

Food and Environmental Hygiene Department's enforcement actions against unlicensed restaurants Investigation Report

In September 2021, the complainant complained to this Office against the Food and Environmental Hygiene Department ("FEHD").

The Complaint

2. The complainant complained to FEHD that a restaurant had been operating without a licence for years. Despite FEHD's prosecutions instigated against the restaurant, the unlicensed operation continued. The complainant was dissatisfied that FEHD had not applied to Court for a closure order against the restaurant ("Complaint Point (1)").

3. In May 2021, the complainant emailed FEHD, asking why it had not applied for a closure order against the restaurant. FEHD did not reply to the complainant ("Complaint Point (2)").

Our Follow-up

4. During our preliminary inquiry into the complaint, the complainant queried whether FEHD had properly followed up on the unlicensed operation of the restaurant.

5. After considering the complainant's query as well as the response and information from FEHD, we decided to conduct a full investigation in December 2021 and asked relevant Government departments for information. In October 2022, we completed the investigation and had the following findings.

Our Findings

Application for Food Business Licence

6. According to the Food Business Regulation ("the Regulation") and the prevailing licensing policy, any person who intends to operate a restaurant shall apply to FEHD for a full licence and/or a provisional licence.

7. If the basic requirements for an application are fulfilled, FEHD will issue a provisional licence with 6-month validity during which the restaurant can operate while FEHD will continue to process the application for a full licence.

8. All the licensing requirements should be complied with within 12 months after the issuance of a Letter of Requirements for a full licence or within six months upon the expiry of a provisional licence. The application will be cancelled if the applicant fails to comply with all the licensing requirements before the deadline unless such failure is due to factors beyond the applicant's reasonable control.

Relevant Legislation and Regulatory Policy

9. The Regulation stipulates that any person who operates a food business without a licence commits an offence and is liable to a maximum fine of \$50,000 and imprisonment for six months upon conviction, and to an additional fine of \$900 for each day if the offence is continuing ("daily fine").

10. According to FEHD's existing guidelines, the Department will inspect a food premises once a week if its operator has not applied for a food business licence and will instigate prosecution if any unlicensed operation is found. If the operator has applied for a food business licence, FEHD will inspect the premises every month and instigate prosecution if unlicensed operation is found.

11. Pursuant to section 128B of the Public Health and Municipal Services Ordinance, the Director of Food and Environmental Hygiene may apply to Court for a closure order against an unlicensed food premises ("Closure Order").

12. Amidst the policy and criteria FEHD has formulated, the categories and priority for applying for a Closure Order against unlicensed food premises are:

- (1) failure to comply with all the licensing requirements in 3 months after the expiry of a provisional licence; or
- (2) failure to comply with all the licensing requirements in 6 months after the issuance of a Letter of Requirements.

13. FEHD will accord priority for applying to Court for a Closure Order if the unlicensed food premises:

- (1) is not under application for a licence;
- (2) fails to meet the basic licensing requirements;
- (3) has record of 2 or more offences for causing obstruction by placing seats in the street;
- (4) is located at upstairs involving open flame (in particular those with hot pot activities);
- (5) causes serious environmental nuisance to the neighbourhood or has involved in food poisoning cases.

14. When enforcing a Closure Order, FEHD will lock or seal all the exits of the food premises and suspend the supply of water, electricity and gas in accordance with the statutory requirements. As the enforcement decision may affect other stakeholders, including the interests of the landlord of the premises concerned, or even the fire safety of residents in the building, FEHD has to ask relevant departments for information such as building plans and particulars of ownership before considering whether to apply for a Closure Order. FEHD will request building plans from the Buildings Department (“BD”) if the premises is a private property and consult the Housing Department if the premises is under the management of the Hong Kong Housing Authority (“HKHA”). Where the premises was sold by HKHA, FEHD will request building plans of the premises from the Independent Checking Unit (“ICU”) under the Office of the Permanent Secretary for Housing (previously under the Transport and Housing Bureau). Based on its inspections, prosecution records and information provided by other departments, FEHD will consider whether to apply for a Closure Order and determine further follow-up actions.

FEHD’s Explanation

Licence applications regarding the premises concerned (“the Premises”)

15. Between August 2017 and June 2021, three different applicants¹ had applied to FEHD’s Licensing Section for operating food business at the Premises. Records of the relevant applications are as follows:

¹ They all applied for operating a restaurant of the same name at the premises concerned. As the applicants were different, these applications should be taken as different applications for a restaurant licence.

