

立法會
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by the Administration)

Panel on Security

**Minutes of special meeting held on Monday, 29 November 2004
at 10:45 am in Conference Room A of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Daniel LAM Wai-keung, BBS, JP (Deputy Chairman)
Dr Hon LUI Ming-wah, JP
Hon Margaret NG
Hon CHEUNG Man-kwong
Hon WONG Yung-kan, JP
Hon Howard YOUNG, SBS, JP
Hon LAU Kong-wah, JP
Hon CHOY So-yuk
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung
Hon CHIM Pui-chung

Members attending : Hon Emily LAU Wai-hing, JP
Hon Ronny TONG Ka-wah, SC

Members absent : Hon Albert HO Chun-yan
Dr Hon Philip WONG Yu-hong, GBS

Public Officers attending : Mr Raymond WONG Hung-chiu
Commissioner
Independent Commission Against Corruption

Mr Daniel LI Ming-chak, IDS
Head of Operations
Independent Commission Against Corruption

Mr Michael John BISHOP, IDS
Assistant Director of Operations
Independent Commission Against Corruption

Miss CHEUNG Siu-hing
Deputy Secretary for Security 1
Security Bureau

Mr Kevin P ZERVOS, SC
Senior Assistant Director of Public Prosecutions
Department of Justice

Clerk in attendance : Mrs Sharon TONG
Chief Council Secretary (2)1

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser 1

Mr Raymond LAM
Senior Council Secretary (2)5

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I. Powers of the Independent Commission Against Corruption to search for and seize journalistic material

(LC Paper Nos. CB(2)111/04-05(03), (04) (05) and (06), CB(2)192/04-05(01), CB(2)270/04-05(01) and (02) and LC Paper No. LS 14/04-05)

At the invitation of the Chairman, Deputy Secretary for Security 1 (DS for S1) briefed Members on the Administration's response to issues raised in the submission from the Hong Kong Journalists Association (HKJA), as detailed in the paper provided by the Administration. She said that the Administration did not consider it necessary to amend Part XII of the Interpretation and General Clauses Ordinance (IGCO) (Cap. 1) at this stage.

2. At the invitation of the Chairman, Senior Assistant Director of Public Prosecutions (SADPP) briefed Members on the Administration's response to issues concerning overseas experience in the submission from HKJA. He concluded that Hong Kong was more advanced in comparison with most common law jurisdictions in respect of legislation governing the search and seizure of journalistic material.

3. Mr CHIM Pui-chung questioned the basis on which the Department of Justice

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(D of J), upon request from the court, referred the investigation of the press coverage of *habeas corpus* proceedings relating to a witness to the Independent Commission Against Corruption (ICAC). He questioned why D of J did not refer the matter to an independent committee. He asked whether there was any conflict of interest with ICAC carrying out the investigation work.

Adm 4. SADPP undertook to provide a written response. He said that D of J might have referred the matter to ICAC for investigation considering that it would be in the best interest of the public and justice to do so, and ICAC possessed much information relating to the case.

5. Mr CHIM Pui-chung asked why ICAC had taken up the investigation work and why it had not sought legal advice before deciding whether to take up the investigation work. He queried whether ICAC had agreed to take up the investigation work because the lawyers of the other side in the case might be involved and ICAC wished to take actions against the lawyers. The Chairman asked whether ICAC had requested taking up the investigation work and whether it had proposed D of J to refer the matter to another law enforcement agency.

6. Commissioner, Independent Commission Against Corruption (C/ICAC) responded that ICAC had not requested taking up the investigation work. He said that D of J, which was the legal adviser to ICAC, should have carefully considered the matter before referring it to ICAC. In his view, D of J might have referred the investigation work to ICAC in view that ICAC was in possession of much information relating to the case. He stressed that ICAC had assigned the investigation work to a team different from that responsible for the investigation of the original case involving corrupt activities suspected to have been committed by members of listed company.

