

立法會
Legislative Council

LC Paper No. CB(3) 166/16-17

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Tel : 3919 3300
Date : 28 November 2016
From : Clerk to the Legislative Council
To : All Members of the Legislative Council

Council meeting of 30 November 2016

**Request for special leave of the Council
to give evidence of Council proceedings**

The Department of Justice (“DoJ”) has submitted a request in **Appendix I** for special leave of the Council under section 7 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) (**Appendix II**) and Rule 90 of the Rules of Procedure (“RoP”) (**Appendix III**) for five officers of the Council to give evidence in the criminal proceedings of *HKSAR v LEUNG Kwok-hung* (Criminal Case No. DCCC 546 of 2016) (“the Request”).

2. As stated in the Request, DoJ notes that the documents specified in the Request may only be used in court in a manner consistent with the statutory provisions in light of the principles developed in decided cases governing parliamentary privilege. It considers that sections 3 and 4 of Cap. 382 are not infringed as far as the intended use of the specified documents is concerned.

3. In accordance with Rule 90(2) of RoP, the President has directed that the Request be placed on the Agenda for the Council meeting of 30 November 2016.

4. Members are invited to note that under Rule 90(2), unless on a motion which may be moved without notice at the above meeting by any Member the Council determines that such leave shall be refused, the Council shall be deemed to have ordered that such leave be granted.

5. A note relating to the Request (**Appendix IV**), which is prepared by the Legal Service Division of the Secretariat, is attached for Members’ information.

(Dora WAI)
for Clerk to the Legislative Council

Encl.

律政司
刑事檢控科
香港金鐘道66號
金鐘道政府合署高座7樓
圖文傳真: 852-2536 8442/ 2536 8476



DEPARTMENT OF JUSTICE
Prosecutions Division
7/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong
Fax: 852-2536 8442/ 2536 8476

本司檔號 Our Ref.: DCCC 546/2016
來函檔號 Your Ref.:
電話號碼 Tel. No.: 2867 2331 / 2867 1048

24 November 2016

Mr Kenneth Chen
Secretary General of the Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

BY FAX (2877 9600) & BY POST

Dear Mr Chen,

**Application for Special Leave of the Legislative Council
for officers of the Council to give evidence**

**HKSAR v Leung Kwok-hung
Criminal Case No. DCCC 546 of 2016**

This is an application for special leave of the Legislative Council ("LegCo") under section 7 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) ("LCPPO") and rule 90 of the Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Instrument No. A501) for five officers of LegCo to give evidence in the criminal proceedings instituted against Mr Leung Kwok-hung ("the Defendant").¹

Background

The Defendant is charged with the offence of Misconduct in Public Office ("MIPO"), contrary to Common Law and punishable under section 101I(1) of the Criminal Procedure Ordinance (Cap. 221). The charge relates to his failure to declare or disclose to, or his concealment from LegCo between 22 May 2012 and 23 June 2016, his acceptance of a payment of HK\$250,000 from Mr Lai Chee-ying through Mr Mark Herman Simon on 22 May 2012. Among other things, the Prosecution is required to

¹ The Chinese translation of this application to be provided when it is ready.

prove that the Defendant, without reasonable excuse or justification, wilfully and intentionally committed the offence.

The Defendant was arrested and charged by the Independent Commission Against Corruption on 23 June 2016. On the next day, he appeared in the Eastern Magistrates' Courts with no plea taken and the case was transferred to the District Court. When he appeared at the District Court on 8 July 2016, the Defendant indicated that he would plead not guilty to the charge. A pre-trial review was held before District Judge Lee on 30 September 2016. At that hearing, the Judge directed that a second pre-trial review be held on 25 November 2016. It is anticipated that the date of the trial will be fixed soon.

Reasons for the Application

The evidence from the five officers of LegCo and the documents specified in the table below are considered as necessary for the Prosecution to substantiate the offence of MIPO by proving that : (1) the Defendant knew about the relevant requirements on declaration or disclosure of interests imposed on LegCo Members; (2) he wilfully and intentionally misconducted himself as a LegCo Member; and (3) his misconduct was serious but not trivial.