- (1) The Licensing Section received an application for (provisional and full) General Restaurant Licences for the Premises (“Application A”) at the end of August 2017. Subsequently, FEHD issued a Letter of Requirements for full and provisional General Restaurant licences at the end of December. In late July 2018, FEHD issued a provisional licence with validity until late January 2019. The applicant failed to comply with all the licensing requirements before the expiry of the licence and Application A was cancelled in accordance with established procedures in early August 2019.
- (2) In mid-April 2020, the Licensing Section received from another applicant an application for (provisional and full) General Restaurant Licences (“Application B”). In early May, FEHD issued a Letter of Requirements for full and provisional General Restaurant licences. No provisional licence was issued as the applicant had not submitted the required documents. The applicant failed to comply with all the licensing requirements before the deadline and Application B was cancelled in accordance with established procedures at the end of May 2021.
- (3) In early June 2021, the Licensing Section received from another applicant an application for (provisional and full) General Restaurant Licences for the Premises (“Application C”). In early July, FEHD issued a Letter of Requirements for full and provisional General Restaurant Licences.

Relevant enforcement records

16. Between February 2018 and January 2022, the respective District Environmental Hygiene Office (“DEHO”) under FEHD took the following enforcement actions against the Premises:

- (1) During an inspection at the end of February 2018, DEHO found unlicensed restaurant operation at the Premises and prosecuted the operator.
- (2) In March 2018, DEHO inspected the Premises three times and found the unlicensed restaurant operation continued. DEHO’s application to

Court for imposing a daily fine for a total of 24 days based on the summons issued at the end of February 2018 was granted.

- (3) In early May 2019, DEHO found unlicensed restaurant operation at the Premises during an inspection and issued a summons to the operator. DEHO further inspected the Premises four times within the month and found the unlicensed restaurant operation continued. DEHO's application to Court for imposing a daily fine for a total of 29 days based on the summons issued in early May was granted.
- (4) From 2018 to January 2022, DEHO issued a total of 34 summons to different operators of the unlicensed restaurant at the Premises.
- (5) Between 2020 and 2021, DEHO received five complaints about the Premises, three of which were about unlicensed restaurant operations.

Complaint Point (1): Failing to apply for Closure Order

17. Under the prevailing policy, FEHD will consider applying to Court for a Closure Order against the operator of unlicensed food businesses when taking enforcement actions. In deciding whether such application should be made, FEHD will consider the factors mentioned in paragraphs 13 and 14.

18. FEHD's explanation for not applying for a Closure Order was as follows:

- (1) In late July 2018, a provisional licence valid until late January 2019 was granted to the Premises under Application A. As the operator had failed to comply with all the licensing requirements in 3 months after the provisional licence had expired but continued to operate the restaurant in late April 2019, FEHD could have put the Premises on the list for consideration of application to Court for a Closure Order. Nevertheless, according to the enforcement policy mentioned in paragraph 13, the Premises was not accorded priority for application for a Closure Order;
- (2) In October 2019, DEHO sent a memorandum to the ICU to request the layout plan of the Premises in order to further examine and assess whether it should apply for a Closure Order, but it received no reply

from the latter. Yet it did not make further request to the ICU for the layout plan;

- (3) In mid-April 2020, the Licensing Section received Application B from another applicant. Hence, it set aside the consideration of applying for a Closure Order;
- (4) The applicant of Application B failed to comply with the licensing requirements in 6 months after the issuance of the Letter of Requirements but continued to operate the restaurant. In early November 2020, FEHD could apply the criteria and consider applying to Court for a Closure Order;
- (5) In February 2021, DEHO sent a memorandum to BD, requesting the layout plan of the Premises so as to verify whether it was appropriate to apply for a Closure Order. Nevertheless, DEHO did not receive any reply from BD. Subsequently, DEHO did not make further request to BD for the layout plan;
- (6) In early June 2021, the Licensing Section received Application C from another applicant. Hence, DEHO set aside the consideration of applying for a Closure Order; and
- (7) In early July 2021, FEHD issued the Letter of Requirements to the applicant of Application C. When FEHD received our referral of this complaint (in September 2021), the deadline for compliance with the licensing requirements had not passed and DEHO had no basis to apply to Court for a Closure Order.

19. The restaurant at the Premises suspended operation between mid-January and early September 2022. FEHD would continue to check and take actions as appropriate if the restaurant resumed operation.

