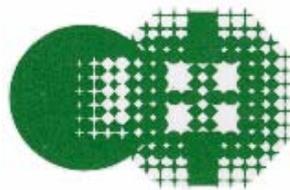


DIRECT INVESTIGATION REPORT

**"SPECIAL PROCEDURES" OF
BUILDINGS DEPARTMENT FOR HANDLING
UBW CASES INVOLVING CELEBRITIES**

January 2014



**Office of The Ombudsman
Hong Kong**

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1

INTRODUCTION

BACKGROUND

1.1 Since 2011, a number of local celebrities (including senior Government officials and Members of the Executive Council (“ExCo”) and the Legislative Council (“LegCo”)) had become the subjects of extensive media coverage for suspected unauthorised building works (“UBW”) in their properties. As the media reports gave rise to such questions as whether the parties involved had breached the law and whether the Administration had handled such cases with impartiality and fairness, they attracted much public attention.

1.2 This Office later learned from media reports that since mid-2011, the Buildings Department (“BD”), which is responsible for dealing with UBW, had already been using a set of procedures specially for handling UBW cases involving celebrities (“celebrity cases”). By according priority to investigating celebrity cases, BD hoped to be able to answer public queries about such cases as soon as possible. In this report, we conveniently dub those procedures “special procedures”.

1.3 As celebrity cases emerged one after another in 2012 and the general public continued to express concern about the Administration’s handling of such cases, The Ombudsman started in December 2012 to make preliminary inquiries. On 4 November 2013, he decided to initiate a direct investigation against BD, pursuant to section 7(1)(a)(ii) of The Ombudsman Ordinance (Cap 397).

SCOPE OF INVESTIGATION

1.4 This investigation aims at examining the above-mentioned “special procedures” and their implementation by BD, with a view to identifying inadequacies if any.

PROCESS

1.5 We have studied the documents and files from BD, as well as the press releases issued by the Administration. In addition, we have held meetings to exchange views with BD officials in the course of our investigation.

1.6 On 18 December 2013, we issued a draft investigation report to BD for comments. This final report, incorporating the comments from BD, was completed on 17 January 2014.

2

GENERAL ENFORCEMENT POLICY AND PROCEDURES

DEFINITION OF UBW

2.1 UBW include the following three types of construction works carried out in buildings:

- (1) any addition or alteration to the building without the prior approval of the Building Authority (“BA”, i.e. the Director of Buildings);
- (2) minor construction works not carried out in compliance with the Minor Works Control System as stipulated in the Buildings Ordinance (“BO”) (Cap 123); and
- (3) construction works which, while having no impact on the structure of a building and hence exempted from obtaining the prior approval of BA, does not comply with the building standards specified in building regulations.

2.2 Common examples of UBW items include flat roof/rooftop structures, supporting frames for air-conditioners or cooling towers, and unauthorised building works related to the subdivision of flats into “partitioned flats”.

STATUTORY POWERS

2.3 Being the Department responsible for enforcing the BO, BD is

empowered by the BO to take enforcement actions against UBW. BD officers may, under section 22(1) of the BO, enter any premises or enter upon any land to ascertain whether any building, structure or land is dangerous or liable to become dangerous. Where necessary, BD officers may, in the presence of a police officer, break into any premises. For enforcing the above provision, section 22(2) of the BO also authorises BD officers to take any actions or steps that they consider necessary, including the making of openings and the taking of reasonable samples.

2.4 The power of BD officers as conferred by section 22(1) mentioned above is subject to the restrictions as set out in section 22(1A), i.e. except in case of emergency, BD officers must have obtained the permission to enter by the owner or occupier of the premises or land, or a warrant issued by a magistrate¹. Otherwise, they may not enter the premises or enter upon the land under section 22(1).

2.5 When premises are confirmed to have UBW, the Director of Buildings can issue a “statutory order” pursuant to section 24(1) of the BO, requiring the owner of the premises to demolish, remove or alter the UBW before a specified date. In case of non-compliance by the owner, section 24(3) of the BO provides that BD can instruct its contractor to carry out the action as required by the order and, pursuant to section 24(4) of the BO, recover the cost from the owner, who may also be subject to criminal prosecution for failure to comply with the order.

2.6 If there is evidence that a person who has statutory responsibility (such as an authorised person or a registered structural engineer) knowingly violates the requirement that BD’s prior approval must be obtained before commencement of building works, or makes false statements to BD, the Department will conduct a criminal investigation into the case and seek legal advice from the Department of Justice whether or not to institute a prosecution.

