international kindergartens, either using a foreign language as the medium of instruction or providing non-local programmes and the application fees they charge range from \$300 to \$3,700; the remaining 6 are local kindergartens, teaching the local curriculum and charging an application fee of \$90 or below.

PROCEDURES AND CRITERIA FOR APPROVING APPLICATION FEES ABOVE THE CEILING

2.7 EDB has explained to us that all kindergartens in Hong Kong are privately run and they differ from one another in terms of needs, operations, arrangements for admission and related expenses. Parents' expectations and needs concerning kindergarten services may also change over time. Accordingly, when considering kindergartens' applications for collecting an application fee above the ceiling, EDB examines the merits of each application and the justifications and information provided by the kindergarten concerned. This is to ensure that the application fees collected by kindergartens reasonably reflect the actual expenses relating to their admission procedures.

2.8 Upon receipt of an application, EDB's education professionals at different ranks compile and analyse the information provided and take reference from previous applications and approval records before submitting the case to their supervisors for vetting and approval. This procedure ensures that an application is approved only if there are sufficient justifications, and provides internal checks and balances. For instance, an application may be escalated to the directorate level where necessary for vetting and/or internal discussions.

2.9 For most of the kindergartens, application fees are collected mainly for the following purposes:

- hiring additional administrative staff;
- processing information on applicants; and
- printing and distributing application forms and related school publications.

However, owing to their school-based situation, some kindergartens may collect application fees to cover the following expenses:

- deploying/hiring specialists to assess applicants;
- interviewing parents;
- organising guided campus tours / Information Day;
- setting up an online application system and allowing for its subsequent maintenance;

- maintaining a database of applicants; and
- establishing an online payment system, etc.

2.10 EDB's task is to assess:

- (1) whether the expenses for various items estimated/claimed by the kindergartens are reasonable;
- (2) whether there is any profit-making element in the application fees collected by the kindergartens;
- (3) whether the "User Pays" principle is followed in parents paying for the administrative costs of kindergartens' processing of applications; and
- (4) the situations of other comparable kindergartens to determine if the stated expenses and fees are reasonable.

UNAUTHORISED COLLECTION OF APPLICATION FEES ABOVE THE CEILING

2.11 Kindergartens collecting an application fee above the ceiling with EDB's approval should, as required by the Education Regulations, post EDB's approval letter on its notice board or display it in a conspicuous place on the campus. EDB also monitors kindergartens' collection of application fees through its routine inspections, visits, day-to-day communication with the kindergartens, as well as enquiries from parents. In case of non-compliance, such as failure to obtain EDB's approval before collecting an application fee above the ceiling, EDB may, depending on the circumstances, take such actions as issuing an oral/written advice or a written warning, ordering a refund to parents, and requiring the kindergarten to amend its information about application fees.

2.12 Between January 2009 and October 2016, EDB handled cases involving 18 kindergartens' unauthorised collection of application fees exceeding the ceiling. After looking into the matters, the cases relating to 16 kindergartens were substantiated. EDB gave 11 verbal/written advices and 1 written warning to require amendment and follow-up by the kindergartens concerned. All those kindergartens have since

amended the information about their application fees, and submitted applications to EDB for adjusting the fees and/or made refund arrangements.

EDB'S EXPLANATION

2.13 As regards how EDB assesses whether kindergartens' alleged expenses for admission exercises are reasonable, the Bureau has the following explanation.

2.14 Application fees are meant for covering the expenses incurred by kindergartens in processing admission applications and selecting candidates. Since the operations and related expenses of kindergartens vary, and each kindergarten has its own way of processing admission applications and selecting candidates, it is difficult to apply a uniform set of criteria to determine which expense items are necessary and reasonable and which are not. Kindergartens should provide justifications in support of their applications. EDB will take into account the information and justifications provided, based on which to decide whether the application should be granted. It will not audit each expenses item or any possible surplus relating to the application fee, but kindergartens are required to explain to parents the application fee and its purpose.

2.15 Moreover, a surplus arising from collection of application fees by a kindergarten should not be simplistically regarded as a case of profit-making. When processing a kindergarten's application for collecting an application fee above the ceiling, EDB takes into account the expenses for its admission exercise as estimated by the kindergarten. The actual income and expenditure relating to a kindergarten's admission exercise every year are in fact subject to various factors such as fluctuations in the number of applicants, staff costs, etc. Therefore, it is hard to predict whether the kindergarten will eventually enjoy a surplus. Given that kindergartens are private organisations and financial disclosure to EDB is not mandatory, EDB is unable to ensure that the income arising from collection of application fees by kindergartens tallies with the estimated expenses provided in their applications to the Bureau. Nevertheless, if EDB receives complaints from parents about kindergartens collecting an application fee without authorisation, or failing to provide any admission service stated in their applications, the Bureau will look into the matter and take follow-up action.

