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15 December 2003

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The Case of Mr Antony Leung Kam-chung

I am writing to inform you, in advance of our formal announcement to be made this afternoon, of the decision in the case involving Mr Antony Leung Kam-chung, the former Financial Secretary. The case relates to his actions in respect of a car (a Lexus saloon) purchased by him on 20 January 2003, whilst discussions about an increase in the First Registration Tax of motor vehicles were taking place within the Administration. Enclosed herewith for your advance information is our press release and attached to it are a statement made by myself and another statement made by Mr Grenville Cross, SC, the Director of Public Prosecutions (DPP). These statements go into far greater detail, both in respect of the facts and the legal reasoning behind the decision, than ever before because we are conscious that this case has aroused serious public concern.

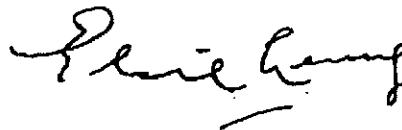
- (a) From the outset, I delegated to DPP the task of deciding whether or not to prosecute Mr Leung in order to avoid any possible perception of bias because Mr Leung was a former colleague of mine.
- (b) The DPP came to the decision not to prosecute Mr Leung after full consideration of the evidence, the law and the opinions given by two outside counsel who were Mr John Griffiths, SC and Mr Martin Wilson, QC. These opinions were sought for sound legal reasons, and there was absolutely no truth in allegations that the Department of Justice had fished around for an opinion to fit in with a preconceived conclusion.
- (c) Mr Griffiths and Mr Wilson independently advised that when the totality of the evidence was examined, a prosecution against Mr Leung for the offence of misconduct in public office could not be justified because a reasonable prospect of securing a conviction in the case did not exist. DPP came to the same conclusion not to prosecute Mr Leung since, when all the evidence was weighed, criminality could not be established to the required standard to institute a prosecution. Mr Griffiths, Mr Wilson and DPP are experienced criminal practitioners and all three of them came to the same conclusion not to prosecute Mr Leung.
- (d) I am satisfied that the present decision not to prosecute Mr Leung is a proper decision made in strict accordance with our established prosecution policy. I am further satisfied that no special treatment was accorded to Mr Leung's case. Had the whole of evidence afforded a reasonable prospect of conviction, it would have been in the public interest to prosecute Mr Leung.
- (e) I am aware of the sensitivity of this matter and the intense public debate. I am satisfied that due process was observed in the whole conduct of the case, and that the decision not to prosecute Mr Leung was a proper professional decision which was made by DPP free from any interference.

- (f) After very careful consideration of all the evidence and legal advice in the matter, I have accepted DPP's decision. It follows that I accept fully accountability for the decision.

We appreciate that this is a case in respect of which LegCo Members have had expressed great interest. To provide exceptional transparency to this particular case, without prejudicing the due administration of justice, DPP and I would be prepared to meet Members in a closed-door discussion session. My administrative staff will contact the LegCo Secretariat sometime today to arrange for a suitable timeslot.

In view of the sensitivity of the matter, I should be grateful if you would not disclose the contents of this letter and the enclosures attached hereto until our formal announcement is made later in the day, at around 2 PM.

Yours sincerely,



(Ms Elsie Leung)
Secretary for Justice

Enclosures

DPP Decides not to Prosecute Antony Leung

The Director of Public Prosecutions (DPP), Mr Grenville Cross, SC, has decided not to prosecute former Financial Secretary, Mr Antony Leung, for his actions in respect of a car purchased shortly before an increase in First Registration Tax in the 2003 Budget. The DPP came to the decision after full consideration of the evidence, the law and the opinions given by two leading counsel at the private Bar, one in Hong Kong and the other in England.

Speaking at a meet-the-media session today (Dec 15), Mr Cross said that, on the totality of the evidence, a prosecution could not be justified as it could not be proved Mr Leung deliberately sought to evade tax on a car he purchased in January 2003.

He said his decision was accepted by the Secretary for Justice, Ms Elsie Leung. She had, Mr Cross said, from the early stage of the case, delegated to him the task of deciding whether or not to prosecute Mr Leung. This was done in order to avoid any possible perception of bias because of her former working relationship with Mr Leung.

Mr Cross stressed that, had the whole of the evidence afforded a reasonable prospect of conviction, it would have been in the public interest to prosecute Mr Leung.

He said both leading counsel from the private Bar, Mr John Griffiths, SC, and Mr Martin Wilson, QC, concluded that when the totality of the evidence was examined a prosecution of Mr Leung for the offence of misconduct in public office could not be justified and that a reasonable prospect of securing a conviction in this case simply did not exist.