ENFORCEMENT POLICY

2.7 BD formulated an enforcement policy on UBW in 1975 and revised it

¹ Section 22(1B) of the BO stipulates that a magistrate may issue a warrant authorising entry or even breaking into any premises if there are reasonable grounds for suspecting that with respect to the building works that have been or are being carried out, there is material divergence or deviation from any plan approved; or that the building works are not in compliance with the standard of structural stability, public health or fire safety; or that the premises have been rendered dangerous and entry into the premises by an authorised officer has been refused or could not be gained and the notice of the intention to apply for a warrant has been served on the owner or occupier of the premises.

in 1988. Under the policy, BD would accord high priority to tackle those UBW items that pose obvious hazards or imminent danger to life or property, are under construction or newly completed, or cause serious health problems or environmental nuisance.

2.8 In April 2011, BD further revised the policy by extending the coverage of high priority cases of actionable UBW to include all UBW items on the exterior of buildings, including those on rooftops, podiums and yards as well as those found in alleys or extending from external walls, irrespective of their level of risks to public safety and whether they are newly completed. The Department's revised enforcement policy is set out in **Annex A**.

2.9 For UBW items not requiring priority enforcement actions, BD will issue an advisory letter or a statutory warning notice to the owner depending on the situation. Where a statutory warning notice is issued, BD will send the notice to the Land Registry for registration against the title of the property to impose an encumbrance. The warning notice will be cancelled only after BD has confirmed that the irregularities are rectified.

2.10 In April 2012, BD started implementing a new enforcement policy for UBW in New Territories Exempted Houses² ("NTEHs"). Apart from the established policy to first tackle those UBW items that pose imminent danger or are under construction or newly completed, BD will also take enforcement action under the First Round Targets Scheme³ against UBW items with no imminent danger but potential risk. In case the irregularities are less serious and the potential risk of the existing UBW item is relatively low, BD will allow the owner to submit an application under the Reporting Scheme⁴ to appoint some qualified persons to conduct an inspection. If the reported UBW item meets the requirements, the owner will only have to carry out regular safety checks instead of removing it immediately.

² New Territories Exempted Houses normally refer to village houses in the New Territories, which are exempted under the Buildings Ordinance (Application to the New Territories) Ordinance and, therefore, not subject to part of the provisions of BO (including the provisions about approval by BD and its consent to building works) as well as the associated regulations. They include village houses built by indigenous villagers in the New Territories under the Small House Policy.

³ Regarding existing UBW cases with no imminent danger but serious violations and higher potential risks (such as village houses having more than three storeys or those with an enclosed UBW item covering more than half of the rooftop), BD will include them in the First Round Targets Scheme and carry out large-scale clearance operations in the villages concerned, one by one.

⁴ BD accepted applications under the Reporting Scheme from 1 April to 31 December 2012.

ENFORCEMENT PROCEDURES

2.11 Upon receiving a report of UBW, BD will decide when to carry out site inspections according to the nature of the case, e.g. whether the UBW item constitutes imminent danger and may become imminently dangerous. BD has in place the following performance pledges for conducting site inspections in different circumstances:

UBW with Imminent Danger

Location of UBW Item	Performance pledge for conducting site inspection (From receipt of report)	
	Office Hours	Non-office Hours
Urban areas	1.5 hours	2 hours
New towns in the New Territories	2 hours	2 hours
Other areas in the New Territories	3 hours	3 hours

UBW without Imminent Danger

Nature of UBW Item	Performance pledge for conducting site inspection (From receipt of report)
Work in progress	48 hours
On the external wall of building	30 days
Others	50 days

2.12 BD officers will take into account their observations during site inspection or any evidence at hand to decide whether the building works concerned should be categorised as UBW. They will also look for any other UBW items in the vicinity of the reported one. Where other UBW items are found, BD officers must carefully verify the situation and submit a report.

2.13 During the investigation, if BD officers suspect that there are UBW

items on the premises concerned but cannot confirm the case, they will usually require the owner to provide information for BD to decide whether and how to take further action. According to BD's operational guidelines, if no high priority cases of UBW can be found or confirmed and no apparent danger is observed after three site inspections, BD may stop action and wait until there is further information or evidence to support a re-investigation and other appropriate follow-up actions.

2.14 Where the UBW items are confirmed to be high priority cases (**para. 2.8**) but with no imminent danger, BD will first issue an advisory letter to the owner urging immediate rectification. In case the owner fails to rectify the irregularities before the deadline given in the advisory letter, BD will then issue a statutory order requiring him/her to demolish, remove or alter the UBW items concerned and have the order registered in the Land Registry against the title of the property. For high priority cases involving UBW with imminent danger, or UBW items already included in large-scale operations for removal⁵, however, BD will issue a statutory order without first issuing an advisory letter.