2.16 Of those 36 kindergartens that have obtained approval from EDB, 30 are international kindergartens (**para. 2.6**) but they differ in terms of curriculum, teaching method, target pupils, and profiles of teachers. Hence, they have their own special

arrangements in admission procedures. For example, there may be assessment on individual applicants (including assessment on language proficiency and assessment of those who have special educational needs), guided campus tours for applicants and their families, Open Day and trial classes.

2.17 Some of the international kindergartens offering non-local programmes taught in foreign languages (such as English, German or French) are particularly meticulous in their admission screening procedures. As pupils are expected to have attained a certain level of language proficiency, applicants' language abilities would be assessed through individual interviews and small-group activities conducted by teachers or the vice principal / principal. Depending on applicants' specific needs, some kindergartens would even arrange reviews by specialists, such as educational psychologists, language therapists, learning support specialists or student counsellors, in order to assess what kinds of support services are needed by those applicants. Many international kindergartens would also schedule in-depth interviews by their curriculum leader / vice principal / principal with applicants and their parents, so as to learn more about the support available from the family, and the parents could understand the kindergarten's curriculum and mode of instruction.

2.18 Most international kindergartens have to allocate extra resources for implementing the aforesaid screening arrangements owing to the large number of applications received. Based on the "User Pays" principle (**para. 2.10(3)**), EDB considers that expenses for admission arrangements should be borne by the parents of applicants, not the parents of current pupils.

2.19 We notice that the Profile of Kindergartens and Kindergarten-cum-Child Care Centres ("the Profile") published by EDB and Administrative Circular No. 4/2014 (**para. 2.5**) issued by the Bureau to all kindergartens only specify that charging of fees (including application fees) exceeding the ceilings requires Perm Sec's prior approval, but they do not set out the Bureau's criteria for making such approvals. Both the kindergartens and the public are, therefore, in the dark about EDB's criteria for granting approvals. On this issue, EDB has explained to us that kindergartens might contact EDB officers direct for any enquiries about the criteria, and EDB would give guidance and specific answers vis-à-vis their individual circumstances. EDB considers this a flexible approach. Since the admission procedures of kindergartens are generally simple, EDB anticipates that not many of them would apply for charging application fees above the ceiling on the grounds of complex admission procedures.

2.20 EDB has cited two cases of applications by kindergartens to illustrate how the Bureau assesses whether kindergartens' expense items were reasonable (**para. 2.10(1)**).

Application Case A

2.21 In submitting an application for collecting an application fee of \$2,000, an international kindergarten elaborated to EDB that its admission procedures would involve:

- employing project officers conversant in both English and Chinese to handle admission-related matters, including explanation to parents about the availability of school places, distribution of information kits about the kindergarten to applicants, conduct of personal guided campus tours for applicants and their families, as well as briefings on the kindergarten's special features and answering of questions; and
- assessing applicants, including their English proficiency and adaptability, through individual and group interviews conducted by teachers and the vice principal / principal, with separate assessments for applicants with special learning needs.

2.22 The kindergarten explained to EDB that the aforesaid admission arrangements were for ensuring that parents were fully aware of the kindergarten's curriculum and expectations of pupils, and for helping the kindergarten identify eligible candidates; the application fee was collected to offset the expenses incurred in processing applications and selecting candidates.

Application Case B

2.23 An international kindergarten made an application to EDB, seeking to collect an application fee of \$3,000 on the following grounds:

- It was necessary to employ additional staff dedicated to admission-related duties, because the number of applications received by the kindergarten had increased significantly in recent years.

- The admission-related duties included answering of enquiries from parents, conduct of guided campus tours, compilation of a database on applicants, arrangement of interviews and assessments, etc.
- Teachers would conduct in English or Putonghua individual interviews and small-group activities with applicants to assess their language proficiency, and section heads would talk with applicants. The vice principal and principal would meet the parents of applicants to provide support for their families to facilitate applicants' integration into school life, and allow the parents to decide whether to let their children enrol in the kindergarten.