7. Head of Operations, ICAC (HO/ICAC) said that the matter referred from D of J to ICAC for investigation was directly related to an ongoing corruption investigation. He stressed that ICAC was empowered by law to investigate an offence disclosed during the course of investigation into a suspected corruption offence. The ICAC had no agenda to direct its actions against any particular person. He added that the court had spent four hours to hear ICAC's application for search warrants before granting such search warrants.

8. Mr CHIM Pui-chung asked about the current situation of the witness concerned. C/ICAC responded that the witness was still under the protection of ICAC.

9. Mr Ronny TONG said that it could be noted from the judgment delivered by the Court of First Instance (CFI) and the judgment delivered by the Court of Appeal (C of A) that ICAC did not have evidence suggesting that the media organisations' were involved in any criminal offence or conspiracy to pervert the course of justice.

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He questioned whether the search by ICAC was a fishing expedition. He asked –

- (a) whether there was any evidence suggesting a real risk that the media organisations would destroy the journalistic materials sought in the investigation; and
- (b) whether ICAC had requested the editors or management of the media organisations concerned to provide the journalistic material kept by their reporters.

10. C/ICAC responded that ICAC had not claimed that the media organisations were suspected of involving in conspiracy to pervert the course of justice. ICAC carried out a search on the media organisations because the newspapers, editorial staff and journalists were suspected to have breached section 17(1) of the Witness Protection Ordinance (WPO). Evidence had to be gathered to establish who was involved and the extent of involvement. ICAC had submitted an affirmation setting out the detailed justifications when it applied for the search warrants. As the case was still under investigation and the affirmation was covered by public interest immunity, he was not in a position to disclose further details. He said that –

- (a) whether there was a real risk of the media organisations destroying the journalistic materials sought in the investigation had been determined by the court, which were referred to in paragraph 6 of Annex A to the Administration's response to issues raised in the submission from the Hong Kong Journalists Association (HKJA); and
- (b) the search by ICAC was not a fishing expedition. The reports published by media organisations on the identity of a witness put under a witness protection programme had already constituted *prima facie* evidence of a breach of section 17(1) of WPO. It was necessary to gather evidence on whether other persons besides the reporters and the media organisations concerned were involved in the offence.

11. SADPP said that whether there was a real risk of the media organisations destroying the journalistic materials sought in the investigation involved an assessment based on all the materials provided to the judge. C of A was of the view that if ICAC had made an application for a production order, it might have seriously prejudiced the investigation.

12. Mr Ronny TONG asked whether the media reports were the only evidence suggesting a breach of WPO.

13. HO/ICAC responded that besides the media reports, there was other evidence suggesting that someone had deliberately disclosed information relating to the witness to the media. As the case was still under investigation, he was not in a position to

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disclose further details.

14. Mr Ronny TONG asked whether there was evidence suggesting that the editors of media organisations had directed the reporters to gather the journalistic material concerned or the reporters had gathered the information on their own.

15. HO/ICAC responded that if there was already evidence available pointing to the commission of an offence, legal advice would be sought on whether a prosecution should be instituted against the persons concerned. The searches had been conducted for the purpose of investigation to gather evidence and to identify persons who might be criminally involved.

16. Mr LEUNG Kwok-hung said that the search by ICAC was a fishing expedition. The case reflected that there were loopholes in the existing legislation. He considered that ICAC should have arrested the suspects instead of searching the media organisations.

17. C/ICAC responded that ICAC would not arrest a person without sufficient evidence suggesting that the person was involved in the commission of an offence. He said that stringent requirements governing law enforcement agencies' access to journalistic material had been set out in IGCO.

18. Mr LEUNG Kwok-hung asked whether the Legislative Council (LegCo) was empowered to obtain a warrant to search the files of ICAC in respect of its search and seizure of journalistic material.

19. Senior Assistant Legal Adviser 1 (SALA1) said that under the Legislative Council (Powers and Privileges) Ordinance (P&PO) (Cap. 382), LegCo or a standing committee thereof might order any person to attend its meetings and to give evidence or to produce any document in his possession or control. There were occasions in the past in which public officers, when required to produce documents, refused on the ground of public interest immunity. A resolution on how a committee Chairman should deal with such a situation had been passed by LegCo.

