廉政公署
INDEPENDENT COMMISSION AGAINST CORRUPTION

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Your Ref: CB4/SC/12

27 September 2013

Ms Anita SIT
Clerk to Select Committee
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Ms SIT,

Select Committee to Inquire into Matters Relating to Mr Timothy TONG's Duty Visits, Entertainment, and Bestowing and Receipt of Gifts during his Tenure as Commissioner of the Independent Commission Against Corruption

I refer to your letter dated 19 September 2013 and my letter dated 6 September 2013.

The ICAC is willing to cooperate with the Select Committee and provide the assistance it requires. However, I believe members of the Select Committee will appreciate the importance of ensuring that the criminal investigation led by myself into the offences under Prevention of Bribery Ordinance and the common law offence of "Misconduct in Public Office" allegedly committed by Mr TONG Hin-ming (**TONG**) is conducted in a fair and impartial manner. It is under this principle I provide the Select Committee with the information under Part I (a) and Part II of your Major Areas of Study (**MAS**), and decline to provide the remaining information and documents.

I am thankful to your clarification on your request for information covered in your letter dated 25 July 2013 and your effort to draw our attention to the possibility of conducting part of the inquiry "in camera" with a view to addressing some of the concerns.

The information and documents sought to be obtained by the Select Committee in respect of Part I (b) to (e) of the MAS concern factual matters relevant to the criminal investigation against TONG. Whether or not they are ICAC's records created while TONG was the Commissioner, efforts are being given to turn the essential information and documents into evidence by interviewing the persons involved. One of my concerns is the discussion of such information or documents, especially in open forum, would affect the evidence gathering process.

I presume the arrangement of inquiry "in camera" is similar to closed hearing mentioned in the proposed procedure and practice for the Select Committee [LC Paper No. CB(4)892/12-13(02)]. It seems that such arrangement, if agreed by majority of the committee, could not entirely overcome the concerns raised in my letter dated 6 September 2013, including the deterrent effect of the examination on the prospective witnesses in the criminal investigation. It may, if there is a criminal trial, create difficulty for the prosecution to disclose the evidence of witnesses in such inquiries, which are inevitably unused materials subject to disclosure.

Further, even if disclosure is to be confined to contemporaneous records (as opposed to records compiled in the course of the on-going investigation), and even if proceedings are to be held "in camera", there will still be serious unaddressed concerns. In particular, contemporaneous records might be shown to witnesses during proceedings which they have not beforehand seen. Information contained in those records may be disclosed to witnesses which they hitherto were not aware of. The memory of those witnesses might as a result be criticized as having been irreversibly tainted. Future statements or evidence obtained from or given by such witnesses may be criticized as being coloured by such disclosure, thereby affecting their reliability or credibility. Parties may also be tipped off as a result of such disclosure, the effects of which on the on-going investigation will be impossible to assess. The likelihood of the disclosure of the balance of the materials requested causing serious prejudice to the ongoing investigation or any prosecution arising therefrom is in my view a grave and serious one.

In respect of your request for removing the "Confidential" classification from our letter dated 6 September 2013 and its Annexes, we have already given you a positive reply on 26 September.

I hope the above can assist the Select Committee to appreciate the decision of not providing it with the information or documents it sought to obtain in respect of Part I (b) to (e) of the MAS.

Yours sincerely,

(Simon Y L PEH)
Commissioner
Independent Commission Against Corruption