Mr Cross added that Mr Griffiths and Mr Wilson were correct to advise that although Mr Leung should have made a declaration to the Executive Council about his recent purchase, this was not misconduct of sufficient seriousness to justify prosecution as it appeared on the evidence to be due to nothing more sinister than a desire to avoid personal embarrassment.

When all the evidence in this case was weighed, criminality could not be established to the required standard to institute a prosecution, Mr Cross said.

Mr Cross added that prosecutions in Hong Kong could only ever be instituted on the basis of sufficiency of evidence. A prosecution should never be started unless the prosecutor was satisfied that there was admissible, substantial and reliable evidence to justify placing a person upon trial.

If, once everything was considered, it was decided that a reasonable prospect of securing a conviction was absent, a suspect would not be prosecuted, Mr Cross said.

"It has never been the rule in this jurisdiction that those suspected of criminal offences must automatically be the subject of prosecution," he added.

The following is the full text of two statements issued by the Secretary for Justice, Ms Elsie Leung, and the Director of Public Prosecutions, Mr Grenville Cross, SC, today (Dec 15) on the case concerning Mr Antony Leung.

End/Monday, December 15, 2003

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**A Statement by the
Secretary for Justice**

**The case of
Mr Antony Leung Kam-chung**

Following a media report on the 9 March, 2003, the Independent Commission Against Corruption (ICAC) received complaints against Mr. Antony Leung Kam-chung (Mr. Leung), the former Financial Secretary. The complaints related to his purchase of a Lexus saloon several weeks before he delivered the 2003-2004 Budget Speech. In that speech, he announced a sharp increase in the First Registration Tax of motor vehicles (FRT). By purchasing the car before, rather than after, that tax increase, Mr Leung made a saving of \$190,000. A Report was submitted by the ICAC to the Department of Justice on the 15 July, 2003, for advice as to whether the act complained of would justify a charge of 'Misconduct in Public Office'. We advised that further inquiries should be made and a Supplementary Report was submitted to us on the 21 August, 2003.

2. When the Director of Public Prosecutions (DPP) reported the matter to me for the first time after receipt of the two reports, I made the following decisions: (1) that the DPP should have conduct of the matter without seeking instructions from me; and (2) that independent advice should be sought from a private member of the Bar.

3. In respect of my first decision, I was aware of the sensitivity of the matter because Mr. Leung was my colleague as a Principal Official of the HKSAR Government and a Member of the Executive Council, and the matter had aroused serious public concern. I was satisfied that the DPP had had no connection with Mr. Leung financially, socially or otherwise. Therefore, I gave him full authority to deal with the matter. However, I made it clear that, before the decision was announced, I wanted to see the case papers and all legal

advice given or obtained. This was because, as Head of the Department, I am ultimately accountable for any decision that he makes.

4. In respect of my second decision, the latest judicial authority on 'Misconduct in Public Office' is *Shum Kwok-Sher v. HKSAR* (2002) 5 HKCFAR 381, in which Mr. Michael Thomas, SC represented the HKSAR and Mr. John Griffiths, SC represented the Appellant (defendant). Counsel involved in that case would be the first choice to advise on this matter since the law on the subject was exhaustively argued in the Court of Final Appeal. I understand from the DPP that Mr. Thomas was approached but declined our request for advice because of his acquaintance with Mr. Leung. However, Mr. Griffiths, who has had no contact whatsoever with Mr. Leung, agreed to accept the brief. After considering the matter, he advised that no prosecution should be brought. Having examined the advice of Mr Griffiths, the DPP felt this was a rare case in which a second independent opinion would be beneficial. In so deciding the DPP bore in mind the sensitivity of the case, the complexity of the law, and the level of public concern. The legal expert selected was Mr. Martin Wilson, QC. Mr. Wilson also advised that no prosecution should be brought.

5. On the 9 December, 2003, the DPP submitted a full report to me on the matter. He came to the conclusion that, when all the evidence involving Mr. Leung in the period January to March 2003 was examined as a whole, criminality could not be established in this case to the required standard on a charge of Misconduct in Public Office. Having had the opportunity of studying the case papers, the two Leading Counsel's opinions, the authorities which I was referred to, and the submissions made to the Department of Justice by Mr. Leung's lawyers, I am satisfied that the DPP's decision must be right.

6. The offence of Misconduct in Public Office involves the following elements, each of which must be proved :

- (a) a public official;
- (b) in the course of or in relation to that public office;

- (c) willfully and intentionally;
- (d) culpably misconducts himself.

The misconduct must also be serious enough to warrant criminal conviction and punishment.

7. The reasons why the DPP has come to the conclusion not to prosecute are fully set out in the statement which he has issued simultaneously with mine. I do not wish to re-iterate those reasons.