IMPROVEMENT MEASURES PROPOSED BY EDB

2.24 Given the rising public concern about kindergarten education and the fees involved, EDB set up a task force in February 2016 to review the arrangements regarding the collection of application fees by kindergartens. The task force would draw up working guidelines on vetting and approving kindergartens' applications for collection of application fees above the ceiling, so as to provide EDB officers with specific criteria for reference and minimise inconsistencies in vetting and approving applications.

2.25 EDB has asked all kindergartens to give, in the online version of the Profile, information on the amount of application fees they charge. Such information has been provided accordingly as from September 2016. For those kindergartens granted approval to collect application fees above the ceiling, EDB has already reminded them to disclose to parents the various expense items covered by the application fees, and to inform EDB of any subsequent changes to those items.

3

OUR FINDINGS, COMMENTS AND RECOMMENDATIONS

OUR FINDINGS AND COMMENTS

3.1 After examining the information and explanation provided by EDB, as well as the files on 36 cases of approved collection of application fees exceeding the ceiling as at October 2016, we have the following findings and comments.

Lax Approval Mechanism with Inconsistent Criteria and Sloppy Procedures

3.2 One of EDB's justifications for approving collection of application fees above the ceiling is that kindergartens should be allowed to meet their expenses on processing of applications and admission arrangements (**para. 2.4(1)**). We find this acceptable in principle. Nevertheless, we note that EDB has not laid down any specific criteria for vetting and approving applications for collection of application fees above the ceiling, resulting in inconsistent treatment of application cases by different officers, and failure to accurately evaluate whether the expense items estimated/claimed by kindergartens were reasonable or not (**para. 2.10(1)**).

3.3 According to the file documents provided by EDB, 17 kindergartens had itemised their expenses in their applications to EDB, while the remaining 19 kindergartens had only given a general account of the workflow and staffing arrangements for handling the admission applications. Without asking those kindergartens to give further details on the expense items, EDB approved their applications outright.

3.4 While claiming on the one hand that in certain cases the Bureau would require kindergartens to provide a detailed breakdown of their expenses, EDB has on the other hand indicated that it would not audit the detailed expense items covered by kindergartens' application fees or any possible surplus that may be generated (**para. 2.14**). On grounds of staff constraint, EDB has also rejected our suggestion to conduct random checks on the admission process of kindergartens to verify the justifications submitted in their applications for collecting application fees above the ceiling, and to confirm their delivery of services promised to parents. We consider EDB's current vetting and approval procedures too lax and incapable of properly evaluating whether the application fees collected by those kindergartens are reasonable, or ascertaining whether the kindergartens are making a profit from the application fees. This is not in line with the criteria EDB has laid down for vetting and approving application fees above the ceiling, i.e. "whether the expenses for various items estimated/claimed by the kindergartens are reasonable" (**para. 2.10(1)**), and "whether there is an element of profit-making in the application fees collected" by the kindergartens (**para. 2.10(2)**).

Failure to Query Calculation of Staff Cost

3.5 We notice that EDB does not require the kindergartens concerned to provide any substantive proof for the huge expenses claimed in certain applications, especially the additional salary costs for the teaching and administrative staff engaged in admission related matters.

3.6 Generally speaking, handling of admission-related matters should be part of the duties of the teaching and administrative staff that a kindergarten employs. If admission-related matters are handled during normal office hours or such work has already been specified in their employment contracts with no extra remuneration payable by the kindergarten, we believe that the salaries of those staff members are already covered in the kindergarten's general income and expenditure account, sufficiently offset by the tuition fees and other general revenue received by the kindergarten. If so, counting part of their salaries towards admission-related expenses would amount to double counting, which would result in extra income for the kindergarten. We notice that some kindergartens that charge an application fee of more than \$1,000 have included in their admission-related expenses the remuneration/time cost incurred by teaching and administrative staff / the principal, thus arriving at a much higher figure for those expenses. And yet EDB has never queried the appropriateness of posting the remuneration / time cost of the teaching and administrative staff, especially the principal, in this manner.

3.7 We also note that in contrast, a local kindergarten (“Kindergarten A”) had exercised restraint when making its application to EDB. Receiving as many as 2,000 admission applications, the staff members of Kindergarten A had to work overtime for processing the documents of applicants. They worked beyond normal office hours for holding briefing sessions, and spent three whole Saturdays in a row conducting interviews. Yet, Kindergarten A just applied to EDB for approval to raise its application fee to \$50. The remuneration / time cost of the teaching and administrative staff / principal involved in handling the admission applications had not been counted towards the expenses incurred in its admission exercise.