Complaint Point (2): Failing to reply to the email of 18 May 2021

20. FEHD admitted that DEHO had not updated the complainant on its follow-up actions and investigation results after giving an interim reply to the complainant in late May 2021. FEHD apologised to the complainant for the inadequacy and instructed the

relevant staff to make improvement.

Other Issues

21. We note the following issues from the information provided by FEHD, which, in our opinion, should be seriously followed up.

Failing to keep inspection records

22. A summons was issued against the operator of the unlicensed restaurant at the Premises at the end of February 2018. DEHO conducted three inspections on the Premises in March 2018 and the Court imposed a daily fine on the operator. It was not until late July 2018 that the Premises was granted a provisional General Restaurant licence. According to the guidelines mentioned in paragraph 10, FEHD should have inspected the Premises once a month and instigated prosecution upon finding any unlicensed food premises operation.

23. However, FEHD did not keep any records of the inspections on the Premises between April and July 2018.

24. Furthermore, the provisional General Restaurant licence for Application A expired in late January 2019 and the operator was issued a summons for operating a restaurant without licence in May 2019. According to the guidelines mentioned in paragraph 10, FEHD should have inspected the Premises once a month and instigated prosecution upon finding any unlicensed operation.

25. However, FEHD did not keep any record of inspections on the Premises between February and April 2019.

26. FEHD stated that it had commenced an investigation into the absence of inspection records for the said periods of time. It would take follow-up actions against any staff failing to follow the work guidelines under the civil service management system. FEHD had again advised and reminded the staff of relevant sections to strictly adhere to the work guidelines in following up unlicensed food business.

Failing to follow guidelines to conduct weekly inspections on the restaurant in question and instigate prosecutions

27. FEHD's prevailing guidelines stipulate that food premises not under any food business licence application should be inspected once a week. When the first licence application for the Premises (i.e. Application A) was cancelled in accordance with established procedures in early August 2019, the restaurant at the Premises was still in operation in mid-April 2020 but no licence application had been made.

28. FEHD's prosecution records, however, showed that between early August 2019 and mid-April 2020, the Department had instigated prosecution against the Premises only once a month.

29. FEHD could not confirm whether DEHO staff had followed the guidelines to conduct weekly inspections on the Premises and no prosecution should be instigated because they had not found any unlicensed operation, or the staff had failed to inspect the Premises every week and instigate prosecutions as appropriate. We doubt whether FEHD staff had followed the guidelines and inspected the Premises.

30. After the Licensing Section had cancelled Application A in early August 2019, FEHD's inspections on the Premises should be changed from monthly to weekly. As to whether DEHO was aware of the cancellation of Application A, FEHD explained that the Licensing Section's notification letter to the applicant of Application A regarding the cancellation of the application was copied to the Fire Services Department, ICU and DEHO. As DEHO had not kept any copy of the notification letter, FEHD believed that its staff were not aware that the Licensing Section had cancelled Application A in early August 2019, and DEHO staff continued to inspect the Premises once a month rather than once a week. FEHD pointed out that DEHO's failure to document the copy letter was an isolated incident which had occurred in 2019 and many staff had been posted out since then, thus the reason for the inadvertence could hardly be known.

Failing to respond to the complainant's request for information

31. We notice that in his email to DEHO in mid-April 2021, the complainant requested DEHO's records of actions taken in handling his complaint, including the dates, time, name and rank of the staff involved in the actions and the actions taken. DEHO replied to the complainant in the same month and informed him of the investigation findings and actions taken, without providing the requested information.

Our Comments

Complaint Point (1): Failing to apply for Closure Order

32. Although the Premises was among the cases accorded high priority for application for Closure Order, FEHD had considered whether it should make such application in accordance with the relevant criteria in late April 2019 and early November 2020.

33. DEHO had issued memoranda to the ICU in 2019 and to BD in 2021 respectively, requesting the layout plan of the Premises for considering whether it should apply for a Closure Order. While their replies were pending, the Licensing Section received new applications for food business licence in respect of the Premises from different applicants. Hence, DEHO had set aside its consideration of applying for a Closure Order.

34. We find FEHD's explanation not unreasonable. Given that three different applicants had applied for food business licences for the Premises, and the unlicensed restaurant at the Premises was not operated by the latest applicant, DEHO had no basis to apply to Court for a Closure Order against the previous applicant's unlicensed operation when processing a new licence application. Yet, members of the public who were not aware of the material facts might have an impression that the unlicensed restaurant had been in operation since 2018.