8. However, I must stress that Mr. Griffiths and Mr. Wilson were the only outside Counsel whose opinions the Department of Justice sought in this matter. No other outside Counsel, apart from these two, was consulted. The rumours that five Counsel were consulted and that four of them were of the view that Mr. Leung should be prosecuted were totally untrue. Such false rumours could not be allowed to mislead the public, and statements of denial were issued as soon as the stories were published.

9. Prosecutorial decisions are often difficult and controversial. I am satisfied that due process was observed in the whole conduct of the case, which was in strict accordance with prosecution policy. The present decision is fair, free from any interference, and displays professionalism. I commend the DPP for making his decision under tremendous pressure. It would be much easier for him to claim the moral highground by prosecuting a person who previously held an important position in the government. But that would be contrary to a fundamental principle of our prosecution policy : there must be a reasonable prospect of securing a conviction before a prosecution may be brought, and even borderline cases should not be prosecuted. This Department has the responsibility to safeguard citizens from arbitrary prosecutions, which may affect the liberty of the subject. If the provable facts of the case meant that there was a reasonable prospect of conviction on the whole of the evidence, the public interest would require that Mr. Leung be charged. But there was no such reasonable prospect.

10. In our Statement of Prosecution Policy and Practice, which was revised last year, we have committed ourselves to as much openness in relation to the decision-making process as is consistent with the due administration of justice. We stated that reasons for decisions in the course of prosecutions may be given where practicable, usually only to those with a legitimate interest in the matter and where it is appropriate to do so. Public hearings and debates were held in Legislative Council in respect of this case, and many of the facts have been disclosed to the public and widely reported in the media. We therefore find it necessary to give an account of our decision to the Legislative Council and to the public at large.

11. The Director of Public Prosecutions will be holding briefings to answer queries that may be raised on the conduct of the matter.

Ms Elsie Leung
Secretary for Justice
15 December 2003

**A Statement by the
Director of Public Prosecutions**

**The Case of
Mr. Antony Leung Kam-chung**

INTRODUCTION

1. After complaints of impropriety in relation to the purchase of a car were levelled in the early part of 2003 against Mr. Antony Leung Kam-chung, then Financial Secretary of the HKSARG (FS), the Independent Commission Against Corruption (ICAC) conducted a comprehensive investigation.
2. Once all aspects of that investigation were completed, the ICAC submitted their finalised report to the Director of Public Prosecutions (DPP) for consideration in late August 2003.
3. The DPP instructed a Senior Counsel at the Bar of Hong Kong to provide an independent opinion on the issue of whether a prosecution of Mr. Leung was appropriate upon the application of the law and established prosecution policy to the evidence.
4. The Senior Counsel submitted his finalised advice to the DPP in late October 2003. He advised the DPP not to prosecute Mr. Leung.
5. Having considered the advice of Senior Counsel, the DPP decided in November that he would be assisted by a second opinion. He therefore instructed a Queen's Counsel at the Bar of England and Wales to provide an independent opinion on the issue of whether a prosecution of Mr. Leung was appropriate upon the application of the law and established prosecution policy to the evidence.

6. The Queen's Counsel submitted that opinion to the DPP in early December 2003. He advised the DPP not to prosecute Mr. Leung.

7. The DPP considered the opinions, the evidence, the law and other relevant material. He decided that there was not a reasonable prospect of securing a conviction against Mr. Leung on the evidence as a whole. Had there been sufficient evidence, a prosecution of Mr. Leung would have been instituted in the public interest.

8. The DPP explained to the Secretary for Justice (SJ) the basis of his decision. Having studied the materials, the SJ agreed with the decision of the DPP.

Roles of Secretary for Justice and Director of Public Prosecutions

9. At an early stage, the SJ and the DPP discussed the situation created by the relationship which the SJ enjoyed with Mr. Leung as a colleague in ExCo since 1997. Under the Basic Law, the Department of Justice is responsible for the control of prosecutions, free from any interference, and the SJ is head of the Department. However, in order to avoid any possible perception of bias, the SJ delegated to the DPP the taking of the decision in this matter. It was agreed that after the DPP had reached his decision, he would explain its basis to the SJ, so that she, in turn, would be in a position to explain it to others as required.

Criteria for Prosecution

10. Paragraph 7.1 of *The Statement of Prosecution Policy and Practice* (2002) stipulates :

The prosecutor must consider two issues in deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued? That policy is consistent with the policies applied throughout the common law world.

The Relevant Law

11. To understand the decision reached in this case, it is necessary to summarise the relevant aspects of the criminal law, which were applied by each of those who considered this case.