3.8 By allowing some other kindergartens (**para. 3.6**) to treat part of the remuneration / time cost of its teaching and administrative staff as the expenses incurred in their admission exercises, EDB was tolerating their collection of a loftier application fee, thus imposing a heavier burden on parents.

Failure to Query Profit-making Element in High Application Fee

3.9 In one case, an international kindergarten (“Kindergarten B”) applied to EDB for retrospective approval to collect an application fee exceeding the ceiling. From the information Kindergarten B submitted to EDB, which included the number of applications it has received and details of expenses of its admission exercise in the previous school year, we could easily see that the amount of application fees collected far exceeded the costs incurred by Kindergarten B, thus generating a surplus of more than \$1 million. Again, without querying whether the high application fee was for offsetting the cost of its admission exercise or for helping the Kindergarten to make a profit, EDB approved its application. The Bureau did not bother to ask how the surplus had been disposed of. We consider that even if surplus was eventually used on the existing pupils of the kindergarten, this would still constitute unfairness to the parents of the applicants, who had paid an exceedingly high application fee, and the applicants would in effect be subsidising existing pupils. EDB has argued that the actual income and expenditure of kindergartens are subject to a host of factors and, therefore, it is hard to tell whether kindergartens would eventually end up with a surplus (**para. 2.15**). However, the fact that EDB approved Kindergarten B’s application without having raised any query on its huge surplus in the previous school year reflects that the Bureau had failed to discharge its duty to check whether there was any profit-making element in the application fees collected by the kindergarten. Even if Kindergarten B turned out to be receiving fewer applications or having to spend more in the following school

year such that it could not break even, it could still apply to the Bureau again for approval to raise its application fee.

3.10 Besides, the application information provided by Kindergarten B indicated that one of the expense items was for venue and facilities, amounting to more than \$100,000. According to its official website, however, the kindergarten has a campus covering several thousand square metres with a gross floor area exceeding 10,000 square metres. Furthermore, the school is well equipped. Yet, EDB failed to perform its duty to assess whether that expense item was really necessary and reasonable (i.e. to query why the kindergarten had to rent a separate venue for its admission exercise), before approving its application for collecting an exceedingly high application fee.

3.11 It has also come to our attention that when Kindergarten B applied for approval to charge an application fee of over \$1,000, it included the cost of setting up an online application system (around \$700,000) as an expense item in the admission exercise. EDB granted its approval without minding that the cost of setting up the system was a one-off item and the kindergarten should not have treated it as a recurrent expenses item in calculating the application fee. Once approval for collecting an application fee above the ceiling is granted, kindergartens need not re-apply to EDB every year afterwards (**para. 2.5**). Consequently, Kindergarten B could thereafter collect an application fee that is not commensurate with its actual expenses.

Failure to Handle Rigorously Cases of Over-charging Application Fees

3.12 In addition, we discover that in May, October and November 2012, EDB asked/reminded three international kindergartens to stop collecting their exceedingly high application fees pending the Bureau's approval. The three kindergartens were only granted approval respectively in October and December 2013, and March 2014 to collect an application fee above the ceiling. However, while processing their applications, EDB did not investigate whether those three kindergartens were still charging an application fee above the ceiling. Furthermore, instead of requiring those kindergartens to refund the excess to all the parents of the applicants, EDB merely gave them a verbal advice.

3.13 Between 2009 and 2014, EDB handled 18 cases of over-charging application fees, but issued only 1 written warning to 1 kindergarten (**para. 2.12**). And that warning was issued mainly in response to parents' complaints against the

kindergarten for collecting an application fee above the ceiling without EDB's approval and failing to handle properly the parents' requests for refund of the application fee. The parents were given a refund only after they had lodged their complaints and claims for refund with EDB.

3.14 In fact, even when EDB has discovered that a kindergarten is collecting an application fee exceeding the ceiling without approval, it would not bother to ask the kindergarten to refund the excess to all the parents of the applicants. No proactive follow-up action would be taken by the Bureau unless some dissatisfied parents come forward (**para. 3.13**). This is very unfair to those parents who do not know that they could ask for a refund. EDB is blameworthy for being so passive and slack in its regulation of kindergarten's collection of application fees.

CONCLUDING REMARKS

3.15 We are aware that some kindergartens do have unique modes of operation and teaching (**para. 2.16**) and invest huge resources in designing meticulous admission procedures for screening applicants. That pertains to commercial decisions of kindergartens and we will not comment. **Our focus is on whether EDB has, in vetting and approving applications by kindergartens for approval to collect application fees above the ceiling, properly exercised its statutory powers to rigorously assess the applications to ensure that the application fees are set at a reasonable level and would not impose too heavy an extra burden on parents.** It is basically acceptable if a kindergarten is given approval by EDB, in accordance with the Bureau's established policy and after rigorous assessment by the Bureau, to collect an application fee above the ceiling to offset the expenses incurred in its admission exercise.