35. We could not deduce whether DEHO would have applied to Court for a Closure Order if it had successfully obtained the layout plans of the Premises from the ICU between October 2019 and April 2020 and from BD between February and June 2021 respectively. However, we are of the view that DEHO should have taken the initiative to follow up with the ICU and BD if their replies remained outstanding after long waits. We are puzzled that FEHD did not take the follow up action.

36. We have not investigated why the ICU and BD had not responded to DEHO's requests for layout plans because they were not under complaint in this full investigation. Nevertheless, FEHD should follow up on the matter and strengthen the collaboration with them to ensure that its information request procedures are effective.

37. Moreover, we find that FEHD usually requests information on premises by way of memorandum. However, regarding the Premises sold by HKHA, Government departments can check the as-built drawings (including alterations or additions approved by the ICU) recorded in the Housing Electronic Building Records Online System. By

obtaining an electronic certificate from the ICU, Government departments can assess the system to search, read and obtain relevant layout plans and documents. FEHD should consider enhancing its efficiency by changing its practice and checking building plans of premises online.

38. Overall, our investigation findings reveal that the FEHD staff failed to follow the guidelines to document records of inspections on the Premises and inspect the restaurant operating without a licence at the Premises every week and instigate prosecutions accordingly.

39. Furthermore, DEHO staff were not aware that the Licensing Section had cancelled Application A in early August 2019 and therefore failed to inspect the Premises once a week as stipulated in the guidelines on conduct of inspections. We also found that the notification mechanism between FEHD's Licensing Section and DEHO needed improvement.

40. In view of the above analysis, The Ombudsman considers Complaint Point (1) **unsubstantiated but there were other inadequacies** on the part of FEHD.

41. We learn that FEHD has improved the internal communication mechanism between the Licensing Section and DEHO by enhancing its licence information management system so that the Licensing Section can send relevant information (including cancellations of licence application) automatically by emails to DEHO staff for follow-up actions apart from internal despatch of letters under established procedures.

Complaint Point (2): Failing to reply to the enquiry of 18 May 2021

42. FEHD has admitted that it failed to give a substantive reply to the complainant's enquiry of 18 May 2021. The Department has apologised to the complainant and instructed the staff concerned to make improvement.

43. FEHD has also admitted that it had neither provided the complainant with the information requested in his email of mid-April 2021 nor responded to this request. Although FEHD had become aware of the situation in the course of our investigation, it still failed to follow up on the complainant's request for information. Despite the apology to the complainant and instructions to its staff, FEHD actually did not follow up on the complainant's request.

44. As can be seen in the above paragraphs, FEHD failed to properly handle the complainant's enquiry and request for information. Nor did it manage to rectify promptly the problems in this case. Hence, The Ombudsman considers Complaint Point (2) **substantiated**.

FEHD's Response to Our Draft Investigation Report

45. Regarding paragraph 38 above, FEHD indicated that without complete records, it could not confirm whether the staff concerned had failed to follow the guidelines to conduct weekly inspections and prosecute the operator of the unlicensed restaurant at the Premises. FEHD has carried out disciplinary investigation and followed up on the staff's failure to maintain proper records about the case.

46. Regarding paragraph 43 above, FEHD understood that the relevant records of actions that the complainant had requested were indeed internal records of actions taken by FEHD, which included enforcement officers' notebooks and the investigation reports submitted to their supervisors. FEHD considered those records internal documents containing personal particulars of third parties that should not be provided to the complainant. Nevertheless, in its reply to the complainant at the end of April 2021, DEHO provided some key information that the complainant was concerned about, including the key facts that FEHD staff had inspected the Premises at different times and prosecuted the operator of the unlicensed food business, and daily fines had been imposed. The reply also included the name, rank and contact telephone number of the case officer so that the complainant could call the officer for enquiries.

47. Moreover, FEHD pointed out following DEHO's reply at the end of April 2021, the complainant emailed FEHD on 18 May 2021 only to ask why DEHO had failed for years to apply to Court for a Closure Order. The complainant did not complain that DEHO had failed to provide the information he requested in his email of mid-April 2021. Nor did he make any requests for the relevant records of actions taken or express any discontents about DEHO's reply of late April 2021 in his subsequent complaint.

48. FEHD was of the view that DEHO had reasonably responded to the complainant's request for information and there was no impropriety on the part of DEHO.