12. The allegation investigated by the ICAC centred on the offence of misconduct in public office. In 2002, the Court of Final Appeal, in its judgment in *Shum Kwok-sheer v HKSAR*, indicated what the elements of the offence of misconduct in public office involve. The elements are :

- (1) *a public official;*
- (2) *who in the course of or in relation to his public office;*
- (3) *wilfully and intentionally;*
- (4) *culpably misconducts himself.*

13. A public official culpably misconducts himself if, with an improper motive, he '*wilfully and intentionally*' exercises a power or discretion he has by virtue of his office without reasonable excuse or justification. '*Wilfully*', for these purposes, means deliberately, so that the public official has acted with knowledge or awareness of the consequences. The misconduct in question must also be serious and injurious to the public interest.

14. In the earlier case of *Kwan Ping-bong v R*, in 1978, the Privy Council said there was no principle in the criminal law of Hong Kong more fundamental than that the prosecution must prove the existence of all essential elements of the offence with which an accused is charged. The Privy Council emphasised that the proof must be '*beyond reasonable doubt*', which called for a degree of certainty considerably higher than proof on a mere balance of probabilities. That requirement of proof beyond reasonable doubt, however, did not prevent a court from inferring, from facts proved by direct evidence, the existence of some further fact, such as the knowledge or intent of the accused, which constituted an essential element of the offence. Before that inference might

be drawn, however, the Privy Council indicated that it *'must be compelling – one (and the only one) that no reasonable man could fail to draw from the facts proved'*. That remains an accurate statement of the law as it applies in Hong Kong.

Background

(a) Car Purchase

15. Mr. Leung and his wife, Madam Fu Mingxia, at the start of 2003, were expecting a child whose birth date was expected to be, as in fact occurred, 26 February 2003. Mr. Leung has stated that they decided to buy a car to carry the baby because his Porsche and Toyota Land Cruiser were not best suited to getting in-and-out with a baby. He also had a BMW Saloon, provided by the government, which Madam Fu was entitled to use but which might not be available if required by him for official duties, which were considerable.

16. After together inspecting a number of different makes and colours of car in early January 2003, Madam Fu decided she liked a silver-coloured Lexus which was then in stock. Other makes and models had been inspected and rejected. If a car was ordered before the Budget, which was due on 5 March 2003, but delivered after it, the increased rates of First Registration Tax (FRT) contained in the Budget would be payable. Some of the rejected cars fell into this category, though price and Madam Fu's personal preferences could have played a part in the choice.

17. On 18 January 2003, after two test drives, Mr. Leung decided to buy a 2002 version Lexus LS430 from Crown Motors Ltd. The net price was \$702,204, after receiving a discount of \$50,000, and paying for Lexus insurance. On 20 January 2003, he paid a deposit of \$80,000. The FRT included in the price was \$229,620. The base price before tax, discount and incidental costs (extended warranty, air conditioner, etc.), was \$382,700.

18. The Lexus LS430 was registered in the name of Mr. Leung on 23 January 2003. Mr. Leung took delivery on 25 January 2003.

(b) **Budget Strategy Group (BSG)**

19. As FS, Mr. Leung chaired the BSG. The BSG assists the FS in the preparation of the Budget. At its meetings on :

- 30 July 2002, the BSG considered existing and potential revenue matters, including FRT;
- 31 October 2002, the BSG recommended an upwards adjustment in tax rates for more expensive private cars, and new rates were provisionally agreed;
- 14 January 2003, the BSG agreed to further review the magnitude of the proposed FRT to make the tax regime more progressive;
- 11 February 2003, the BSG considered an FRT paper which examined the impact of FRT upon various models, including Lexus LS 430. This paper modified the previous proposal downwards, but, nonetheless, for cars like Lexus, it proposed raising the FRT by some 57 % or 62%.

On 28 February 2003, all revenue measures to be included in the Budget were settled, and, as regards FRT, there was no change to that proposed at the BSG meeting on 11 February 2003.

(c) **ExCo Meetings**

20. The recommended rates were presented to ExCo on 5 March 2003 as part of the budget proposals of FS, and, after discussion, were made subject to a Revenue Protection Order, and formed part of his 2003-04 Budget in LegCo later that day.

21. Towards the end of that ExCo meeting, Dr. E.K. Yeoh formally declared that he had ordered a new car for delivery in about two months. Mr. James Tien and Mr. Stephen Lam said they had recently purchased cars. A ruling was made that Dr. Yeoh's declaration was appropriate as his car was yet to be registered, but that those of Mr. Tien and Mr. Lam were not necessary as their vehicles had already been registered and they had not been involved in preparing the Budget. Mr. Leung did not participate in this discussion.