3.16 In fact, parents of applicants rely entirely on EDB's careful and detailed vetting of kindergartens' applications for collecting an application fee above the ceiling to ascertain whether the fees collected are really for cost-recovery only, and to make sure that the fees are fair, justified, and in line with the spirit of the relevant legislation, rather than being used by kindergartens to generate profit under all sorts of pretexts. As can be seen from the files provided by EDB and the public's views that we have received, quite a number of parents were dissatisfied with kindergartens collecting a high application fee. Parents generally believe that the selection and administrative procedures of kindergartens are relatively simple, and the cost involved should not be

too high. And yet some kindergartens collect high application fees and enjoy huge surpluses as a result. Some do not even offer interviews to all applicants after collecting high application fees from their parents. Those not selected for interview are not given any refund.

3.17 On the one hand, EDB claims that it has a role in monitoring and thus making sure that the application fees collected by kindergartens are only used for covering the expenses incurred in their admission and enrolment exercises, but on the other hand, the Bureau has not been rigorously checking whether there is any profit-making element in the application fees charged by kindergartens. Obviously, the Bureau has failed to live up to its own pledge. From the cases examined, we can see that some kindergartens had not only recovered all costs, but also reaped a surplus of more than a million dollars just by collecting application fees. Even though they had been honest with EDB about the surplus, vetting officers at different ranks in the Bureau turned a blind eye and approved their applications outright. That was extremely sloppy of the Bureau (**para. 3.9**). We consider EDB's regulation of collection of application fees to be very lax and the Bureau to have failed in its duty as a gatekeeper. Kindergartens are allowed to charge higher application fees by exaggerating their expenses. EDB's so-called "User Pays" principle (**para. 2.10(3)**) exists in name only. Furthermore, consistent criteria for vetting and approving applications are lacking, and the interests of parents are ignored. There is a dire need for improvement.

RECOMMENDATIONS

3.18 In the light of the above analysis, The Ombudsman urges EDB to:

- (1) expedite its formulation of specific working guidelines for staff so that they can vet and approve applications for collecting application fees above the ceiling in a strict, fair and just manner (**paras. 2.24 and 3.2**);
- (2) require kindergartens to give clear details of each estimated expense item together with detailed and substantive evidence, especially those on staffing and big or year-round expense items, asking the kindergartens also to keep their income and expenditure records relating to application fees for EDB's scrutiny (**para. 3.5**);

- (3) raise queries with kindergartens whose budgets show likely surplus from the application fees collected or questionable expense items (including unnecessary and non-recurrent expense items), or even reject their applications (**paras. 3.9 and 3.11**);
- (4) take rigorous action to follow up on reports on false expense items relating to application fees, or on kindergartens failing to deliver services as promised to applicants' parents; where such reports are confirmed, withdraw the approval granted for a higher application fee and require the kindergartens concerned to provide more detailed information (including the expenditure and audit report of the previous school year) for the Bureau's vetting when making a fresh application for approval to collect application fees above the ceiling; also ask the kindergartens to account for the whereabouts and uses of the surplus from the application fees collected, so to ensure that they are not making any profit through collecting application fees (**paras. 3.9 – 3.11**); and
- (5) require kindergartens which collect exceedingly high application fees without EDB's approval to refund the overcharged amount to parents; invoke its statutory power to stop those kindergartens from continuing to charge application fees that have not been approved (**para. 3.12**).

ACKNOWLEDGEMENTS

3.19 The Ombudsman is grateful to EDB for its full cooperation during the course of this investigation.

Office of The Ombudsman

Ref: OMB/DI/373

December 2016

Summary of Investigation Reports

Complaints against Buildings Department for Defective Follow-up Actions on Removal Orders

Foreword

Unauthorised building works (“UBW”) may pose structural or fire safety risks, as well as environmental nuisance. They may also hinder maintenance works of buildings.

2. The Buildings Department (“BD”) is empowered by the Buildings Ordinance (“the Ordinance”) to take enforcement action against UBW.

3. The following categories are “actionable” UWB items and accorded priority enforcement by BD:

- (1) items constituting obvious hazard or imminent danger to life and property;
- (2) items newly constructed;
- (3) items constituting a serious health nuisance; and
- (4) items constituting a serious environmental nuisance.