20. SADPP responded that ICAC's affirmation, which contained sensitive and confidential information, was protected by public interest immunity. He said that in the application for a production order, the information used to support the application was required by law to be provided to the other side three days before the date of the relevant *inter partes* hearing. There was no statutory provision preventing the disclosure or use of such information. In view of the sensitivity and confidentiality of the information concerned, it was inappropriate for ICAC to apply for a production order.

21. SADPP further said that Part XII of IGCO allowed a judge to issue a warrant

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only if there were reasonable grounds to believe that the preconditions set out in the relevant sections had been satisfied. In the case concerned, the investigation did not only cover the conspiracy to pervert the course of justice, but also the *prima facie* breach of section 17(1) of WPO. Thus, investigation was needed to identify the persons involved and their extent of involvement. He added that once the case was concluded, public interest immunity would no longer apply and all information contained in the affirmation would be available for inspection by the public.

22. SALA1 said that P&PO only referred to public interest immunity. The Rules of Procedure of LegCo provided that reference should not be made to a case pending in a court of law in such a way as in the opinion of the President or Chairman of a committee might prejudice that case. A case would usually be regarded as pending in a court of law when the documents relating to the case were filed into court.

23. Mr LEUNG Kwok-hung said that unless ICAC lodged an appeal with the Court of Final Appeal to clarify the legal issues involved in the search and seizure of journalistic material, ICAC should provide all information and documents relating to its search and seizure of the media organisations concerned. He considered that a closed meeting could be held, if necessary, to consider such information and documents provided by ICAC.

24. C/ICAC said that Members should consider carefully whether the role of the Panel was to carry out investigations into criminal investigations and conduct a retrial of a case which had been determined by court or to examine whether the policy behind a certain piece of legislation was appropriate. He further said that as the case concerned was currently at a critical stage, it was inappropriate to provide the information concerned at this stage, even if it was provided in confidence. He stressed that if prosecution was instituted in respect of the case, the relevant information provided to court would be made available to the public when the trial was over.

25. HO/ICAC said that the case was still under investigation and ICAC hoped to seek legal advice in the near future regarding whether prosecution should be instituted in respect of the case. If prosecution was to be instituted, all information relevant to the case would be provided to the court, which would disclose such information when the legal proceedings were over. If there was no prosecution in respect of the case, the disclosure of such information might be subject to the provisions in the Personal Data (Privacy) Ordinance (Cap. 486).

Adm 26. The Chairman requested ICAC to consider providing the following after all legal proceedings in respect of the case was completed –

(a) information which were relevant to the case but not provided to the

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court, if prosecution was instituted in respect of the case; and

- (b) all information relevant to the case, if prosecution was not to be instituted in respect of the case.

27. Ms Emily LAU said that there had been much discussion about whether the existing mechanism for the search and seizure of journalistic material was appropriate. She questioned whether Part XII of IGCO was enacted to provide a means for law enforcement agencies to search for and seize evidence when there was *prima facie* evidence of the commission of an offence but insufficient evidence to institute prosecution. She expressed concern that in the past three occasions when a search warrant was sought under Part XII of IGCO, the production order route had never been exercised. She asked whether the Administration would consider the suggestions of the Hong Kong Journalists Association that –

- (a) in considering whether to issue a production order, the judge had to be satisfied that the public interest in obtaining the journalistic material clearly overrode the public interest in protecting press freedom and that the circumstances were of a sufficiently vital and serious nature; and
- (b) an appeal mechanism should be provided in legislation and the journalistic material seized should be sealed in all cases to allow media organisations and journalists to lodge an appeal.