22. At the ExCo meeting on 11 March 2003, there was further discussion of the earlier declaration by Dr. Yeoh. Although Mr. Leung did not participate, he had, the previous day, informed the Chief Executive (CE) that the increase in FRT of his vehicle was about \$190,000.

(d) **The Code for Principal Officials (The Code)**

23. The Code was issued in June 2002. It requires principal officials, *inter alia*, to observe the highest standards of personal conduct and integrity; to avoid putting themselves in a position which might arouse any suspicion of dishonesty or conflict of interest; to report to the CE any private interests that might influence, or appear to influence, their judgment in the performance of their duties.

Mr. Leung Explains

24. Following reports about his car purchase, Mr. Leung advised the CE on 10 March 2003 of various matters. These included :

- he had not associated his purchase of a car to an increase in FRT until questions were raised by the media on 8 March 2003
- the timing of the purchase was dictated solely by the need to have the car ready before the baby was born

- he realised he should have taken precautions to avoid any perceived conflict of interest
- he had decided to donate \$380,000 to the Community Chest.

25. On 13 March 2003, Mr. Leung advised the CE of further matters. These included :

- he contemplated buying a new car for his wife and baby in December 2002 and visited showrooms in January 2003
- he and his wife drove the new ES300, but they did not like its performance
- he bought the Lexus LS430 2002 model, which was in a clearance sale, and attracted a discount, after he had tested it
- he did not buy a 2003 model because it would not be in stock before his wife's confinement
- at the BSG meeting on 14 January 2003, 18 revenue measures were considered, but he did not recall that FRT was one of these until he checked his files on 11 March 2003.

26. After the CE criticised him on 15 March 2003 for having breached the requirements of The Code, by not avoiding any perceived conflict of interest and not reporting his purchase, Mr. Leung responded that same day. He accepted that what he had done amounted to a breach of parts of The Code, and that he had made a mistake, but insisted that he had no intention to evade tax. He acknowledged that his behaviour as a Principal Official had been highly inappropriate and indicated that he had offered to resign on 10 March 2003.

27. Mr. Leung appeared before the LegCo Constitutional Affairs Panel on 17 March 2003 and 8 April 2003. He said :

- his wife required the saloon car to facilitate transportation of the baby
- he was nervous about his wife's health condition
- the existing vehicles, one a two-door sports car (the Porsche), the other a jeep with a high body (the Toyota), were not suitable for the carriage of a baby
- the mistake was not intentional
- he had been negligent and handled the matter inappropriately, but was preoccupied with, on the one hand, the birth, and, on the other, with preparing the Budget and attending to other official duties
- he was nervous and excited about the birth but could do little to help his wife due to his workload
- he separated official work and private life and failed to connect the two
- he failed to make a declaration at the ExCo meeting on 5 March 2003 because he had not connected the two matters in his mind and was focused on the Budget he was about to deliver.

ICAC Investigation

28. Having received complaints in March and April 2003, the ICAC investigated the circumstances concerning the car purchase by Mr. Leung. Legal advice was provided in the course of that investigation. Once its investigation had been finalised, the ICAC submitted its Report to the DPP on 21 August 2003.

The Report indicated that if there was to be a prosecution of Mr. Leung, the appropriate charge would be that of misconduct in public office.

Representations of Mr. Leung

29. On 31 July 2003, lawyers acting for Mr. Leung made representations to the DPP. It was submitted that once all relevant matters were taken account of, no prosecution could properly be instituted. The representations included :

- the Lexus saloon was purchased for a specific family need, as a vehicle was required that was easy to get in and out of by a mother holding a baby
- Madam Fu became worried in December 2002 that the Porsche coupe and the Toyota Land Cruiser were not suitable for carrying a baby. The Porsche was too small and the Toyota posed problems for someone getting in and out with a baby
- although the preferred choice of Mr. Leung and Madam Fu was a Mercedes Benz E320 or a BMW 5-series, these were not readily available in January 2003, and any car that would be delivered after 26 February 2003 would not suit their purpose
- after test-driving, the Lexus LS430 (2002), which was then in stock, was found to be the car most suitable for the couple's needs
- there was no intention to evade tax, although, with hindsight, it was accepted that Mr. Leung had acted imprudently
- Mr. Leung genuinely disassociated the purchase of the vehicle, as a prospective first-time father, from his responsibilities as FS
- Mr. Leung was reluctant to use the official car for private matters

