

**For information  
2 November 2004**

## **Legislative Council Panel on Security**

### **The Interpretation and General Clauses (Amendment) Bill 1995 Protection of Journalistic Material**

#### **Purpose**

This paper sets out, in response to the Panel's request, the major factors which were taken into consideration when the provisions in the Interpretation and General Clauses Ordinance (IGCO) regarding search and seizure of journalistic material were enacted in 1995.

#### **Background**

2. With a view to providing additional safeguards for journalistic material, in June 1995 the Administration introduced the Interpretation and General Clauses (Amendment) Bill 1995 to the then Legislative Council (LegCo). After thorough discussion by the Bills Committee formed to study the Bill and extensive amendments made taking into account the Bills Committee's suggestions, the Interpretation and General Clauses (Amendment) Ordinance 1995 (IGCAO) was passed by the then LegCo on 28 July 1995 and enacted on 3 August 1995.

#### **Considerations in the 1995 Legislative Exercise**

##### *A comprehensive approach*

3. In taking forward the legislative exercise, the Administration noted that powers of search and seizure were provided for under a number of ordinances, and they covered various law enforcement agencies. Against this background, the Administration decided to take a comprehensive approach by amending the IGCO to deal with the different provisions on search and seizure of journalistic material concerning various disciplined services and departments in one go.

##### *Balance between protecting press freedom and safeguarding public interest*

4. A prime consideration in the 1995 amendment exercise was to

ensure a proper balance between the need to protect press freedom and that of safeguarding other public interests. On the one hand, the legislative scheme should lay down stringent criteria to govern law enforcement agencies' access to journalistic material. On the other hand, it should provide our law enforcement agencies with such access if there are strong justifications for doing so.

5. The Bills Committee received deputations from the Foreign Correspondents' Club and the Hong Kong Journalists Association in addition to considering the Administration's explanation. The three-tier approach adopted in the IGCAO was agreed on having regard to the views expressed. Under each tier, attempts by law enforcement agencies to access journalistic material are subject to the stringent conditions and judicial scrutiny stipulated in the legislation –

(a) Tier One (production order, *inter partes* hearing)

Under this tier, an officer may apply to a District Court or Court of First Instance judge for a production order, requiring the person who possesses the journalistic material to produce it or to give the officer access to it. An application for the order shall be made *inter partes*, i.e. with both sides present. The officer has to satisfy the judge that a number of conditions are met before an order can be made. These conditions include, inter alia, that the material is likely to be of substantial value to the investigation of an arrestable offence or relevant evidence in proceedings relating to that offence, and that it is in the public interest to grant the order, having regard to the likely benefit to the investigation, and the circumstances under which the journalistic material is held.

(b) Tier Two (warrant application, seize and seal)

This tier provides that an officer may make an *ex parte* application to a District Court or Court of First Instance judge for a warrant authorising him to enter premises and to search for or seize journalistic material. Such application shall not be made unless it has been approved personally by a directorate disciplined officer listed in Schedule 7 of the Ordinance. This is to ensure that the decisions are made at a high level and that the grounds for resorting to this course of action are thoroughly considered and fully justified. The applicant will have to satisfy the judge that –

- there are reasonable grounds for believing that an arrestable offence has been committed, that there is material, known or suspected to be journalistic material on the premises in question, and that the material sought is likely to be of substantial value to the investigation of the offence or relevant evidence in proceedings for

that offence;

- other methods of obtaining the material have been tried and failed, or have not been tried because of the likelihood of failure or serious prejudice to the investigation;
- there are reasonable grounds to believe that it is in the public interest to grant the order, having regard to the benefit likely to accrue to the investigation; and
- it is not practicable to communicate with any person entitled to grant access to either the premises or the material to which the application applies; or the service of a notice pursuant to a Tier One production order may seriously prejudice the investigation.

Alternatively, the applicant will have to satisfy the judge that a Tier One production order relating to the material has not been complied with.

Any journalistic material seized pursuant to the warrant has to be sealed. The person from whom the material was seized may make an *inter partes* application for the return of the material. Unless the judge is satisfied that it would be in the public interest that the material be made use of by the authorities, he shall order it to be immediately returned to the person from whom it was seized.

(c) Tier Three (warrant application, seize and use)

In exceptional circumstances, an officer may make an *ex parte* application for a warrant and for the immediate use of the journalistic material seized. Apart from satisfying all the additional requirements in Tier Two, the officer has to prove to the satisfaction of the judge that the investigation may be seriously prejudiced if immediate access to the material is not permitted.

***Other issues***

6. Other issues which were raised by members of the Bills Committee and were taken into account included, *inter alia*, the following –

- (a) *Scope of protection* – The scope of protection provided under the Amendment Bill was considered by the Bills Committee. The Administration explained that the definition of “journalistic material” was taken from the UK Police and Criminal Evidence Act 1984 (PACE) and a conscious decision was made not to define the expression in specific

terms because it might have the undesirable effect of reducing the scope of protection for journalistic material. Similarly, “journalism” would be construed according to its ordinary and natural meaning, which otherwise might reduce the scope of protection.

- (b) *Means of obtaining material* – There was consideration concerning the way in which journalistic material was acquired. The Administration clarified that the Amendment Bill targeted material, not acts. By defining “journalistic material” generally, without reference to the way in which the material was acquired, created or possessed, the law would provide the best protection to bona fide journalistic material.
- (c) *Confidential journalistic material* – On whether journalistic material obtained in confidence should be accorded exemption from search and seizure, the Bills Committee agreed that journalistic material should not have absolute immunity. It was also noted that under the three-tier approach the judge had to take into account the “circumstances under which a person in possession of the material holds it”, in considering an application for a production order by an enforcement agency or an application for return of the material seized by the person from whom the material was seized.

## **Conclusion**

7. The Administration considers that the present legislative scheme on the law enforcement agencies’ access to journalistic material strikes an appropriate balance between protecting the freedom of the press and safeguarding public interest. The law enforcement agencies have always sought to abide by the provisions in the IGCAO in deciding whether to apply to the court for an authorization and, if so, under which tier. They never look upon journalistic material as their normal means of acquiring evidence for the purpose of criminal investigation, and have resorted to the provisions in the IGCAO very infrequently and only when there were strong justifications to do so.

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**Security Bureau**