

立法會
Legislative Council

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LC Paper No. CB(2)306/04-05
(These minutes have been seen
by the Administration)

Panel on Security

**Minutes of meeting held on Tuesday, 2 November 2004
at 2:30 pm in Conference Room A of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Daniel LAM Wai-keung, BBS, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Dr Hon LUI Ming-wah, JP
Hon Margaret NG
Hon CHEUNG Man-kwong
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, JP
Hon Howard YOUNG, SBS, JP
Hon LAU Kong-wah, JP
Hon CHOY So-yuk
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung
Hon CHIM Pui-chung

Members attending : Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
Hon TAM Heung-man

Public Officers attending : Item IV
Mr Raymond WONG Hung-chiu
Commissioner
Independent Commission Against Corruption

Mr Daniel LI Ming-chak, IDS
Head of Operations
Independent Commission Against Corruption

Mr Michael John BISHOP, IDS
Assistant Director of Operations
Independent Commission Against Corruption

Miss CHEUNG Siu-hing
Deputy Secretary for Security 1
Security Bureau

Mr Kevin P ZERVOS, SC
Senior Assistant Director of Public Prosecutions
Department of Justice

Item V

Mrs Jennie CHOK
Deputy Secretary for Security 2

Mr Charles WONG
Principal Assistant Secretary for Security

Ms Amelia LUK
Deputy Law Officer
Department of Justice

Miss Elizabeth LIU
Senior Government Counsel
Department of Justice

Mr Dicky CHAN
Assistant Commissioner (Operation)
Correctional Services Department

Attendance by invitation : Hong Kong Journalists Association

Ms MAK Yin-ting
Honorary Secretary

Clerk in attendance : Mrs Sharon TONG
Chief Council Secretary (2)1

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser 1

Mr Raymond LAM
Senior Council Secretary (2) 5

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I. Confirmation of minutes of previous meeting
(LC Paper No. CB(2)63/04-05)

The minutes of the meeting held on 12 October 2004 were confirmed.

II. Information papers issued since the last meeting
(LC Paper Nos. CB(2)70/04-05(01) - (03), CB(2)73/04-05(01),
CB(2)92/04-05(01) and CB(2)93/04-05(01))

2. Members noted that the following papers had been issued since the last meeting -

- (a) Referral from Duty Roster Members regarding the right of abode (ROA) in Hong Kong, the Administration's response to views expressed by the Parent's Association for the Implementation of Right of Abode of Mainland Children (Hong Kong) and further submission from the deputation;
- (b) Two submissions from the Central and Western District Council regarding the future development of the Central Police Station Compound; and
- (c) Referral from a Duty Roster Member regarding the mechanism for handling complaints from persons serving sentences.

3. In connection with the paper referred to in paragraph 2(a) above, members agreed that the Administration be requested to provide latest statistics and information in relation to ROA under Article 24(2)(3) of the Basic Law. Members also agreed that the Administration be requested to provide information in relation to the mechanism for handling complaints from persons serving sentences referred to in paragraph 2(c) above.

4. The Chairman informed Members that the Administration had been requested to provide a paper on the meal break arrangements for ambulancemen.

5. Members noted a letter dated 1 November 2004 from Hon Albert CHAN,

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which was tabled at the meeting, requesting the Panel to follow up issues relating to the allocation of Home Ownership Scheme flats for reprovisioning departmental quarters for the disciplined services. Members agreed that the matter be referred to the Panel on Public Service for follow-up.

6. Ms Audrey EU suggested that the Administration be requested to provide information on whether non-core frontline duties in disciplined services departments had been taken up by civilian staff. Members agreed.

III. Date of next meeting and items for discussion
(LC Paper Nos. CB(2)111/04-05(01) and (02))

7. Members agreed that the following items be discussed at the next meeting to be held on 7 December 2004 at 2:30 pm -

- (a) Progress of implementation of automated passenger clearance and automated vehicle clearance at boundary control points;
- (b) Measures to combat illegal employment; and
- (c) Aviation Security (Amendment) Bill.

8. In connection with the item in paragraph 7(c) above, Miss Margaret NG said that the Administration should not commence the drafting of a bill before consultation with the Panel on its legislative proposal. The Chairman said that he would convey the view to the Administration in his forthcoming meeting with the Secretary for Security on the future work plan of the Panel.