4. Since April 2011, BD has strengthened its enforcement against UBW by including UBW items on rooftops/flat roofs/open yards as “actionable”. Given the large number of UBW item involved, BD has to prioritise its enforcement actions against such items.

5. In taking enforcement action, BD will issue a statutory order to the owner concerned, requiring removal of the UBW item. BD will also register the order (commonly known as “imposing an encumbrance”) at the Land Registry (“LR”). The encumbrance will be removed upon the owner’s compliance with the removal order.

6. The Ordinance stipulates that any person who, without reasonable excuse, fails to comply with a statutory order commits an offence and is liable to a fine and imprisonment.

7. If an owner, after having been convicted of non-compliance with a removal order, still fails to comply with the order, BD will prosecute the owner again. Meanwhile, BD will consider engaging a contractor to remove the UBW item and recover the removal costs from the owner.

8. Registration of a statutory order at LR imposes an encumbrance on the property, thereby reducing the value of the property. By conducting a search at LR, a prospective buyer of the property and the mortgage institution concerned can find out whether any statutory order has been issued against a property and registered at LR. Hence, registration of orders at LR serves to urge owners to remove UBW items voluntarily as well as protecting the interests of prospective buyers and mortgage institutions.

9. Two complaint cases recently investigated by this Office reveal that BD had failed to take decisive enforcement action against a UBW item within a reasonable time, causing distress to the Owners' Corporation ("OC") of the building affected; and had not registered at LR a removal order against a certain property, thus prejudicing the interests of the prospective buyer of the property.

CASE 1: Delay in Enforcement against a UBW Item, thereby Hindering OC's Compliance with a Building Inspection Notice ("BIN")

The Complaint

10. The OC of the building complained to us that BD had on the one hand issued a BIN to the OC, and on the other hand procrastinated in taking enforcement action against a UBW item on the flat roof of the building ("UBW/FR"), which hindered the OC's compliance with the BIN.

Our Findings

BD's Enforcement Actions

11. In May **2011**, BD discovered the UBW/FR. While not posing obvious danger, the concerned UBW item was an "actionable" item.

12. In June **2012**, BD issued an order ("the Order") to the owner ("Mr A"), demanding removal of the item within 60 days.

13. In February **2013**, BD issued a warning letter to Mr A, reminding him to comply with the Order, lest he would be prosecuted.

14. In March, Mr A wrote to BD, stating that the five tenants living in the UBW/FR had financial difficulties (they were either living on social welfare or recovering from illness) and were unable to move out within a short time. Mr A asked for the removal deadline to be extended.

15. In April, BD issued a statutory notice (i.e. the BIN) under the Mandatory Building Inspection Scheme, asking the OC to complete a building inspection and necessary repairs to the common parts of the building by certain dates.

16. In September, Mr A telephoned BD, reiterating the tenants' hardships and requesting social worker service. BD, therefore, referred the case to a social worker that the Department engaged, to assist the tenants to move out from the UBW/FR.

17. In March **2015**, the tenants still refused to move out. The social worker closed the case. BD subsequently issued a warning letter to Mr A, demanding him to comply with the Order, lest he would be prosecuted. In May, BD started prosecution against Mr A.

18. In February **2016**, Mr A pleaded guilty and was fined by the court.

19. In April, as Mr A still had not removed the UBW/FR, BD instituted prosecution against him again.

20. In July, BD's inspection confirmed that the UBW/FR had been removed. Mr A pleaded guilty and was fined by the court in the same month.

Our Comments

21. As can be seen from the above, BD issued the Order in June 2012, which should have been complied with within 60 days as specified. However, BD did not issue a warning letter to Mr A until February 2013, which was more than **six months** after the deadline for compliance of the Order.

22. After issuing the warning letter, BD referred the case to the social worker and again suspended its enforcement action. The Department argued that:

The social worker recalled that in addition to liaising with Mr A, he had also visited the tenants in the UBW/FR to understand their hardships and offer assistance. However, the tenants were hostile and even threatened to report to the Police that they had been harassed by the social worker. Besides, while the social worker was following up on the case, BD reviewed case progress with him from time to time, and handled the case pragmatically.

23. However, in fact, according to the social worker's case progress reports, between November 2013 and March 2015, all he had done was contacting Mr A five times to advise him to remove the UBW/FR and reminding him of the consequences of non-compliance with the Order. And every time, the owner just claimed that the tenants had difficulties in moving out and that he would continue to persuade them. The progress reports did not mention, as claimed by BD, that the social worker had paid any visit to the tenants or that he had encountered hostility from the tenants.