Section 7(1) of LCPPO provides,

"No member or officer of the Council, and no person employed to take minutes or keep any record of evidence before the Council or a committee, shall give evidence elsewhere in respect of the contents of such minutes or record of evidence, or of the contents of any document laid before the Council or committee, as the case may be, or in respect of any proceedings or examination held before the Council or committee, as the case may be, without the special leave of the Council." (emphasis added)

The officers in respect of whom special leave of the Council is sought are either (i) officers of the Council; or (ii) persons employed to take minutes or keep any record of evidence before the Council or committee. The specified documents are either (i) contents of minutes or records of evidence before the Council or a committee; (ii) contents of document laid before the Council or committee, as the case may be; or (iii) proceedings or examination held before the Council or committee, as the case may be. As such, special leave of the Council is required.

Specified Documents and Witnesses requiring Special Leave

Details of the specified documents to be respectively produced by the five officers of LegCo, namely Mr Wong Kin-man, Mr Chan Che-fai Bosco, Mr Leung Siu-kei, Ms Szeto Siu-wa and Ms Sit Fung-ming Anita, are set out as follows :-

Reference	Specified Document	Witness
WKM/1/E & WKM/1/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 22 January 2014 in respect of "Oral Answers to Questions" session concerning the topic "Hong Kong Marathon" and the debate on the motion "Safeguarding editorial independence and autonomy" (English version: pages 5719-5724, 5737-5751 and 6016-6124) (Chinese version: pages 4107-4111, 4121-4131 and 4322-4394)	Mr Wong Kin-man
WKM/2/E & WKM/2/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 8 February 2006 regarding declaration of interests by the Defendant at the meeting in relation to "Policy on public service broadcasting" (English version: pages 4123-4127, and 4397-4432) (Chinese version: pages 2695-2698, and 2864-2886)	-ditto-
WKM/3/E & WKM/3/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 18 April 2012 regarding declaration of interests by the Defendant at the meeting in relation to "Motion under Rule 49B(1) of the Rules of Procedure" (English version: pages 7965-7969 and 8210-8246) (Chinese version: pages 5561-5564, and 5742-5767)	-ditto-
WKM/4/E & WKM/4/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 6 October 2004 in relation to an affirmation/oath taken by the Defendant as a LegCo Member for 2004-2008 term of office (English version: pages 1-12) (Chinese version: pages 1-11)	-ditto-
WKM/5/E & WKM/5/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 8 October 2008 in relation to an affirmation/oath taken by the Defendant as a LegCo Member for 2008-2012 term of office (English version: pages 1-14) (Chinese version: pages 1-12)	-ditto-

Reference	Specified Document	Witness
WKM/6/E & WKM/6/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 19 May 2010 in relation to an affirmation/oath taken by the Defendant as a LegCo Member for 2010-2012 (by-election) term of office (English version: pages 8373-8382) (For Chinese version: pages 5707-5714)	Mr Wong Kin-man
WKM/7/E & WKM 7/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 10 October 2012 in relation to an affirmation/oath taken by the Defendant as a LegCo Member for 2012-2016 term of office (English version: pages 1-16) (Chinese version: pages 1-14)	-ditto-
CCF/1/E & CCF/1/C	Two DVDs containing <u>video recording of the Council meeting</u> of LegCo on 22 January 2014 (English interpretation version & Floor version)	Mr Chan Che-fai Bosco
LSK/15/1 & LSK/15/2	<u>Report of the Committee on Members' Interests</u> on complaints against Hon LEE Cheuk-yan and the Defendant attached with a CD-ROM storing the transcripts of the meetings/hearings and the transcripts (Chinese version)	Mr Leung Siu-kei
SSW/1/E & SSW/1/C	Copy of extract of the final version of <u>Minutes of the meeting of the Panel on Housing</u> held on Thursday, 4 January 2007, at 2:30pm in the Chamber of the LegCo Building (Ref: CB1/PL/HG/1) [LC Paper No. CB(1)1235/06-07] (English version: pages 1-15) (Chinese version: pages 1-15)	Ms Szeto Siu-wa
SSW/2/E & SSW/2/C	Copy of extract of the final version of <u>Minutes of the meeting of the Panel on Housing</u> held on Monday, 7 May 2007, at 2:30pm in the Chamber of the LegCo Building (Ref: CB1/PL/HG/1) [LC Paper No. CB(1)2225/06-07] (English version: pages 1-11) (Chinese version: pages 1-11)	-ditto-