IV. Powers of the Independent Commission Against Corruption to search for and seize journalistic material
(LC Paper Nos. CB(2)111/04-05(03), (04), (05), (06) and LC Paper No. LS14/04-05)

9. At the invitation of the Chairman, Commissioner, Independent Commission Against Corruption (C/ICAC) briefed Members on the paper provided by ICAC on the obtaining and execution of search warrants for journalistic material. He stressed that –

- (a) ICAC respected press freedom. It hoped to strengthen communication with the media and enhance mutual understanding;
- (b) existing legislation already laid down strict legal provisions governing the search and seizure of journalistic material by law enforcement agencies. Such powers were available to other law enforcement

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agencies but could only be exercised with judicial approval after the court was satisfied that all legal requirements were met and that it was in the public interest to issue the warrant;

- (c) the present case involved the conduct of a criminal investigation into allegations of very serious alleged offences, including conspiracy to pervert public justice and violation of the Witness Protection Ordinance. The ICAC fully understood the sensitivity of the matter and had given very careful thoughts to the case as well as taken legal advice before deciding to apply for search warrants. In view of the importance of the matter, ICAC had made an application for search warrants to a High Court Judge, instead of a District Court Judge. The court had spent four hours to hear the application before granting the search warrants; and
- (d) in carrying out the search operations, ICAC had instructed its officers to exercise restraint, to explain to the management of the media organisations concerned and request their cooperation, and to execute the search warrants only when the media organisations concerned refused to cooperate.

10. At the invitation of the Chairman, Deputy Secretary for Security 1 (DS for S1) briefed Members on the major factors taken into consideration when the provisions in the Interpretation and General Clauses Ordinance (IGCO) (Cap. 1) regarding search and seizure of journalistic material were enacted in 1995. She emphasised that the present provisions already struck a balance between protection of press freedom and protection of the public interest.

11. At the invitation of the Chairman, Senior Assistant Director of Public Prosecutions (SADPP) briefed Members on the paper provided by the Department of Justice (D of J) comparing the provisions on search and seizure of journalistic material in IGCO with relevant legislation in five overseas jurisdictions.

12. At the invitation of the Chairman, Senior Assistant Legal Adviser 1 (SALA1) presented his paper on the recent judgments on the powers of ICAC to search for and seize journalistic material.

13. At the invitation of the Chairman, Ms MAK Yin-ting presented the views of the Hong Kong Journalists Association (HKJA) as detailed in the submission of HKJA. Ms MAK said that ICAC had not exercised its powers of search and seizure under IGCO in a restrained manner. She questioned whether ICAC, with the application for 14 search warrants in one lot, had examined clearly whether the media organisations concerned were in possession of the relevant journalistic material. She considered that ICAC had no respect for press freedom. She informed Members that in the case concerned, there were reports that officers of ICAC had threatened that if the media organisations did not provide the requested journalistic material, ICAC

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officers would examine the personal computer of a senior staff of the media organisation who was unrelated to the case.

14. The Chairman asked whether internal guidelines on search and seizure of journalistic material had been issued by law enforcement agencies and whether such guidelines had been reviewed as a result of the case in question. DS for S1 responded that internal guidelines, which were mainly related to procedural matters and were under review from time to time, had been issued by law enforcement agencies. In view of the recent case, the Administration would seek legal advice before considering whether there was a need to revise the internal guidelines.

15. Mr CHEUNG Man-kwong queried why ICAC applied to the court directly for search warrants, instead of applying for a production order under section 84 of IGCO. He questioned whether section 84 of IGCO had ever been invoked before and whether ICAC had actually considered applying for a production order under the section.

16. C/ICAC responded that ICAC had exercised the powers of search and seizure under IGCO on three occasions in the past. In those cases, the media organisations concerned were suspected of breaching the law and ICAC had explained to the court why section 84 of IGCO was not applicable. He said that search warrants would not be issued by the court unless it was satisfied with the justifications given by ICAC. Even if the law enforcement agency had satisfied all the requirements in section 85 of IGCO, the court might still decide not to issue a search warrant if it was not in the public interest to do so.

17. C/ICAC added that after ICAC's search of the media organisations, he and the Deputy Commissioner of ICAC had, in the meetings with representatives of media associations, explained ICAC's position and stressed that reporters were entitled to lodge complaints regarding the manner of ICAC officers. One complaint had since been received.

18. Mr CHEUNG Man-kwong said that although IGCO provided for a three-tier approach for the search and seizure of journalistic material, law enforcement agencies would be tempted not to adopt the "production order route" but to resort to the other two "search warrant routes".

19. C/ICAC responded that the choice of route depended on the circumstances of each case. It was necessary for ICAC to explain to the court why the "production order route" was not applicable. He said that it was sometimes impractical to adopt the "production order route", as it was inappropriate to inform a suspect in advance the purpose and reasons for a search of evidential material which might incriminate the suspect.

