

# **Complaint against Food and Environmental Hygiene Department for failing to properly handle the hygiene problem caused by roadside car washing activities of car washing shops**

## **Investigation Report**

Mr X complained to this Office against the Food and Environmental Hygiene Department (“FEHD”).

### **Background and Our Investigation**

2. On 26 April and 7 May 2019, this Office received respectively Mr X’s email and complaint form complaining against the Environmental Protection Department (“EPD”) and FEHD. Mr X alleged that since end-2018, he had repeatedly complained to EPD about two car washing shops (“the Shops”) polluting the environment with their frequent car washing and polishing activities on the roadside. Yet, the problem persisted. He subsequently learned from a paper of the relevant District Council that enforcement against the problem was largely FEHD’s responsibility. He was dissatisfied that both EPD and FEHD had failed to properly follow up on his complaint.

3. We subsequently initiated inquiries with EPD and FEHD and, having completed the inquiries, replied to the complainant on 22 July. We considered that EPD had properly followed up on Mr X’s case; and although FEHD had never received his complaints, it had co-operated with EPD and conducted joint operations upon its request.

4. Nevertheless, we saw from the CCTV footage provided by Mr X on 10 June 2019 that the Shops had been washing cars on the roadside frequently, and that some apparently plain-clothed officers had repeatedly conducted inspections and taken photographs at the location in question (“the location”) for record. Yet, they moved away objects of obstruction on the street every time before taking photographs, or deliberately took photographs at spots where the car washing activities could escape the camera. These signs suggested that they intentionally concealed the actual cleanliness of the street.

5. In this connection, this Office decided to initiate a full investigation into Mr X’s allegation against FEHD for failing to properly handle the Shops’ illegal roadside car washing activities, and informed FEHD and the complainant of the decision on 22 July 2019. On 8 November 2019, we sent FEHD a draft investigation report for comments. On 29 November, we received FEHD’s reply. We completed this investigation report on 17 December after considering FEHD’s views and suitably incorporating its views in the report.

### **Our Findings**

## ***Relevant Legislation***

6. The Fixed Penalty (Public Cleanliness and Obstruction) Ordinance (“the FPO”, Cap 570) confers power on FEHD-designated public officers to issue fixed penalty notices with respect to certain offences described in Schedule 1, one of which is provided in section 4(1) of the Public Cleansing and Prevention of Nuisances Regulation (Cap 132BK, “the Regulation”), i.e. depositing waste (including wastewater) on or in any street or public place. Generally speaking, any FEHD-authorized enforcement officer can, upon witnessing any person committing any of the above scheduled offences that may lead to the issuance of a fixed penalty notice, issue such notice to the offender based on the circumstances at the scene and evidence available. Upon receipt of a complaint about an irregularity, FEHD staff would conduct inspections.

7. Regarding the requirement of proof for instituting prosecutions against roadside car washing activities, FEHD’s enforcement officers have to collect sufficient evidence to prove that the person washing the car intentionally fouls the road surface by dumping wastewater with litter in a public place, or that he/she has no intention to clean the place after washing the car. Only with such evidence can they issue a fixed penalty notice to the offender pursuant to section 4(1) of the Regulation. In some situations, enforcement officers may not be able to confirm at once the criminal intent of the offender, so they have to spend more time to observe the allegedly illegal activity before taking enforcement action. As for roadside car polishing activities, FEHD enforcement officers cannot institute prosecutions by invoking the above Regulation unless they witness someone dumping waste in a public place.

## ***CCTV Footage Provided by Complainant***

8. This Office discovered the following upon scrutinising the CCTV footage (taken between May and June 2019) provided by the complainant:

- (1) numerous scenes showed that three apparently plain-clothed staff (thereafter referred to as “Staff A”, “Staff B” and “Staff C”) had taken photographs at the location. Yet, before doing so, they moved away objects of obstruction believed to belong to the Shops, then placed them back on the street afterwards. We saw in those CCTV footage that:
  - (a) on 25 May, when Staff B arrived at the location to take photographs, someone was washing a car. Nevertheless, Staff B just took photographs at spots where the car washing activity could escape the camera. He took photographs at the spot of the car washing activity only after that person had finished washing the car;
  - (b) on 28 May, someone believed to be staff of the Shops took out a floor mat from a car and put it atop a fire hydrant so that he could clean the car. Staff A, who was wearing apparently the uniform

of an FEHD-outsourced cleansing contractor (“the contractor”), got off a vehicle and began to take photographs after removing the mat from atop the fire hydrant and other objects of obstruction which probably belonged to the Shops. Meanwhile, someone continued washing a car behind him;