- the car was bought to meet an urgent family need, and Mr. Leung simply did not consider at all whether or not he would save FRT and there was no association of the two matters in his mind
- FRT was one small part of the 2003-04 Budget. At the BSG meetings on
 - 30 July 2002 : FRT was one of about 30 existing and potential revenue items discussed
 - 31 October 2002 : various items were discussed, including Salaries Tax, Profits Tax and FRT, with most of the meeting focused on Salaries Tax and Profits Tax
 - 14 January 2003 : 18 revenue measures/options were considered, with FRT to be further reviewed. Much of the meeting was devoted to Salaries Tax, Profits Tax and civil service pay
- the FRT was not finalised when the car was purchased in January
- Mr. Leung's reaction to media inquiries showed he had no idea what the FRT would be on his car if it had been purchased after the Budget. He did not know if it was \$50,000, \$190,000, or some other figure. This demonstrated he had not done any calculation on the FRT of his car prior to purchase. He donated \$380,000 to charity, which represented double the tax difference, once he realised what had happened
- Mr. Leung at no time tried to conceal his car from the public or the media. On the contrary, it was registered in his own name, and he openly parked it at his home and at the Central Government Offices on several occasions

- When Dr. Yeoh made a declaration at the ExCo meeting on 5 March 2003, Mr. Leung was preoccupied with the Budget he was to present later that day and with the press conferences thereafter
- on learning of concerns over a perceived conflict of interest, Mr. Leung immediately contacted the Chief Executive and briefed him
- Mr. Leung accepted that he had been negligent in not having declared his purchase according to the Code for Principal Officials, but emphasised that he had no intention to evade tax liability and that his mistake was an oversight.

Department of Justice Processes the Case

30. After the DPP received the ICAC Report in late August 2003, he instructed a Senior Counsel at the private Bar to assess the case and to advise if a prosecution was appropriate. The DPP decided that this course was expedient in a case of such sensitivity. He felt he would, in any event, be assisted by the advice of an expert in the law related to the offence of misconduct in public office.

31. The outside legal expert selected to advise was Mr. John Griffiths SC (Senior Counsel). Mr. Griffiths is one of the foremost Senior Counsel in Hong Kong, having originally been appointed as Queen's Counsel in 1972. He is a lawyer of impeccable credentials and of high repute. Mr. Griffiths was the Attorney General of Hong Kong from 1979 to 1983. In 2002, Mr. Griffiths conducted the landmark case of *Shum Kwok-she* in the Court of Final Appeal. In that case, the Court considered the nature and ambit of the offence of misconduct in public office. Mr. Griffiths, therefore, was a perfect choice to advise upon the law in this area, and to indicate whether Mr. Leung's conduct in purchasing the Lexus saloon in January 2003 constituted the offence of misconduct in public office. Having had no dealings with Mr. Leung, Mr. Griffiths agreed to advise upon the case.

32. Mr. Griffiths submitted his finalised advice to the DPP on 29 October 2003.

33. Having examined the advice of Mr. Griffiths, the DPP felt this was a rare case in which a second independent opinion would be beneficial. In so deciding the DPP bore in mind the sensitivity of the case, the complexity of the law, and the level of public concern. The legal expert to be selected was Mr. Martin Wilson, QC (Queen's Counsel). Like Mr. Griffiths, Mr. Wilson enjoys great stature in the law. Mr. Wilson, who practises in London, is an experienced criminal lawyer, having been appointed Queen's Counsel in 1982. He is a Recorder (part-time judge) of the Crown Court of England and Wales. Mr. Wilson has the advantage of a familiarity with the criminal law and circumstances of Hong Kong, and has both prosecuted and defended in criminal cases in this jurisdiction in recent times. In particular, in the mid-1990's, he prosecuted successfully the Bumiputra Malaysia Finance Limited (BMFL) case, which resulted in the convictions of George Tan, former chairman of the Carrian Group of Companies, and of Rais Saniman, a director of BMFL, for conspiracy to defraud BMFL. Mr. Wilson was instructed to examine all aspects of this case and to advise if a prosecution was appropriate.

34. The advice of Queen's Counsel was received by the DPP on 5 December 2003.

Mr. Griffiths SC Advises

35. Mr. Griffiths advised that in order to establish the offence of misconduct in public office in relation to the car purchase, it was necessary to demonstrate that Mr. Leung acted '*wilfully and intentionally*' in conducting himself as he did. That is, it had to be established that at the time of the purchase he subjectively realised and intended that what he did would, or might well, have the consequence of saving him some FRT. That was the issue at the heart of Mr. Leung's response to the matter.

36. Senior Counsel advised that objectively Mr. Leung should have realised what the effect of the purchase of the car would be, and that consequently there was a prima facie case, or a case to answer, based on inference. However, he pointed out that the test for prosecution was higher than that. There had to be a

reasonable prospect of conviction, and in determining that it was necessary to consider any defences which were plainly open to or had been indicated by the suspect.