20. Mr LEUNG Kwok-hung said that law enforcement agencies had frequently abused their powers. In 1989, the Police had abused its powers in the search and seizure of journalistic materials from media organisations after the arrest of members

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of the April-fifth Action. ICAC had also abused its powers in the case concerned. He questioned the basis on which ICAC suspected that all the media organisations concerned would destroy the journalistic material sought in the investigation. He considered that ICAC should provide the Panel with the relevant information. He asked whether a select committee, if formed, could require ICAC to produce the relevant investigation report for examination by the select committee.

21. C/ICAC responded that ICAC had been carrying out investigation into a case referred from the Court of Appeal regarding alleged breach of section 17(1) of the Witness Protection Ordinance (WPO) (Cap. 564). In the case, a number of media organisations were suspected of disclosing the identity of and information about a person put under a witness protection programme of ICAC. He said that the ICAC had submitted an affirmation setting out detailed justifications when it applied for the search warrants and the court had spent four hours considering the application before issuing the search warrants. As the case was still under investigation and the relevant information was covered by public interest immunity, he was not in a position to disclose further details.

22. Head of Operations, ICAC (HO/ICAC) added that in its application for the search warrants, ICAC had, in accordance with the requirements under IGCO, given a detailed explanation of whether other methods of obtaining the material had been tried and failed or had not been tried because they were unlikely to succeed or would likely to seriously prejudice the investigation. The explanation had also been provided to and accepted by the Court of Appeal.

23. Senior Assistant Legal Adviser 1 (SALA1) said that it could be noted from the judgments handed down by the Court of First Instance (CFI) and the Court of Appeal that the affirmation was protected by public interest immunity and the contents of the affirmation had not been made public. Under the Legislative Council (Powers and Privileges) Ordinance (LC(P&P)O) (Cap. 382), the Legislative Council (LegCo) or a standing committee thereof might order any person to produce any document in his possession. There were occasions in the past in which public officers, when required to produce documents, refused on the ground of public interest immunity. LegCo had agreed to some rules to deal with these situations.

24. Mr LEUNG Kwok-hung asked whether LegCo could apply for a search warrant to search for and seize the journalistic material kept by ICAC. SALA1 explained that LC(P&P)O empowered LegCo or a standing committee thereof to order any person to give evidence or to produce papers and documents. However, there was no provision on the power to search for and seize materials.

25. Mr LEUNG Kwok-hung said that the power to search for and seize materials was unique and could only be exercised by law enforcement agencies. Thus, such a power should be exercised with caution. He reiterated that ICAC should disclose information regarding why it suspected that all the media organisations concerned would destroy the journalistic material sought in the investigation.

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26. Miss Margaret NG said that *habeas corpus* proceedings were normally not held in camera. Even when such proceedings were held in camera, the judgment should at least be made public. This was to ensure that no one would be subject to secret arrest. She questioned why the *habeas corpus* proceedings were held in Chambers or in camera. The Chairman asked whether ICAC had requested that the *habeas corpus* proceedings be held in camera.

27. HO/ICAC responded that references had been made in the *habeas corpus* proceedings in relation to a person placed under the witness protection programme. As it was an offence under section 17(1) of WPO to disclose information about the identity of a person who was or had been a participant of a witness protection programme, ICAC had requested that the *habeas corpus* proceedings be held in camera. C/ICAC said that although the *habeas corpus* proceedings were held in camera, the judgment was made public.

28. SADPP said that the case was related to a person put under a witness protection programme. The disclosure of the person put under the witness protection programme could jeopardise the safety of the person. A person who, without lawful authority or reasonable excuse, disclosed information about the identity of a participant in a witness protection programme committed an offence under section 17(1) of WPO. SADPP added that one of the allegations made by ICAC in relation to the *habeas corpus* proceedings was that certain persons might have conspired to pursue the *habeas corpus* application for the purpose of intimidating the participant and thereby dissuading her from acting as a prosecution witness.

29. Miss Margaret NG said that what SADPP had referred to was not a judicial finding, but an allegation about abuse of process. This would amount to an accusation outside the court of someone abusing the court's process.

30. SADPP responded that he was just responding to the question of why an application was made by ICAC for holding the *habeas corpus* proceedings in camera. He pointed out that the allegation made by ICAC had been referred to in the judgments handed down by CFI and the Court of Appeal.

31. Miss Margaret NG said that as the views of the Court of Appeal in the case were not legally binding and considered as *obiter*, ICAC should lodge an appeal to the Court of Final Appeal (CFA) to clarify the legal issues involved. She added that a subcommittee could alternatively be formed to examine whether legislative amendments were required.