24. Surely, the objective of BD referring the case to the social worker was to help the tenants move out from the UBW/FR. The progress reports, however, showed that the social worker had only contacted Mr A time and again. BD should have known

well that what the social worker was doing had deviated from the original objective and that his efforts were a sheer waste of time. Even if what the social worker claimed were true (i.e. he had visited the tenants but they were hostile), given that the tenants had refused many times his offer to help, BD should not let the social worker continue talking to Mr A. It was unrealistic to expect that such talking would result in Mr A convincing the tenants to move out. Those efforts were destined to fail.

25. The protracted dialogue between the social worker and Mr A had caused the case to drag on for a further **16 months**.

26. In the course of investigation, we were unable to ascertain the extent of delay that the UBW/FR had caused to the OC's compliance with BD's BIN. Nevertheless, we consider that since BD had already issued the Order against the UBW/FR, it was reasonable of the OC to expect that BD would take enforcement action vigorously so that the UBW/FR would be removed as soon as possible to facilitate the OC's compliance with the BIN and the necessary repair works.

27. The Ombudsman considers that BD had procrastinated its enforcement action against the UBW/FR and the delay was rather serious. That had caused great distress to the OC as it was worried that the continued existence of the UBW/FR would hinder its compliance with the BIN.

CASE 2: Delay in Registering an Order at LR, to the Detriment of New Owner

The Complaint

28. Ms B complained to this Office that BD had failed to register at LR a removal order issued in 2009 ("the 2009 Order") against a UBW item at a residential flat ("Flat X"). As a result, she purchased Flat X without knowing the existence of the UBW item. The responsibility for removing the UBW item was in the end shifted to her.

Our Findings

The Events

29. It was in August 2015 that Ms B purchased Flat X. The transaction was completed in late September 2015. Between the date of signing the sale and purchase agreement and the date of completing the transaction, the solicitors engaged by Ms B had searched LR's land registers twice. The 2009 Order issued by BD against Flat X was not shown there.

30. In November 2015, BD issued another order ("the 2015 Order"), requiring the owner of Flat X to remove the UBW item. The 2015 Order mentioned that BD had issued the 2009 Order to the former owner ("Mr C"), requiring him to remove the UBW item.

31. The responsibility for removing the UBW item was thus shifted to the new owner Ms B.

BD's Explanation for Not Registering the 2009 Order at LR

32. BD's explanation was as follows.

33. BD always register removal orders at LR, so that prospective buyers and mortgage institutions will become aware of the UBW when they conduct a land search.

34. However, prior to 2011, an internal document of BD known as "Existing Buildings Division Manual" ("the Old Guidelines") stipulated that removal orders issued under the so-called "Blitz UBW Clearance" operations were not required to be immediately registered at LR, the reason being that from BD's experience, most owners would comply with removal orders before the deadline. In order to minimise any inconvenience to the owners and to save registration costs, BD would not register removal orders at LR until after several months of non-compliance.

35. Moreover, BD explained that under section 44 of the Ordinance, a person aggrieved by any decision made by the Building Authority (i.e. the Director of BD) may appeal against the decision. Unless the Building Authority is of the opinion that an emergency exists, with effect from the day a notice of appeal is given, the Building Authority shall neither enforce nor permit the enforcement of such decision until the appeal is disposed of or unless it is withdrawn or abandoned.

36. In this case, BD issued an order in March 2009 (i.e. the 2009 Order), requiring Mr C to remove the UBW item. In April 2009, Mr C appealed against the 2009 Order. Under section 44 of the Ordinance, BD should not enforce the 2009 Order when the appeal of Mr C was under way.

37. On the grounds stated in paragraphs 34 to 36 above, BD had not registered the 2009 Order at LR.

38. As for the 2015 Order, since the ownership of Flat X had changed, BD issued the 2015 Order to the new owner to supersede the 2009 Order.

39. Since 1 April 2011, BD has adopted a new policy to promptly register at LR any orders issued under "Blitz UBW Clearance" operations. Hence, BD sent the 2015 Order to LR in June 2016 for registration.

40. BD is of the view that owners should be responsible for any UBW items found in their property. That no removal order has been issued against a particular property does not mean that the property is free from UBW. Therefore, prospective buyers should take precautionary measures (such as inspecting the property and seeking professional advice) to ascertain whether there are any UBW items in the property that

they intend to purchase. Owners or prospective buyers may also enquire of BD about any outstanding order in respect of a property, or whether there is any order pending issue. BD will provide the information.