37. Senior Counsel examined the representations made by Mr. Leung's lawyers on 31 July 2003. These asserted that the possibility of saving tax did not in fact occur to him through pressure of work, and the perceived urgent need, and the demand of his wife, for a car to carry the baby after the birth due on 26 February 2003; that he had no intention to avoid FRT; that the discussions of FRT in the BSG were lost in his mind in a welter of other issues discussed; that he was not short of money, so did not need the tax saving, and that he was a man of excellent character; and that he and his wife used the car openly and did not seek to conceal its purchase from anybody.

38. With all these matters in mind, Senior Counsel advised that the motive of evading FRT by purchasing the car in January 2003 had to be proved to be Mr. Leung's dominant purpose. As Mr. Leung had made no such admission, his state of mind would have to be inferred from the evidence. The inference that Mr. Leung intended to evade FRT by making the purchase when he did was not the only one to be drawn. Other competing inferences could equally be drawn. It was at least reasonably possible that as an older man with a young wife having their first child another inference to be drawn was that his dominant purpose was to satisfy her desire for the purchase of a car prior to 26 February 2003. When these matters were assessed, Senior Counsel concluded that any court might well doubt an intention to avoid FRT was the compelling and only inference that could reasonably be drawn. As it could not be established with certainty that Mr. Leung subjectively intended in purchasing the car to save himself FRT, Senior Counsel advised that there were some, but only speculative prospects of success in so far as the offence of misconduct in public office by purchasing the car on 20 January 2003 was concerned. As such Senior Counsel advised that there was not a reasonable prospect of securing a conviction in regard to the car purchase.

39. Senior Counsel examined separately the failure of Mr. Leung to make a declaration in ExCo after Dr. E.K. Yeoh had done so on 5 March 2003. Mr. Leung, of course, had done himself no favours on that occasion by saying nothing, although his explanation was that, as the meeting wound down, his mind was focused on the Budget he was about to deliver and the press conferences which would follow, rather than on the immediate discussion. On this aspect, standing alone, Senior Counsel advised that there were reasonable, but not certain prospects of securing a conviction. That was on the basis that a failure to make disclosure to the Chief Executive was a breach of the Code which constituted criminal misconduct. However, whilst accepting that there might be factors of which he was not aware, Senior Counsel advised that a prosecution ought not to be instituted in the public interest. In so advising, regard was had, in particular, to the inability of the prosecution to prove that the purchase of the car was motivated by a desire to save FRT. That was a factor which placed the failure to declare in a much less serious category. The failure to declare arose from no more than a desire to save himself embarrassment when others raised the matter in ExCo. That, however, was not the end of the matter.

40. Because of the importance of Senior Counsel examining the evidence in its entirety, and determining whether what happened in March 2003 affected his assessment of what happened in January 2003, Senior Counsel then assessed the case in its entirety, rather than in a compartmentalised sort of way. Having completed that exercise, Senior Counsel advised that when all the evidence from January through to March was considered as a continuous course of conduct, and thus as a single possible offence, the chances of mounting a successful prosecution were affected by precisely the same considerations as had influenced his conclusion in relation to the car purchase issue. If, that is, it was not possible to prove as the only possible inference that Mr. Leung's motive in purchasing the Lexus was to save FRT, it would not be possible to prove a continuous dishonest course of conduct in breach of duty, linking both the purchase of the car and the failure to disclose to the CE to the '*wilful and deliberate*' intention to save FRT. Senior Counsel accordingly advised that grave suspicion notwithstanding, a prosecution on the basis of a continuous course of conduct could not be justified on the evidence.

Mr. Wilson QC Advises

41. Mr. Wilson made his position plain from the outset. He indicated that there was no public interest in starting a prosecution which was likely to fail merely to show that Mr. Leung had not been given special treatment. However, he emphasised that if there was a reasonable prospect of a conviction for the offence of misconduct in public office, the public interest would require that Mr. Leung be charged.

42. Queen's Counsel considered that if in fact the purchase of the car could amount to misconduct in public office, then no subsequent declaration of interest would cure it. Conversely, if it could not amount to an offence, the subsequent failure to disclose it would not have a retroactive impact on the purchase. He advised that even if it were possible to allege that Mr. Leung had used his knowledge of the imminent tax increase to take advantage of it in his private capacity, and that this amounted to the offence, it would be necessary also to establish that because of that knowledge he did something which he otherwise would not have done. It was simply not possible for the prosecution to prove that without the inside knowledge he would not have made the purchase when he did. Although Mr. Leung may have been politically unwise in making the purchase when he did, there was, in any event, nothing to establish that this private act was done, as the law requires, in the course of or in relation to his public office.