- (c) on 29 May, Staff A went to the location again to take photographs. He twice greeted someone aboard a light van. After he had left, the light van was driven into one of the Shops. The van probably belonged to that shop or its customer;
- (d) on 3 June, Staff A appeared again to take photographs. He tapped the shoulder of a person who was washing a car. Upon Staff A’s departure, the Shops’ staff began to wash cars, both on the roadside and inside the Shop. In the process, wastewater kept flowing onto the street. Another footage of the same day showed that Staff A threw a cigarette butt on the roadside;
- (e) on 4 and 6 June, Staff A and C went to the location again to conduct inspections. On both occasions, they first moved away objects of obstruction that belonged to the Shops before taking photographs, then placed them back to where they had been afterwards. The footage of 4 June showed that Staff C was wearing apparently the uniform of the contractor;
- (f) on 21 May, three persons believed to be FEHD-uniformed officers arrived at the Shops to conduct inspection. A man was polishing a car on the street but the uniformed officers paid no heed and went straight to the Shops to talk with the staff. Then the officers left. Upon their departure, the man previously polishing the car resumed the task.

***Our Site Visits***

9. Our officer conducted site visits at the Shops on 16 July, as well as 19 and 29 August 2019. The observations are summarised below.

Date	Time	Observations
16 July	3 – 4 pm	(1) the Shops washed three cars one by one. Meanwhile, a large amount of wastewater flowed onto the street;  (2) illegal parking was rampant at the location. At its most serious, two to three cars believed to be using the Shops’ service were parked side by side on the road, such that other vehicles could not pass through

		and staff of the Shops had to drive those cars to the roadside or into the Shops for them to pass.
19 August	10:45 am to 12 noon	Two cars arriving one after another were driven into one of the Shops for washing service. Wastewater flowed out from the Shop to the street. When a third car arrived, staff of the Shop washed its body and hubcaps right on the roadside.
29 August	11 am to 12:30 pm	(1) all cars were being washed inside the Shops, but some were not completely parked into the Shops, so wastewater flowed onto the pavement;  (2) a shop staff rinsed fruit right on the roadside;  (3) cars believed to belong to the Shops' customers were parked outside the Shops for a long time. Some were even parked at the road centre.

## **FEHD's Response**

### ***On Monitoring Contractors and the CCTV Footage***

10. Every day, FEHD conducted random surprise inspections in areas under its jurisdiction to check the performance of its contractors. Contractors were, therefore, normally not required to submit photographs and reports regularly. Priority in inspection would be accorded to major facilities, singled-out locations and hygiene black spots in densely populated areas.

11. Upon careful scrutiny, FEHD confirmed that Staff A and C were employees of the contractor, while Staff B could not be identified. None of them were FEHD staff. The contractor later confirmed with FEHD that Staff A and C followed its own requirement to take photographs of the streets under its responsibility to report on their cleanliness.

12. FEHD pointed out that it did not ask the contractor to submit work records. As such, the aforementioned practice of the contractor's employees did not constitute hiding the cleanliness of the location from the Department. Neither did the contractor breach the contract. FEHD, on the other hand, had issued written warnings to the contractor because, as shown in the CCTV footage, Staff A and C were smoking at work and not wearing tidy uniform respectively. Furthermore, FEHD had urged the contractor to take note of the acts of Staff A and Staff C (e.g. moving away objects of obstruction that belonged to the Shops and turning their back on those washing the cars when taking photographs) and strengthen staff management.

### ***On the Department's Enforcement Actions***

13. FEHD indicated that its enforcement staff were in uniform while on duty in May 2019. The CCTV footage we provided (see paragraph 8(1)(f) above) showed that on 21 May, the three FEHD uniformed officers conducted inspection at the location around 11:25 am but found no one fouling public place while washing cars on the roadside or dumping waste in public place while polishing cars. The cleanliness of the street was considered acceptable. Notwithstanding this, the officers issued verbal warnings to the Shops' persons-in-charge at once. FEHD considered the three officers to have followed relevant guidelines of the Department in carrying out their duties.