2.15 In general, BD will notify the informant of the progress or result in 30 days after completing the investigation.

2.16 In normal circumstances, owners of UBW items are required to comply with the statutory orders within two months. After the deadline, BD will conduct a further site inspection to check whether the irregularities have been rectified. In case of non-compliance, BD will issue a reminder and a warning letter to the owners, advising them that the Department will consider instituting prosecutions if they continue to disregard the orders. On receipt of the orders, owners who have difficulty in arranging rectification works may apply to BD for extending the deadline⁶ for compliance. They may also raise objection against the orders by appealing to the Appeal Tribunal (Buildings) under section 44 of the BO. Pending the outcome of an appeal, BD will suspend its enforcement of the relevant order.

2.17 A flowchart showing BD's general handling of reports on UBW is at **Annex B**.

⁵ Apart from tackling UBW items reported, BD will initiate a number of large-scale operations to remove in one go the UBW items of a group of target buildings for higher efficiency in UBW clearance.

⁶ BD will consider whether to grant an extension of deadline depending on the situation of individual cases, such as the scale of demolition works involved, level of difficulty and complexity of the process.

3

“*SPECIAL PROCEDURES*”

ORIGIN, OBJECTIVE AND MAIN FEATURES

3.1 Between mid-2011 and early 2012, the media reported a number of UBW incidents involving celebrities, which gave rise to considerable public concern.

3.2 In February 2012, in a reply to the media regarding the progress of investigation into a certain celebrity case, the then Secretary for Development (“SDEV”) first disclosed that the Administration had formulated the “special procedures” mentioned in **para. 1.2** for handling celebrity case. Below is an extract of the reply:

“You may remember that in the middle of last year (2011), there were a number of UBW incidents involving senior Government officials, celebrities and Council Members. Therefore, BD has some established procedures in place. If the owner involved in a UBW case reported by members of the public or the media is a social celebrity and it has given rise to serious concerns among the media as well as the community, BD will take priority follow-up action under the procedures established last year...We will also try our best to cooperate with the media and provide the information you require in order to allay public concerns.”

3.3 Subsequently, SDEV and the Director of Buildings provided further information in response to questions from LegCo Members and the media on various occasions. They reiterated that the essence of the “special procedures” lies in carrying out priority inspection to ascertain the existence of the reported UBW item as soon as possible in order to allay public concerns.

3.4 In response to our investigation, BD explained that:

- (1) The “special procedures” apply to cases involving senior Government officials (including the Chief Executive, Secretaries of Bureaux, officials under the accountability system, permanent secretaries and heads of departments) and social celebrities (including ExCo and LegCo Members and other influential people in the community).
- (2) Taking “priority follow-up action” under the “special procedures” refers to carrying out site inspection and investigation on the day of receipt of a UBW report from the media/the public, or in any case, not later than a few days afterwards.
- (3) On receipt of media enquiries, BD will disclose the progress and result of its investigation to the media. If many enquiries about the same case are received, BD will respond by way of a press release. To care for the feeling and to protect the privacy of the person(s) involved, BD will only sum up the situation when announcing its investigation result or progress, rather than giving full details.

3.5 The decision whether to apply the “special procedures” to a case rests with the Director of Buildings himself.

3.6 BD also stressed that the objective of priority inspection and investigation (“priority follow-up action”) is just to respond to questions from the public and the media as soon as possible. After completing its investigation, BD will take further actions entirely in accordance with its general policy and procedures. It will act strictly according to the law and be impartial to all. It will not be particularly stringent or lenient to any person in its enforcement actions just because of his/her identity..

3.7 BD confirmed that it had not produced any document to spell out the “special procedures”.

ENFORCEMENT OVERVIEW

3.8 As at December 2013, BD had applied the “special procedures” to 46

UBW cases (none of them posed any imminent danger), of which 29 cases had been investigated and concluded. Those cases were concluded mainly because:

- the owner had voluntarily removed the UBW items;
- the UBW were not under the priority action category and no further action by BD was necessary, apart from issuing an advisory letter or a statutory warning notice (**para. 2.9**);
- the building works involved were exempted works which did not require the prior approval of BA and did not contravene any regulations under the BO.

3.9 As for the 17 cases still in progress, BD had also completed its investigation and confirmed that all the UBW items were subject to priority action but did not pose any imminent danger. Those cases remained outstanding mainly due to the following situations:

Non-NTEH Cases

- BD had issued advisory letters, but the owners had not commenced any rectification works. BD was preparing the issuance of statutory orders;
- BD had issued statutory orders, but the owners had not commenced or completed the rectification works. BD was preparing further action;

NTEH Cases

- the NTEH owners had submitted applications to BD under the Reporting Scheme;
- the UBW items had been identified by BD as First Round Targets awaiting removal.

