

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

香港添馬添美道 2 號

2 Tim Mei Avenue, Tamar, Hong Kong

本函檔號 Our Ref.: SBCR 3/5691/95 Pt.51

來函檔號 Your Ref.:CB2/SS/3/13

電話 Telephone: 2810 3523

圖文傳真 Facsimile: 2524 3762

Miss Betty MA
Chief Council Secretary (2)1
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

17 January 2014

Dear Miss MA,

**Subcommittee on
Fugitive Offenders (Czech Republic) Order,
Mutual Legal Assistance in Criminal Matters (Spain) Order, and
Mutual Legal Assistance in Criminal Matters (Czech Republic) Order
Meeting on 21 January 2014**

I refer to your letter dated 3 January 2014. The Administration's response to the comments raised by Members at the meeting on 10 December 2013 is set out below.

Mutual Legal Assistance in Criminal Matters (Spain) Order

Article 3(2) – Exception to “an offence of a political character”

Article 3(2) excludes from the category of “offences of a political character” terrorist offences and any other offences which the Requested Party considers excluded from that category by any international agreement applying to that Party. This article was included at the request of Spain. Similar provisions are also contained in the Agreements with Belgium (Article 4(3)), India (Article IV(3)) and Sri Lanka (Article 4(2)). A similar provision is also found in the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (Article 8(4)).

When a Hong Kong Court has to consider whether an offence is of a political character, it will be invited to give effect to the terms of the Agreement, which is part of the sub-legislation, within the perimeter of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), in addition to all the circumstances of the offence.

Article 3(4) – Discretionary ground for refusal based on offence punishable with life imprisonment or sentence of undetermined duration

Article 3(4) was added at the request of Spain. Similar provision is available in the Agreement with Portugal (Article 4(3)). As Spain always provides a maximum sentence for her offences, it is expected that Hong Kong will not refuse assistance request from Spain on this ground. On the contrary, Spain may refuse to provide assistance to Hong Kong if Hong Kong is unable to give such assurance as Spain considers sufficient that the life imprisonment or a sentence of undetermined duration will not be imposed, or if imposed, will not be carried out. That said, when Hong Kong makes assistance requests to Spain that involve offences that carry a prison sentence of undetermined duration, Hong Kong may explain to Spain the sentence reviewing mechanism under the Long Term Prison Sentences Review Ordinance, Cap. 524, which allows the substitution of an indeterminate sentence of a prisoner by a determinate one, for Spain's consideration of whether to invoke the discretionary right of refusal.

Article 12 – Why did Spain request the exclusion of Article 12(3) of the Model agreement?

Article 12(3) of the Model Agreement requires that a request for the service of a document pertaining to an appearance in the Requesting party shall include such notice as the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served. Spain was of the view that this article was not necessary as such information might be exchanged through Interpol. Spain also expressed difficulties as it did not have such a provision in its other bilateral MLA agreements.

Mutual Legal Assistance in Criminal Matters (Czech Republic) Order

Article 8(3)(b) – Use of information for the prevention of serious crime or of a serious threat to public order

Article 8(3)(b) was added at the request of the Czech Republic. The article sets out the exceptional circumstances where the Requesting Party may use the

information provided by the Requested Party for purposes other than those stated in the request. The exception is only valid for the “prevention” of serious crime and serious threat to public order. It is not to be used when any such crime has already been committed, where a request for assistance would still be necessary. Thus, the primary rule that the information is not to be used for the purpose of any other investigation or prosecution still holds.

It should also be noted that this exception would only be triggered in serious cases of criminal activities (such as murder) or imminent threats to public order. It is expected to be rarely utilized. Hong Kong’s MLA Agreement with Germany contains a provision of similar nature on usage of personal data transmitted on the basis of the Agreement for the purpose of warding off substantial dangers to the security of the requesting party (Article 9(2)). A similar provision is contained in the MLA Agreements between the European Union and the USA (extracted at Annex A), and between USA and a number of European states. It is also recognized amongst European civil law jurisdictions and appears in the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (i.e. Article 26 (1) Data Protection, extracted at Annex B).