Reference	Specified Document	Witness
SFM/1/E & SFM/1/C	Copy of the final version of Minutes of the 19 th meeting of the Finance Committee of the Council held at the LegCo Chamber on 6 June 2008, at 5:05pm (Ref: CB1/F/1/2) [LC Paper No. FC14 08-09] (English and Chinese versions) (English version: pages 1-6) (Chinese version: pages 1-5)	Ms Sit Fung-ming Anita

The application of Sections 3 and 4 of LCPPO

Sections 3 and 4 of LCPPO provide,

“3 Freedom of speech and debate

There shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Council.

4 Immunity from legal proceedings

No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or a committee, or by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise.” (emphasis added)

Section 3 provides for freedom of speech and debate in LegCo or any committee and for the corresponding immunity of the proceedings being questioned in any court or place outside LegCo. Section 4 confers immunity upon LegCo Members from civil or criminal proceedings in respect of matters said, or documents brought before, LegCo or any committee. Section 3 relates to privilege attached to LegCo while section 4 relates to immunity enjoyed by Members of LegCo².

It is appreciated that the specified documents may only be used in court in a manner consistent with the statutory provisions in light of the principles developed in decided cases governing parliamentary privilege. We consider that sections 3 and 4 are not infringed as far as the intended use of the specified documents is concerned. The specified documents will be used to prove that the relevant parliamentary proceedings took place and that the Defendant participated in the proceedings. The Prosecution is

² See second reading of the Legislative Council (Powers and Privileges) Bill 1985 (p.1113)

not seeking to question or challenge the veracity or propriety of anything said by the Defendant as recorded in the relevant records of proceedings or reports. Rather, the Prosecution is seeking to adduce the documents as evidence of the fact that such statements were made by the Defendant. The allegation of impropriety relates to his failure to declare or disclose, or concealment of the receipt in question. The words said by the Defendant are not the cause of prosecution action or the foundation of criminality liability, and he is not exposed to any criminal liability in respect of what he said in LegCo proceedings. As such, the use of the material is consistent with parliamentary privilege. There is nothing in the allegations against the Defendant which relates to the legislative or deliberative processes of LegCo or its Members.

In any event, as with any legislative instrument, the legal meaning and application of the statutory provisions is a matter for the Court to determine. We consider that the correct approach would be for the Council to grant leave for the above mentioned officers of LegCo to give evidence, without prejudice to any argument concerning the true scope of sections 3 and 4 of LCPPO. It will then be for the Court seized of the criminal proceedings to determine the content of the sections, and to decide any issues concerning the use of the material. We consider that the adoption of this approach will facilitate the administration of justice without derogating from any privilege of LegCo, or of its Members.

Way Forward

As the second pre-trial review will be held on 25 November 2016, it is expected that the Court will fix the hearing date of the trial in the near future. The Prosecution is required to inform the Court and parties concerned of the nature of evidence to be adduced and the availability of prosecution witnesses including the officers of LegCo named in this application. We would therefore invite you to accord priority to this matter, and look forward to receiving your favourable reply at your earliest convenience.

Please do not hesitate to contact me (2867 2331) or Mr Jonathan Lin (2867 1048) if we can be of any further assistance.