14. Discharging untreated wastewater generated by car washing activities into roadside storm drain might be an offence under the Water Pollution Control Ordinance ("WPCO", Cap 358) liable to a maximum fine of \$400,000. Despite a higher enforcement threshold, the deterrent effect of WPCO was stronger in comparison with the FPO, which carried a maximum fine of \$25,000 or a fixed penalty of \$1,500. According to the enforcement requirements of the FPO mentioned in paragraph 7 above, FEHD enforcement staff had to spend longer time to observe the alleged offender's activities, and enforcement action was possible only when sufficient evidence could be collected. This might lower the chance of successful enforcement. In fact, FEHD staff conducted inspections at the location on 17, 18, 19, 21 and 24 May, but failed to collect sufficient evidence to prove non-compliance with the FPO. Their subsequent inspections on 5, 6, 8, 9, 10 and 12 September only resulted in the issuance of one fixed penalty notice on 12 September to a person washing a car on the roadside. Consequently, FEHD opined that a lower threshold of proof under the FPO had not made prosecution any easier.

15. FEHD considered that different Government departments had different responsibilities. Given that car washing service providers should apply to EPD for a discharge licence, related problems should be for EPD to handle. FEHD could help address the problem through participating in inter-departmental operations coordinated by EPD and taking appropriate actions in accordance with its jurisdiction, with a view to strengthening enforcement at the location and keeping streets cleaner.

### ***Overall Response from FEHD***

16. Overall, FEHD considered that the Shops' illegal parking and improper discharge of wastewater generated by car washing activities resulting in pollution of Hong Kong waters fell within the purview of the Police and EPD respectively. Nevertheless, FEHD would continue to provide daily cleansing services at the location and keep watch on the activities in question. If there was sufficient evidence, it would take appropriate actions against suspected offenders.

### ***Our Comments***

#### ***FEHD's Monitoring of the Contractor***

17. FEHD claimed that the contractor's employees followed the contractor's requirement to take photographs of the street where the Shops were located for internal monitoring. FEHD had never asked the contractor to do so and had no related information. The contractor did not breach the contract either (see paragraph 12 above). Yet, this Office is of the view that, while the contractor did not act upon FEHD's request in asking its employees to take photographs at the street concerned for internal monitoring, the employees' action was pertinent to the contractor's fulfilment of the service contract. The acts of the contractor's employees caught on CCTV (e.g. moving away objects of obstruction belonging to the Shops and turning their back on those washing the cars while taking photographs – see paragraph 8(1)(b) and (e) above) might have given the contractor a wrong impression of the cleanliness of the street, and eventually affected the cleansing service it rendered. It was indeed undesirable that FEHD had not probed into the situation.

18. In our view, in order to strengthen its monitoring of the contractor's performance, it is necessary for FEHD to further investigate the purpose of the contractor in asking its employees to take photographs of streets, as well as whether such act could achieve the purpose and would mislead the contractor about the cleanliness of the streets.

#### ***FEHD's Enforcement Actions***

19. FEHD expressed that as far as this case was concerned, its main duty was to keep public place clean. As the case involved problems such as illegal parking and improper discharge of wastewater generated by car washing activities resulting in pollution of Hong Kong waters, it should be dealt with by the Police and EPD (see paragraph 16 above). FEHD also considered that despite a higher prosecution threshold compared to the FPO, the WPCO enforced by EPD had a stronger deterrent effect (see paragraph 14 above); and the fact that the Department could only institute one prosecution against the Shops despite multiple inspections showed that a lower threshold of proof under the FPO had not made prosecution by FEHD any easier.

20. Indeed, Government departments should discharge their respective responsibilities and take enforcement actions based on actual circumstances and in accordance with their own powers. FEHD, wielded with the statutory authority conferred on it by the FPO, should have taken enforcement actions accordingly instead of adopting a laid-back attitude because other departments could also take action, or relying on joint operations coordinated by other departments (see paragraph 15 above). Firstly, we learnt from the previous complaint mentioned in paragraph 2 above that in order to fulfill stringent requirements of proof under WPCO, EPD must first collect sufficient wastewater samples at the point of discharge for laboratory testing, then trace and prove that the wastewater was indeed flowing to a public storm drain nearby. This requirement is obviously more rigorous than that of the FPO, which requires proof that the person washing the car intentionally fouls public place by discharging wastewater onto the road surface, or has no intention to clean up the place after washing the car.

21. FEHD pointed out that despite repeated inspections, it could only collect sufficient evidence during one inspection and issue one fixed penalty notice to the offender, illustrating that it was not easy to adduce evidence (see paragraph 14 above). FEHD also stated that, in some situations, enforcement officers had to observe longer to prove the criminal intent of the offender. In our opinion, however, the above only shows that the collection of evidence takes time, as opposed to difficulties in adducing evidence.

