律政司
刑事檢控專員
香港金鐘道66號
金鐘道政府合署高座5樓
圖文傳真：852-2877 0171
網址：www.doj.gov.hk

Director of Public Prosecutions
Department of Justice
5/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong
Fax : 852-2877 0171
Web site : www.doj.gov.hk

Tel : 2867 2300

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The Hon Leung Yiu-chung
Unit 7, G/F, Kwai Yan House
Kwai Fong Estate
Kwai Chung
New Territories

The Hon Lee Cheuk-yan
Room A, 15/F
Wing Wong Commercial Building
557-559 Nathan Road
Kowloon

Dr the Hon Fernando Cheung Chiu-hung
Room 602, Citibank Tower
3 Garden Road
Central
Hong Kong

BY FAX & BY POST

Dear Sirs,

Disneyland

Your letter of 10 October 2005 refers.

Whilst I appreciate your concerns, I am satisfied, after a comprehensive review, that the advice given to the FEHD not to prosecute in respect of the incidents at Disneyland was correct.

On the facts, the possible offence to be engaged was conduct contrary to section 139 of the Public Health and Municipal Services Ordinance, Cap 132. This provides :

> *Any person who wilfully obstructs, resists, or uses abusive language to, any person acting in the execution of his duties under this Ordinance, or under any order or warrant made or issued thereunder, shall, in any case for which no other provision is made by this Ordinance, be guilty of an offence.*

Therefore, to establish an offence against a suspect it is necessary to show, first, that there was an obstruction of the officer, second, that the officer was acting in the execution of his duties, and, third, that the obstruction occurred wilfully.

In its recent judgment (26 May 2005) in *HKSAR v Tam Lap-fai* [2005] 2 HKLRD 487, the Court of Final Appeal considered the issue of obstruction. Chan PJ said :

> *Whether particular conduct amounts to wilful obstruction of an officer in the due execution of his duty is always a matter of fact and degree. It is important to look at the facts of each case, including what the person has done and how it is done, what the officer is doing, and the effect of what the person has done on what the officer is doing. ... When common sense is applied, and I think it is important that common sense is applied, in this type of case, it is quite clear that the test does not intend to include conduct which may cause mere inconvenience to the officer or require him to expend only trifling additional effort.*

Having indicated the relevant law, I will deal briefly with the facts of the two incidents, and touch upon the reasoning for not prosecuting.

On 30 August 2005, FEHD officials visited Disneyland for an inspection. They were asked by Disneyland staff to remove their caps and epaulettes. To this they agreed. The inspection was successfully conducted. This episode does not constitute criminal misconduct, not least because there was no wilful obstruction of the FEHD.

On 6 September 2005, an FEHD official visited Disneyland for an inspection by himself. He says that whilst conducting his inspection, Disneyland's Director of Security, Safety, Fire and Health Services (the Director) asked him to take off his cap and epaulettes in the public areas. He recalls that after he told the Director he had to carry out his inspection in full uniform, the

Director said he could not carry out his inspection. He therefore curtailed the inspection.

The recollection of the Director, however, is different. He says that he asked the FEHD official if he could remove the cap and badge before conducting a public inspection, as had happened on the previous occasion. This was simply a request, and at no stage did he refuse the inspector access to any part of the Resort, or object to the inspection. Having made a telephone call, the inspector said it was *'okay'*, and that he did not need to visit any further locations that day.

The version of the Director as to what occurred on this occasion is corroborated by Disneyland's Food Safety Inspector, who was present throughout the incident on 6 September 2005.

The position is therefore that there are two different and conflicting versions of events. The FEHD inspector provides one, while the Director and the Food Safety Inspector of Disneyland provide another. The final picture to emerge is obviously less than clear, and the possibility of misunderstanding on one side or the other cannot be excluded.

On the available evidence, therefore, it cannot be shown to the required standard that the Director intended to wilfully obstruct the official. That being so, the basic test for prosecution is simply not met. Before a prosecution can be started, there must exist at least a reasonable prospect of conviction. That is obviously lacking here.

At my request, the FEHD has reviewed the state of the evidence. As a result, it has become even more apparent that the original decision not to prosecute was correct.

Also at my request, a Senior Counsel, not involved in the original decision, has reviewed the case. The Senior Counsel has advised me that a prosecution cannot be justified.

I am completely satisfied that it would not be right to institute a prosecution in this case.

As the matter is put in *The Statement of Prosecution Policy and Practice* (2002), at paragraph 8.1 :

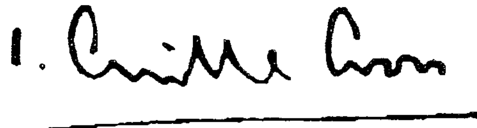
A prosecution should not be started or continued unless the prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. The Secretary for Justice does not support the proposition that a bare prima facie case is enough to justify a decision to prosecute.

In light of the weakness of the evidence, it would obviously be contrary to established prosecution policy for me to authorise a prosecution of anyone in this case.

I understand that since these incidents occurred, FEHD officials have been conducting regular inspections at Disneyland, and that no problems have been encountered.

Thank you for drawing this matter to my attention.

Yours faithfully,



(I. Grenville Cross SC)