3.10 For our analysis of BD's implementation of the "special procedures", please see **Chapter 4**.

4

OUR OBSERVATIONS, COMMENTS AND RECOMMENDATIONS

OUR OBSERVATIONS AND COMMENTS

Formulation of “Special Procedures”

4.1 When celebrities, in particular senior Government officials and politicians, are suspected of having UBW in their properties, their personal integrity would often be called into question. Such incidents would also easily trigger discussions on whether those celebrities have breached the law and whether the Administration was handling their cases in a fair and impartial manner. Understandably, the public would be anxious to know the truth as soon as possible. With a large number of such cases cropping up, it was timely and appropriate of BD to make a decision in mid-2011 to start adopting the “special procedures” (**paras. 3.1-3.3**), under which “priority follow-up action” is to be taken in celebrity cases in order to answer queries as soon as possible. We find the arrangement justifiable.

4.2 We also agree that once inspection of and investigation into celebrity cases are completed, BD should take enforcement actions entirely in accordance with its general policy and procedures. It should act strictly according to the law and be impartial, and must not be particularly stringent or lenient to any person just because of who he/she is (**para 3.6**).

4.3 Nevertheless, the “special procedures” are, after all, a new measure different from the established procedures for handling ordinary UBW cases and are

directed against a certain category of people in the community (i.e. celebrities). Hence, this Office considers that the Administration should have quickly promulgated its decision to adopt the “special procedures”, apprising the public of the details and the rationale. It should not have waited for over half a year until the media enquired about a certain celebrity case, to disclose that a set of “established procedures” was already in place to deal with celebrity cases (**para. 3.2**). The Administration’s action in this respect had indeed been too slow and passive. No wonder some people had in the interim queried BD’s way of handling celebrity cases.

4.4 Besides, more than two years have lapsed since BD implemented the “special procedures” and dozens of cases have already been handled through those procedures (**para 3.8**). Yet BD has not produced any written instructions on them. We consider this state of affairs quite unsatisfactory. Detailed explanation on those procedures had never been formally given. That in paragraph 3.4 was provided only in response to our investigation. Furthermore, there may also be different interpretations on the requirement of “conducting site inspections and investigations **within a few days** at the latest (**para. 3.4 (2)**).” In the absence of operational guidelines, different officers may have different understanding of the “special procedures”, which may in turn lead to different ways of handling cases.

Implementation of “Special Procedures”

4.5 To examine how BD had been implementing the “special procedures”, we selected, among the 46 celebrity cases (**para 3.8**), 15 cases which were of a relatively serious nature.

4.6 Since the highlights of the “special procedures” are BD’s “priority follow-up action” in celebrity cases to “ascertain the existence of UBW”, with a view to “addressing public concerns”, but subsequently “taking enforcement actions impartially and strictly in accordance with the law” (**paras. 3.2, 3.3 and 3.6**), our examination of BD’s implementation of those procedures would focus on these four areas.

4.7 Regarding “**priority follow-up action**”, we note that in most cases, BD managed to conduct a site inspection “within a few days” as stipulated in the “special procedures”. Only in one case did BD conduct an inspection ten days after receiving the UBW report.

4.8 BD attributed that to the heavy caseload of the officer during that period, and indicated that it would deploy more staff for timely inspection in future.

4.9 On “**ascertaining the existence of UBW**”, in the majority of cases, BD was able to ascertain in its first inspection whether the UBW items reported by the media existed or not.

4.10 However, in one case, BD failed to ascertain the existence of the reported UBW item during its inspection. Subsequently, BD repeatedly sought explanation from the authorised person appointed by the owner, but no specific response was received. The investigation dragged on for several months without any result.

4.11 With respect to that case, BD explained that its staff had not found any obvious or imminent danger on the premises, and there was no substantial evidence to support an application to the court for a warrant (**para. 2.4**) authorising the Department to take further action. Nevertheless, as an item of building works not in the approved building plans (though it could be an exempted item) was found, BD requested the authorised person to provide information in accordance with its usual practice (**para. 2.13**).

4.12 We have no way to ascertain the site situation at the time of BD’s investigation. If BD’s account of the events is true, we find it not unreasonable of BD just to request explanation from the authorised person appointed by the owner based on the observations of its staff, which was also in keeping with its general practice of handling suspected UBW cases. However, the objective of the “special procedures” is to respond to questions from the public and the media as soon as possible (**para. 3.6**). In the aforementioned case, BD still could not announce its investigation result to the public/the media after several months. The objective of the “special procedures” was clearly not fulfilled.

