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Legislative Council Building
8 Jackson Road, Central
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Dear Mr Cheung,

Prevention of Bribery (Amendment) Bill 2007

Thank you for your letter of 10 January 2008 on the above subject.

We have consulted the Department of Justice on the questions concerning sections 17 and 18 of the Official Secrets Ordinance ("OSO") (Cap. 521) and our response is set out in the subsequent paragraphs.

(a) Section 17

Section 17(1) of the OSO provides that a person who is or has been a public servant or government contractor commits an offence if he, without "lawful authority", discloses certain information, document or other article to which section 17 applies and that is or has been in his possession by virtue of his position as such. Section 17(2) lists the types of information, document or other article to which section 17(1) applies ("specified information"), e.g. information, document or other article the disclosure of which results in the commission of an offence, or impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders. For the purpose of section 17(1), section 21(1) of the OSO provides that a disclosure by a public servant is made with "lawful authority" if, and only if, it is made in accordance with his "official duty".

Depending on the relevant circumstances of the case involved, it is arguable whether the information contained in the Secretary for Justice (“SJ”) or Commissioner, Independent Commission Against Corruption’s (“C, ICAC”) referral under the proposed section 31AA of the Prevention of Bribery (Amendment) Bill 2007 (“Amendment Bill”) would fall within the scope of “specified information”. However, even if this were the case, the SJ and C, ICAC would not commit an offence under section 17 when making the referral because such a referral is made by C, ICAC or SJ in accordance with the proposed section 31AA and thus would constitute a disclosure made in accordance with their “official duty” which is afforded coverage under section 21(1)(a) of the OSO.

(b) Section 18

Section 18 of the OSO creates offences of (subsequent) disclosure without “lawful authority” by a person other than a public servant or government contractor of information protected under sections 13 to 17 of the OSO. A person would commit an offence under section 18(1) if he discloses without “lawful authority” information protected under sections 13 to 17 knowing that it is so protected and has come to his possession (as provided under section 18(2)) as a result of it having been -

- (a) disclosed (whether to him or another) by a public servant or government contractor without lawful authority;
- (b) entrusted to him by a public servant or government contractor on terms requiring it to be held in confidence or in circumstances in which the public servant or government contractor could reasonably expect that it would be so held; or
- (c) disclosed (whether to him or another) without lawful authority by a person to whom it was entrusted as mentioned in paragraph (b).

Section 21(3)(b) of the OSO provides that for the purpose of section 18(1), a disclosure by a person (other than a public servant or government contractor) is made with “lawful authority” if, and only if, it is made in accordance with an “official authorization”, i.e. an authorization duly given by a public servant, etc.

As explained above, the information in the SJ's referral was disclosed to the Legislative Council (LegCo) Members with "lawful authority (for the purpose of section 17)" and thus, bullet point (a) above would not apply. It is also unlikely that such information would fall within the scope of sections 13 – 16 which deal with information concerning defence, intelligence and international relations. It is, however, arguable whether the disclosure by a LegCo Member of information in the SJ's referral falls within the scope of bullet points (b) and (c) above and thus may lead to an offence under section 18.

As mentioned in the Administration's response (see LC Paper No. CB(2)1215/07-08(01)), we are considering whether there is a need to explicitly provide in the Amendment Bill that LegCo Members may disclose the information contained in the SJ's referral to relevant parties if such disclosure is reasonably necessary for the purpose of taking action under Basic Law 73(9), with due regard to the policy intent for section 30, i.e. to protect the integrity of the investigation when the investigation is still in a covert stage and the reputation of the subject person. We would examine the issue concerning section 18 of the OSO further in that context.

Yours sincerely,



(Arthur Au)

for Director of Administration