43. Queen's Counsel then considered the issue of whether a failure by Mr. Leung to disclose the purchase amounted, as the law requires, to serious misconduct by a public official. There was no hard and fast rule and no precise definition of what amounted to serious misconduct. If a public official participated in a decision-making process which could have the effect of enhancing his own interests, a failure to disclose those interests could amount to misconduct in public office. There was, in this case, a possibility that Mr. Leung bought the car when he did in order to take advantage of his private knowledge of an increase in FRT. Nevertheless, had he made full disclosure at the earliest possible moment, it could have made no conceivable difference to any decision in relation to FRT. Putting the allegation at its highest, Mr. Leung was trying to

avoid the political embarrassment that would follow if it were known that he had bought the Lexus when he did and the real consequence of his failure to reveal the purchase was to put his integrity in doubt. But it had no other effect, nor could it have done.

44. Queen's Counsel advised that those in high office are required to behave with the utmost probity. However, there was no realistic prospect of establishing that in failing to declare an interest Mr. Leung was motivated by anything greater than a desire to avoid embarrassment for having done something which, however unwise, he was lawfully entitled to do. Queen's Counsel concluded that although the non-disclosure was misconduct, it did not amount to the serious misconduct which must in law be established before a prosecution for the offence of misconduct in public office could be instituted.

45. Queen's Counsel advised that in evaluating the case the evidence had to be considered as a whole. There was, at best, only a slight prospect of conviction. Queen's Counsel concluded his advice with these words : *'My opinion is unqualified; it is that Mr. Leung should not be charged'*.

Director of Public Prosecutions Reviews the Case

46. After Senior Counsel and Queen's Counsel had each separately advised the DPP not to prosecute Mr. Leung, he himself independently reviewed the case. He examined the evidence, the law, the ICAC report, the submissions of Mr. Leung's lawyers, and the advices of Mr. Griffiths and Mr. Wilson. He reached the following conclusions :

- If the evidence against Mr. Leung was such as to justify a prosecution, his prosecution would be in the public interest.
- All the evidence involving Mr. Leung in the period January 2003 to March 2003 had to be examined as a whole in determining the viability of a prosecution.

- Prosecution policy had to be applied, without fear or favour. This meant that Mr. Leung was not to be prosecuted unless there was at least a reasonable prospect of conviction. Mr. Leung, at the same time, was to be given no special treatment.
- When the totality of the evidence was weighed, criminality could not be established to the required standard. It could not be demonstrated that, as the law requires, Mr. Leung '*wilfully and intentionally*' misconducted himself in a criminal sense. The prosecution was not in a position to prove that Mr. Leung acted as he did in order to avoid paying FRT. Other competing inferences could, as Mr. Griffiths pointed out, equally be drawn. Even if knowledge on the part of Mr. Leung as to the imminent tax increase could be established, the prosecution could not, as Mr. Wilson pointed out, prove that without that knowledge he would not still have bought the Lexus.
- As the act of purchasing the car could not be shown to be criminal, the character of that purchase was not affected by the subsequent failure to disclose it to ExCo.
- Mr. Griffiths and Mr. Wilson were right to conclude that in all the circumstances it appeared that the reason Mr. Leung had not made a declaration in ExCo on 5 March 2003 was in order to save himself possible embarrassment, and nothing more sinister than that.
- Mr. Griffiths and Mr. Wilson were equally right to advise that although the non-disclosure by Mr. Leung in ExCo on 5 March 2003 was a form of misconduct, it was not serious enough to justify prosecution.
- The advices of Mr. Griffiths and Mr. Wilson that when the totality of the evidence was examined a prosecution of Mr. Leung could not be justified were correct. A reasonable prospect of securing a conviction in this case simply did not exist.

47. It was in these circumstances that the DPP decided that a prosecution of Mr. Leung for the offence of misconduct in public office could not be justified. That decision has been explained to the Secretary for Justice.

Conclusion

48. Prosecutions in Hong Kong can only ever be instituted on the basis of sufficiency of evidence. A prosecution should never be started unless the prosecutor is satisfied that there is admissible, substantial and reliable evidence to justify placing a person upon trial. No one must ever be prosecuted simply because he may have committed an offence, or even because he has probably committed an offence. The prosecutor acts on the basis of hard evidence and with a keen appreciation of all the circumstances of the case, and not on the basis of suspicion, however grave. If, once everything is considered, it is decided that a reasonable prospect of securing a conviction is absent, a suspect will not be prosecuted. It has never been the rule in this jurisdiction that those suspected of criminal offences must automatically be the subject of prosecution. One hopes it never will be.

49. The decision taken has today been communicated to Mr. Leung's lawyers and to the ICAC. The Department of Justice is satisfied that the decision is the correct one. We trust the decision will be respected by all.

I. Grenville Cross SC
Director of Public Prosecutions
Department of Justice
15 December 2003