41. There is a message on BD's website (in the Frequently Asked Questions section) reminding the public to conduct a search of the land records kept by LR or write to BD to enquire if they want to know whether there is any outstanding order issued against a certain property.

Our Comments

42. We consider that the Old Guidelines of BD basically defeated the original purpose of registering a removal order at LR, i.e. to impose an encumbrance on the property concerned, thereby urging the owner to demolish the UBW item voluntarily, and to protect the interests of prospective buyers and mortgage institutions by enabling them to know the existence of the removal order (and hence the UBW item) when they conduct a land search.

43. Deferring registration of removal orders at LR will prejudice the right to information of prospective buyers and mortgage institutions. Although the registration of orders at LR may cause some inconvenience to the property owners and BD will incur registration costs in the process, protecting the right to information (and the actual interests) of prospective buyers and mortgage institutions is of greater importance. We find it inconceivable that BD should sacrifice the interests of prospective buyers for the sake of administrative convenience, and indirectly favour the owners of properties containing UBW items. After all, any "inconvenience" to the property owners will disappear once they have complied with the removal orders.

44. Moreover, most people would not know that BD may follow the Old Guidelines and defer the registration of some statutory orders. In this case, more than six years after its issuance, BD still did not send the 2009 Order to LR for registration. As a result, the solicitors engaged by Ms B were unaware of the 2009 Order even after conducting searches at LR twice. We do not dispute that prospective buyers themselves have a responsibility to ascertain whether there is any UBW item in the property they intend to purchase, but that does not absolve BD from its responsibility to promptly send removal orders to LR for registration.

45. BD also mentioned that the reminder on its website has already alerted the public that they should do a search of the records kept by LR **or** write to BD to enquire. Nevertheless, that reminder does not tell the public that the Department may defer for several years its action of sending a removal order to LR for registration. Nor would the public know that doing a land search is actually not sufficient to safeguard the interests of prospective buyers; they **must** also make an enquiry of BD.

46. BD's practice has undermined the confidence of prospective buyers in LR as a source for verifying the status of a property before completing a transaction.

47. Furthermore, section 44 of the Ordinance only stipulates that BD shall not enforce an order until an appeal is disposed of. In fact, registering the order is fundamentally different from taking enforcement action. Our view is that BD has erred in involving section 44 of the Ordinance as a reason for not registering the 2009 Order at LR.

48. Although the 2009 Order was under appeal by Mr C, the Order in fact remained valid until the appeal was successful. BD should have registered the order at LR. If Mr C eventually succeeded in his appeal, BD could then simply register at LR its cancellation of the Order.

49. The Ombudsman considers it extremely improper of BD not to have the 2009 Order registered at LR.

50. In response to our comments, BD has undertaken to adopt the following improvement and remedial measures:

- (1) to amend its website information to remind the public that:

Some of the orders issued by BD have not been registered at LR. Even when no order has been issued against any UBW item in a particular property, that does not mean that the property is free from UBW. Moreover, the new owner will be held liable for any UBW item found in his/her property. Prospective buyers have a duty to inspect the property and check the approved building plans at BD's Building Information Centre or Building Records Access and Viewing On-line System, so as to ensure that there is no UBW item in the property. Where necessary, they should seek professional advice;

- (2) to register any outstanding removal orders at LR when the Department follow up on cases of non-compliance with the orders; and
- (3) to complete the upgrade of its information system by January 2017 to show the registration dates of all newly issued removal orders so as to facilitate the Department's monitoring.

Recommendations

51. Based on our findings in Case 1 and Case 2 above, The Ombudsman has recommended that BD:

- (1) take firm enforcement action as soon as possible against any person who refuses to comply with its removal order;
- (2) review the way social workers follow up on UBW cases, so as to avert offenders' delay tactics;
- (3) amend its website information as described in paragraph 50(1) above, as soon as possible, to remind the public that some of the orders issued by BD have not been registered at LR and that even when no order has been issued against any UBW item in a particular property, that does not mean that the property is free from UBW. BD should also notify the Law Society of Hong Kong, the Estate Agents Authority and other institutions engaging in property transactions of the amendment; and
- (4) diligently implement the remedial measure as stated in paragraph 50(2) above, i.e. registering any outstanding orders at LR when the Department follow up on cases of non-compliance with the orders.

**Office of The Ombudsman
December 2016**