Yours sincerely,



(Anna YK Lai, SC)

Deputy Director of Public Prosecutions (Ag)

c.c. Commissioner for ICAC (Attn: Mr Remus Lau, CI/SD)
(Ref: IF/2014/1885) (by fax only)

第 382 章 立法會 (權力及特權) 條例

7. 未經許可不得就立法會或任何
委員會的會議程序作證

(1) 如未經立法會特別許可，任何議員或立法會人員，以及受僱在立法會或任何委員會會議席上錄取會議紀要或保存證據紀錄的人，不得就上述會議紀要或證據紀錄的內容、或就提交立法會或任何委員會的文件內容(視屬何情況而定)、或就立法會或任何委員會所進行的會議程序或訊問(視屬何情況而定)，在其他地方作證。

(2) 在立法會休會或押後會議期間，第(1)款所提述的特別許可，可由主席給予；如主席因不在香港或喪失履行職務能力以致不能行事者，則可按照議事規則給予。

(由 2000 年第 71 號第 3 條修訂)

CAP. 382 *Legislative Council (Powers and Privileges)*

7. **Evidence of proceedings in the Council or any
committee not to be given without leave**

(1) No member or officer of the Council, and no person employed to take minutes or keep any record of evidence before the Council or a committee, shall give evidence elsewhere in respect of the contents of such minutes or record of evidence, or of the contents of any document laid before the Council or committee, as the case may be, or in respect of any proceedings or examination held before the Council or committee, as the case may be, without the special leave of the Council.

(2) During a recess or adjournment of the Council, the special leave referred to in subsection (1) may be given by the President or, if the President is unable to act owing to his absence from Hong Kong or incapacity, in accordance with the Rules of Procedure. (*Amended 71 of 2000 s. 3*)

(1) 為取得根據《立法局(權力及特權)條例》(第382章)第7條所需的立法會許可，以就會議紀要、作證紀錄或提交立法會、委員會或小組委員會會議席上省覽的任何文件的內容，或就立法會、委員會或小組委員會的任何會議或審查程序，在立法會以外的地方提供證據，要求該許可的人須向立法會秘書書面陳述其請求及說明其理由，並須提供立法會秘書在個別情況下按立法會主席的指示所進一步要求的資料。

(2) 許可的請求須列入立法會主席所指定會議的議程內；除非立法會藉任何議員在該次會議動議的一項可無經預告的議案，決定拒絕給予許可，否則立法會須當作已命令給予許可。

(3) 立法會秘書須以書面將立法會的決定通知該要求許可的人。

(4) 凡有人在立法會休假、休會待續或解散期間，向立法會要求取得第(1)款所述的許可，可由立法會主席給予，如立法會主席不能執行主席職務，則可由主持立法會會議的議員給予許可。

90. Procedure for Obtaining Leave to Give Evidence of Council Proceedings

(1) For the purpose of obtaining the leave of the Council under section 7 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) in order that evidence may be given elsewhere in respect of the contents of minutes, records of evidence or any document laid before the Council or a committee or subcommittee, or in respect of any proceedings or examination held before the Council or a committee or subcommittee, the person seeking such leave shall submit to the Clerk a written statement of the request and the reasons therefor and such further information as the Clerk, on the direction of the President, may require in any particular case.

(2) The request for leave shall be placed on the Agenda for such meeting as the President may appoint and, unless on a motion which may be moved without notice at that meeting by any Member the Council determines that such leave shall be refused, the Council shall be deemed to have ordered that such leave be granted.

(3) The Clerk shall give written notice of the decision of the Council to the person by whom the request for leave is made.

(4) Where the leave of the Council referred to in subrule (1) is sought during any recess or adjournment or dissolution of the Council such leave may be given by the President or, if the President is unable to act, by the Member presiding.