Our Comments on FEHD's Further Response

49. FEHD has indicated that without complete records, it could not confirm whether the staff concerned had failed to follow the guidelines to conduct weekly inspections and prosecute the operator of the unlicensed restaurant at the Premises. As FEHD's prosecution records showed that the Premises was prosecuted only once a month during the relevant period, we suspect that FEHD staff had not followed the guidelines on inspections. Even if they had inspected the Premises every week in accordance with the guidelines, the absence of relevant records was an obvious non-compliance with the guidelines. Besides, if the staff had actually instigated prosecutions each week according to the guidelines, there should be other records, like the prosecutions instigated each month, to prove that the work was done, unless the weekly inspections conducted during that particular period did not find any unlicensed restaurant operation. Regarding FEHD's disciplinary investigation against the staff concerned, as it is a personnel matter, we will not intervene.

50. Paragraph (v) of the Introduction of the Guidelines on Interpretation and Application ("the Guidelines") of the Code on Access to Information ("the Code") stipulates that all requests for information, whether they are made under the Code or not, should be considered on the same basis as that applicable to requests under the Code. In other words, when departments decide the release or otherwise of the requested information, consideration should be given in accordance with the provisions of the Code.

51. According to paragraph (vi) of the Introduction of the Guidelines, in case a non-Code request is to be refused, departments, should as far as possible, give reasons for refusal in accordance with the provisions in Part 2 of the Code. Departments should also advise the requestor of the review and complaint channels.

52. Paragraph (viii) of the Introduction of the Guidelines stipulates that to varying degrees every Government department responds positively to informal requests for information. It is important that the Code is not used, or perceived to be used, within or outside Government, as a device for obstructing this sort of information flow.

53. Although the complainant's request for information of mid-April 2021 was not made under the Code, FEHD adhered to the Code's principles and positively decided whether or not to release the requested information to the complainant in accordance with the provisions of the Code.

54. Although DEHO's reply of late April 2021 provided the name and rank of the case officer and the actions taken, but the dates and time of inspections were not included and DEHO did not make it clear whether the actions were taken by the staff mentioned in the reply. Besides, if FEHD considered that records of inspections were internal documents which should not be released to the complainant, it should have made reference to Part 2 of the Code and explained the reason for refusal, regardless of whether the complainant and FEHD interpreted "the relevant records of actions taken" in the same way, and FEHD should not have ignored his request.

55. Though the complainant did not repeat his request for the relevant records of actions taken, or express any discontents regarding DEHO's reply of late April 2021 in his subsequent email and complaint, it did not mean there was no impropriety on FEHD's initial handling of the complainant's request for information. Hence, we could not agree with FEHD's conclusion in paragraph 48.

56. We aim to assist Government departments in making improvements and promote better public administration by way of complaint investigations. We expect that departments can positively deal with complaints and gain experience from cases where we have identified inadequacies after investigations for self-improvement.

Conclusion

57. Having scrutinised the information obtained and the response/comments from FEHD, The Ombudsman considers this complaint **partially substantiated**.

Recommendations

58. The Ombudsman recommends that FEHD:

- (1) strengthen internal supervision to ensure that staff responsible for conducting inspections and instigating prosecutions against unlicensed restaurants will perform their duties in accordance with the guidelines and keep proper work records;
- (2) enhance collaboration with the ICU and BD in following up on requests for information so that they can respond to such requests in a timely manner;

- (3) remind its staff to take initiative to contact other departments if the latter do not respond promptly to FEHD's requests for information;
- (4) when going through the procedures for applying for a Closure Order, consider obtaining building plans via the Housing Electronic Building Records Online System so as to enhance effectiveness and efficiency;
- (5) review regularly the internal communication mechanism between the Licensing Section and DEHO to ensure that the enhanced licence information management system can achieve the desired results and DEHO can follow the guidelines to conduct inspections and take enforcement actions according to the latest status of the licence applications;
- (6) remind its staff to learn from this complaint and respond to public enquiries in a timely manner, strengthen its staff's understanding of the Code with training so that they will be able to respond to the enquiries and requests for information made by members of the public in accordance with the Code and its spirit;
- (7) follow up on the complainant's request for information in his email of mid-April 2021 and expedite the handling of the request if the complainant still pursues it; and
- (8) complete the investigation into the staff concerned as soon as practicable and take reference from this case to improve the internal supervision of DEHO from an administrative perspective to avoid recurrence of missing inspection records as seen in this case.

Office of The Ombudsman
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