4.13 On “**allaying public concerns**”, except for the one mentioned above, BD was in every case able to give the media or the public a summary of the result of its site inspection (including all the UBW items found during the inspection), whether the UBW items were on the priority action list, and what further actions would be taken (**para. 3.4(3)**).

4.14 Regarding “**acting according to the law and being impartial in**

enforcement actions”, in all the 15 celebrity cases we examined, BD had taken enforcement actions according to the relevant laws. However, we have the following observations on 9 of those cases:

- (1) In 2 cases, no advisory letters urging the owners to commence rectification works were issued for more than six months after the UBW items had been confirmed.
- (2) In 6 cases, the owners failed to commence rectification works within the period specified in the advisory letters, but statutory orders had yet to be issued one year afterwards.
- (3) In 2 cases, BD did not issue warning letters to the non-compliant owners until more than six months or even one year after the deadlines given in the statutory orders.
- (4) In 1 case, BD only instituted prosecution against the non-compliant owner some eight months after issuing the warning letters.

4.15 BD explained that the 9 cases cited above needed more handling time because they were either cases that would be dealt with in “large-scale clearance operations” or cases involving UBW items “to be handled progressively”⁷.

4.16 We understand that whether celebrities are involved or not, the time taken for handling a case can vary because of different factors, and BD has already told the public time and again that the number of UBW items in the territory that require priority enforcement actions greatly exceed the Department’s ability to tackle them quickly. Nevertheless, as BD has accorded higher priority to celebrity cases in conducting inspections and announcing the results, the public would naturally be interested in what further actions it would take in such cases. Judging from the 9 cases cited above, however, BD’s efficiency in taking enforcement actions could hardly live up to public expectation.

⁷ UBW items that “require priority enforcement actions and would be handled progressively” include those on rooftops and podiums or in yards and alleys. Before the revised enforcement policy of April 2011 (**para. 2.8**), those items were not regarded as UBW that required priority enforcement actions. BD had expected numerous UBW reports when the new policy started to take effect. Moreover, apart from those reported, BD would take enforcement actions against other UBW items in the same building and the number of actionable UBW items might exceed the capacity of BD in issuing statutory orders. Therefore, BD must prioritise those items and issue statutory orders according to their order of priority.

4.17 Between 2011 and 2013, this Office handled more than 100 public complaints about BD's handling of UBW and around 30% of those complaint cases involved some faults or inadequacies on the part of BD. The faults or inadequacies were largely about delays in taking enforcement actions. This shows that it is quite common for BD to take long in handling UBW cases.

4.18 Although there is no evidence to prove that BD has been particularly lax in dealing with celebrity cases, there are often delays in its handling of UBW cases (whether celebrities are involved or not). We consider that BD should probe into the reasons for such delays and try to find a solution to the problem. Failing to do so would not only undermine its authority, but worse still, may also gravely affect public safety.

OUR RECOMMENDATIONS

4.19 The Ombudsman makes the following recommendations to BD:

- (1) to take reference from this study and, when implementing new measures in future that may affect the public, announce the details and the reasons as soon as possible (**para. 4.3**);
- (2) to document the "special procedures", setting out the objective, rationale and working guidelines for staff to follow (**para. 4.4**);
and
- (3) to probe into the reasons for delays in handling UBW cases and try to find a solution to the problem (**para. 4.17**);

ACKNOWLEDGEMENT

4.20 The Ombudsman thanks BD for its full cooperation during this investigation.

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Under the enforcement policy revised in April 2011, the Buildings Department will give priority to removal of the following categories of unauthorised building works items:

- (1) items constituting obvious or imminent danger to life or property (such as obstructing the means of escape or subdivision of flats causing damage to building structures);
- (2) items constituting a serious health or environmental nuisance (e.g. improper connection of drainage systems);
- (3) new items (excluding statutorily exempted building works under the Buildings Ordinance), irrespective of the date of completion of the building where such works have been carried out;
- (4) items on the exterior of buildings, including those on rooftops and podiums, in yards and lanes, and projecting from external walls (excluding projecting structures covered by the Household Minor Works Validation Scheme and the Signboard Control System, and other minor amenity features);
- (5) major standalone items;
- (6) a specific type of items, or items identified in buildings or groups of buildings, targeted for large-scale operations; and
- (7) unauthorised alterations to or other UBW in green and amenity features of a building (e.g. balconies, sky gardens and podium gardens) for which exemption from calculation of gross floor area has been granted by the Building Authority.

Flow Chart on Handling of Reports on Unauthorised Building Works (UBW)

Appendix 2