32. C/ICAC responded that as the Court of Appeal had clarified the law on search and seizure of journalistic material, ICAC had decided not to lodge an appeal to CFA. He said that although the views of the Court of Appeal in the case concerned were not legally binding, they would be considered as relevant and persuasive in similar cases in future.

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33. Miss Margaret NG said that ICAC had stated after the Court of Appeal handed down its judgment that it would act in accordance with the law. However, it had not said so after CFI handed down its judgment. This reflected that ICAC was selectively acting in accordance with the law. She considered that ICAC's decision of not lodging an appeal to CFA was unacceptable. She questioned how the views of the Court of Appeal, which were *obiter*, could be taken as future guidelines for enforcement by ICAC. She also questioned whether ICAC had taken public interest into consideration in deciding whether to lodge an appeal to CFA.

34. C/ICAC said that the legal advice provided by D of J indicated that there was insufficient legal basis to justify lodging an appeal to CFA. He undertook to provide Members with a copy of the judgment on the *habeas corpus* application seeking the release of the participant under the witness protection programme.

(*Post-meeting note* : The judgment provided by ICAC was circulated to members vide LC Paper No. CB(2)192/04-05 on 10 November 2004.)

35. Ms Audrey EU asked whether the conditions in section 85(5)(a) or (b) of IGCO were considered to have been fulfilled if ICAC, after obtaining a search warrant, requested a media organisation to provide the relevant journalistic material within a few hours and the media organisation did not comply with the request.

36. C/ICAC responded that the requirements in section 85(5) of IGCO had to be satisfied before a search warrant would be issued.

37. Ms Audrey EU asked whether "the investigation" in section 85(5)(c) of IGCO referred to the investigation of media organisations or the investigation of persons suspected of conspiracy to pervert the course of public justice. She said that whereas the judgment of CFI was very clear in that there must be a real risk that the journalistic material concerned would be destroyed, the arguments in pages 72 to 75 of the judgment handed down by the Court of Appeal were very loose. She asked what ICAC suspected the media organisations might have done to seriously prejudice the investigation.

38. SADPP said that the relevant information, which covered the issues of concealing and destruction of journalistic material, tipping off, sensitivity of information, and the likelihood of information being revealed to other parties involved in the investigation, had been presented to the court for consideration. Such information was contained in the affirmation of ICAC, which was covered by public interest immunity and thus could not be disclosed.

39. SADPP added that in its application for the search warrants concerned, ICAC had pointed out that the following offences might be involved –

- (a) disclosure by journalists of the identity of a participant of the witness protection programme, which was in contravention of section 17(1)

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of WPO; and

- (b) conspiracy to pervert the course of justice, as certain persons might have pursued the *habeas corpus* application not for the *bona fide* purpose of seeking the release of the participant but for intimidating her and thereby dissuading her from acting as a prosecution witness.

40. The Chairman invited members' views on whether a subcommittee should be formed to follow up the subject matter. Members agreed that a special meeting would be held to continue the discussion on the subject matter.

V. Proposal to amend the Transfer of Sentenced Persons Ordinance to enable the transfer of sentenced persons between the Hong Kong Special Administrative Region and Macau Special Administrative Region
(LC Paper No. CB(2)111/04-05(07))

41. Referring to paragraph 9 of the Administration's paper, Mr Howard YOUNG asked whether the proposed transfer of sentenced persons (TSP) arrangement would only be applicable to permanent residents of the Hong Kong Special Administrative Region (HKSAR) and permanent residents of the Macau Special Administrative Region (MSAR).

42. Deputy Secretary for Security 2 (DS for S2) responded that under the TSP arrangement between HKSAR and MSAR, a sentenced person would not be eligible for transfer unless he was a permanent resident of, or had close ties with, the receiving jurisdiction.

43. Mr Howard YOUNG asked whether the Central People's Government (CPG) had been informed of the proposed arrangement. DS for S2 responded that communications had been made with CPG on the proposed TSP arrangement.

44. Referring to paragraph 10 of the Administration's paper, Mr CHEUNG Man-kwong asked whether and why CE was required to notify CPG of every relevant request for transfer of a sentenced person between HKSAR and jurisdictions other than MSAR.

45. DS for S2 replied that CE had to notify CPG of every relevant request for transfer of a sentenced person, as this was a form of international bilateral mutual legal assistance with other jurisdictions.

46. There being no further business, the meeting ended at 4:40 pm.

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Council Business Division 2
Legislative Council Secretariat
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