立法會

Legislative Council

LC Paper No. LS 15/16-17

Ref: LS/L/27(II)

Issues relevant to consideration of an application for Council's special leave for officers of the Council to give evidence of Council proceedings in a criminal case

By a letter dated 24 November 2016, the Prosecutions Division of the Department of Justice ("DoJ") applied for the special leave of the Council under section 7 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) for five officers of the Council to give evidence in a criminal case by producing documents relating to proceedings of the Council as specified in the letter. This note provides information to assist Members' consideration of DoJ's application.

Principles regarding the use of parliamentary records in courts

2. Section 3 of Cap. 382 provides that there shall be freedom of speech and debate in the Council or proceedings before a committee, and any such freedom of speech and debate shall not be liable to be questioned by any court or place outside the Council. Section 4 of Cap. 382 provides that no civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or a committee, or by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise.

3. The privileges in sections 3 and 4 of Cap. 382 are derived from Article IX of the United Kingdom's Bill of Rights 1689, which states that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". This Article is also adopted by Westminster-model legislatures such as the Parliaments of Australia and New Zealand. Members may wish to note the following principles regarding the use of parliamentary records in courts as developed in decided cases on the application of parliamentary privilege in other jurisdictions, which is similar to the privileges provided in sections 3 and 4 of Cap. 382:

- (a) speeches made in parliamentary proceedings or documents presented to Parliament cannot be the foundation of legal liability, either criminal or civil;¹
- (b) such speeches or documents cannot be used for the purpose of supporting a cause of action, even though that cause of action itself arose outside Parliament;²

¹ *Dillon v Balfour* (1887) 20 LR Ir 600; *Crane v Gething* (2000) 169 ALR 727.

² *Church of Scientology v Johnson-Smith* [1972] 1 QB 522.

- (c) the courts are precluded from examining the truth or propriety of statements made in Parliament, whether by direct evidence, cross-examination, inferences or submissions;³ and
- (d) certain evidence of parliamentary proceedings may be admitted before a court provided that the evidence is used in a way that is consistent with parliamentary privilege⁴ and does not involve an examination of the propriety of the proceedings or of the motives or intentions of those taking part in the proceedings.

4. Section 7 of Cap. 382 and Rule 90 of the Rules of Procedure provide for the manner in which evidence of Council proceedings may be obtained. They do not prohibit the use of Council proceedings as evidence before a court or other tribunal. Whether the use of such evidence is prohibited involves consideration as to whether the privileges in sections 3 and 4 of Cap. 382 apply. It has been decided by the courts that the existence of a parliamentary privilege and its application in any particular situation is a question which is ultimately decided by the courts.⁵

Factors relevant to consideration of DoJ's application

5. In dealing with applications for leave to use parliamentary records in courts, parliaments of other jurisdictions have looked at factors such as the purpose for which evidence of parliamentary proceedings is to be used in courts and the extent to which Parliament may facilitate the administration of justice with respect to the use of or reference to the records of proceedings of Parliament in courts without derogation from the privileges of Parliament, or of its Members.⁶ Members may take into account the above factors when considering DoJ's leave application.

Prepared by

Legal Service Division
Legislative Council Secretariat
25 November 2016

³ *Prebble v Television New Zealand* [1994] 3 All ER 407, Privy Council. This decision was affirmed by the House of Lords in *Hamilton v Al Fayed* [2000] 2 All ER 224.

⁴ Examples of use that is consistent with parliamentary privilege are: the use of parliamentary proceedings to prove material facts, such as that a statement was made in Parliament or made at a particular time or that it refers to a particular person, the use of parliamentary proceedings to prove that a Member was present in the House on a particular day, and to prove that a report of a speech made in the parliamentary proceedings is fair and accurate.

⁵ *R v Chaytor and others* [2010] UKSC 52; [2010] All ER(D) 19, para. 44. See also *Leung Kwok Hung v President of the Legislative Council* [2015] 1 HKC, CFA, para. 43.

⁶ *House of Representatives Practice*, Parliament of Australia, 6th edition, 2012, Chapter 19, p. 720.