22. Furthermore, according to records of the five inspections conducted by its officers in May 2019 provided by FEHD, each inspection had the same outcome, i.e. no one was found to be in breach of the cleanliness legislation and cleanliness of the street was acceptable. As such, the reason for the fact that no fixed penalty notice could be issued despite multiple inspections was mainly that the FEHD officers did not see anyone breaking the law, as opposed to difficulties in adducing evidence.

23. In fact, we found in all our three site visits (see paragraph 9 above) that staff of the Shops were washing cars, equipment or fruit on the roadside. Even when they were washing cars inside the Shops, wastewater just flowed directly onto the street. Each of those three visits lasted just about an hour on average. During the inspection in July when the weather was better, our officer found upon arrival at the location that several cars were being washed.

24. We also noticed that FEHD officers were in uniform during surprise inspections (see paragraph 13 above). This might have raised the alertness of the offenders. During our site visits, we found some concealed spots nearby from where the car washing activities of the Shops could be observed. If the FEHD officers had stayed a bit longer when the weather was better, they could have collected sufficient evidence and taken action against the Shops without much hassle.

25. In light of the above, we consider that FEHD should step up enforcement and review the current inspection method (such as staying at the scene longer and conducting plain-clothed inspections) for better chance of successful collection of evidence.

26. Based on our analysis in paragraphs 17 to 25 above, this Office considers that both the enforcement and monitoring of contractors on FEHD's part had been insufficient, such that the problem persisted. The complaint against FEHD is **substantiated**.

## **Recommendations**

27. The Ombudsman recommends that FEHD:

- (1) closely monitor the performance of the contractor involved, including conducting more surprise inspections at the location (see paragraph 18 above); and

- (2) step up enforcement and review the current enforcement method (such as staying at the scene longer and conducting plain-clothed inspections) for better chance of successful collection of evidence (see paragraph 25 above).

### **FEHD's Response to our Draft Investigation Report**

28. FEHD had the following responses to our draft investigation report:

- (1) it reiterated that it would proactively conduct its own site inspections instead of relying on the reports submitted by the contractor for assessing its performance. Although we considered that the acts of its employees might have misled the contractor about the actual cleanliness of the street, FEHD had no reasonable grounds to interfere with the internal operation of the contractor. It had already reminded the contractor to take note of the integrity and conduct of its employees and strengthen staff management.
- (2) The Department had followed up on the case actively by conducting a number of inspections at the location. The numerous inspections in September were conducted by plain-clothed officers at concealed spots nearby. Nevertheless, prosecution could only be instituted where guilt was proved beyond reasonable doubt. Besides, while labour-intensive and protracted surveillance and evidence collection in one single case might increase the chance of prosecution, such measures were against the effective use of public resources and the public interest. Given the huge number of hygiene black spots in the district concerned, which might require more imminent enforcement action, FEHD could not have employed the same method of enforcement in every case.

### **Our Final Comments**

29. This Office could hardly agree with FEHD's comment in paragraph 28(1) above. We have no intention to ask FEHD to interfere with the contractor's internal operation unnecessarily. Nevertheless, given the concrete signs of suspicious actions of the contractor's employees and the fact that its employees' actions might have given the contractor a wrong impression about the cleanliness of the street and eventually affected its provision of cleansing service, we found FEHD's lack of action to probe into the matter indeed baffling. We consider it FEHD's duty to strengthen the monitoring of the contractor (e.g. to probe into the suspicious conduct of the contractor's staff and step up surprise inspections) to ensure that the latter's performance is up-to-standard.

30. On paragraph 28(2) above, we agree that FEHD should prioritise its enforcement actions on the principle of effective use of public resources, taking into account the hygiene condition of different locations. Yet, in this case, both the complainant and our officer witnessed the Shops' frequent roadside car washing

activities and fouling of public places. FEHD's claim that no irregularities were found despite repeated inspections (see paragraph 21 above) threw into the question the effectiveness of its inspection methods. We, therefore, deem the recommendation set out in paragraph 27(2) above necessary.

### **Conclusion**

31. In light of the above, The Ombudsman maintains her conclusion set out in **paragraphs 26 and 27** above. This Office would continue to follow up on the case until FEHD has fully implemented our recommendations.

**Office of The Ombudsman  
December 2019**