The provision is also consistent with the exception in our data protection law. Section 58(2) of the Personal Data (Privacy) Ordinance (Cap. 486) provides for express exemption in cases where use of personal data is necessary for prevention of crime.

Section 58(2) provides that :

“(2) Personal data is exempt from the provisions of data protection principle 3¹ in any case in which-

(a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data is held for any of those purposes); and

(b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection,

and in any proceedings against any person for a contravention of any of those provisions it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters.”

¹ Principle 3 restricts use of personal data for a new purpose.

The purposes in subsection (1) include “*the prevention or detection of crime*” and “crime” means:

- “ (a) *an offence under the laws of Hong Kong; or*
- (b) *if personal data is held or used in connection with legal or law enforcement cooperation between Hong Kong and a place outside Hong Kong, an offence under the laws of that place*”²

The spirit of Article 8(3)(b) echoes the exception provided under section 58(2) of Cap. 486. It caters for the prevention of imminent serious crime where it may be impractical to seek consent from the Requested Party e.g. to prevent an immediate terrorist attack.

Article 17 – Time element in relation to civil suit immunity

Members would like to know the implications of the difference in formulation between Article XVII(1) of the Model Agreement (containing a reference to “preceded his departure from the requested part”) and Article 17(1)(b) of the MLA Agreement with the Czech Republic, which concerns civil suit immunity for a person being transferred to provide assistance.

In accordance with Article 6(2) of the Agreement, a request pursuant to Articles 15 or 16 will be executed in accordance with the law of the Requested Party. The applicable law in Hong Kong is the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525). Where Hong Kong sends a request to the Czech Republic for transfer of a person to Hong Kong, the safeguards as provided in section 17(1)(b) of Cap. 525 will apply. Similarly, when a person is to be transferred to the Czech Republic, Hong Kong will require that the safeguards under section 23(2)(a)(ii) apply. The safeguards under sections 17 and 23 of Cap. 525 are consistent with the Model Agreement.

It is important to note that the transfer of a person to provide assistance is a completely consensual agreement. The person will be advised of the transfer arrangements and the relevant undertakings before departure. The person, if not satisfied with the arrangements or undertakings provided, always has the option of not giving consent, in which case no transfer will be effected. The difference in formulation between the Model Agreement and the Agreement with the Czech Republic does not affect the rights enjoyed by the person sought to be transferred.

² Section 58(6) of Cap. 486

Article 20 – Exchange of information/Spontaneous information

The article was included at the request of the Czech Republic, as it may exchange information without request under its law. Similar provisions are also found in the MLA Agreements with Spain (Article 18), France (Article XIX), Switzerland (Article 16) and Belgium (Article XX), and the United Nations Convention Against Corruption (UNCAC) (Article 46(4)) and United Nations Convention Against Transnational Organized Crime (UNTOC) (Article 18(4)).

Under the Agreement, provision of any information is on a voluntary basis and the article does not in any way oblige Hong Kong to provide information. In practice, information is not provided by the Central Authority of Hong Kong without prior request pursuant to an MLA Agreement. However, Hong Kong has, from time to time, received spontaneous information from our counterparts in relation to offences which might be connected to Hong Kong.

Yours sincerely,

a



(Huggin Tang)
for Secretary for Security

c.c.:

Department of Justice (Attn.: Ms. Elizabeth Liu)

Extract from the
the Agreement on Mutual Legal Assistance in Criminal Matters
between the European Union
and the United States of America

“Article 9

1. The requesting state may use any evidence or information obtained from the requested State:

- (a) for the purpose of its criminal investigations and proceedings;

- (b) for preventing an immediate and serious threat to its public security;”

Extract from
the Second Additional Protocol to the European Convention
on Mutual Assistance in Criminal Matters

“Article 26 – Data Protection

1. Personal data transferred from one Party to another as a result of the execution of a request made under the Convention or any of its Protocols, may be used by the Party to which such data have been transferred, only:

- (a) for the purpose of proceedings to which the Convention or any of its Protocols apply;
- (b) for other judicial and administrative proceedings directly related to the proceedings mentioned under (a);
- (c) for preventing an immediate and serious threat to public security. ”