28. C/ICAC responded that ICAC respected press freedom. The provisions in Part XII of IGCO reflected the importance of press freedom in Hong Kong. In the past three occasions when a search warrant was sought under Part XII of IGCO, the journalists were suspects and the application for a production order was considered inappropriate. He stressed that the balance between public interest and freedom of the press was determined by the judge. When applying for a search warrant under Part XII of IGCO, a law enforcement agency had to satisfy the judge that -

- (a) there were reasonable grounds for believing that an arrestable offence had been committed;
- (b) the material sought was likely to be of substantial value to the investigation;
- (c) other methods of obtaining the material had been tried and failed or had not been tried because of the likelihood of failure or serious prejudice to the investigation; and
- (d) there were reasonable grounds to believe that it was in the public interest to grant the search warrant.

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29. DS for S1 said that the provisions in Part XII of IGCO, which should be read in its totality, had struck a right balance between the need to uphold press freedom and the need to respect other public interests. She added that the court would not issue a search warrant without carefully considering the information submitted.

30. The Chairman asked whether ICAC agreed to HKJA's suggestion that all journalistic material seized should be sealed to allow news organisations and journalists to lodge an appeal. C/ICAC responded that there might be urgent cases where there was an immediate need to examine the seized materials, it would be more appropriate for the judge to decide whether certain journalistic material to be seized should be sealed.

31. Dr LUI Ming-wah said that everyone should act in accordance with the law. Investigations should be carried out into suspected cases of breach of the law. However, it was inappropriate to conduct a public retrial of a case that had gone through the judicial process. He considered that the search of ICAC on selected media organisations did not amount to a fishing expedition, unless the search covered all media organisations. He added that amendments to existing legislation could be considered, if a careful study of the relevant provisions revealed such a need.

32. Ms Audrey EU said that it could be noted from the judgments delivered by CFI and C of A that the threshold adopted by C of A was "possibility", while the threshold adopted by CFI was "real risk". She considered that the threshold adopted by C of A was too low and the threshold of "real risk" as referred to by CFI should be adopted. She asked whether ICAC would adopt the threshold of C of A in future cases. She questioned how adequate protection could be provided to whistle blowers of wrongdoings of the government if there was such a low threshold for issuing search warrants. She also questioned why ICAC had not directly requested the media organisations concerned to provide the relevant journalistic material. Miss Margaret NG shared the view that the Administration should consider adopting the threshold of "real risk" referred to by CFI.

33. Regarding the threshold to be adopted by ICAC, C/ICAC said that ICAC would act in accordance with the law. ICAC was fully aware that the search and seizure of journalistic materials was a very sensitive issue. ICAC had given thorough considerations and sought legal advice on the matter before taking actions. He shared the view that whistle blowers were important for the disclosure of wrongdoings. He further said that ICAC would not normally apply for a warrant for the search and seizure of evidence in cases where a journalist merely reported the facts but did not commit any criminal offence. In the three cases concerned, the journalists were suspects for criminal offences.

34. C/ICAC said that ICAC had considered other methods of obtaining the

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journalistic material. The provisions in IGCO also required ICAC to satisfy the court that other methods had been tried and failed or had not been tried because of the likelihood of failure or serious prejudice to investigation. However, it should be noted that media organisations generally adopted a firm stance against the disclosure of the source of journalistic information. After obtaining the search warrants, ICAC had requested the media organisations concerned to provide the relevant journalistic material. However, only one media organisation was willing to provide the requested information.

35. SADPP disagreed with the interpretation of Ms Audrey EU. He said that the judgment delivered by C of A did not refer to the threshold of “possibility”. What C of A referred to in the judgment was the real possibility that if an application had been made under section 84 of IGCO for a production order, there was nothing in the relevant statutory provisions to prevent a journalist from revealing this fact or the information used to support it. Such information might find its way to the suspected perpetrators of the alleged conspiracy, thus seriously prejudicing the investigation. He stressed that the focus of the investigation was the criminal offence. Part XII of IGCO placed an obligation on the judge to make an assessment of the public interest in issuing warrants.

36. The Chairman suggested that the Panel might consider at the next meeting whether a subcommittee should be formed to review the provisions relating to the search and seizure of journalistic material in IGCO. Mr LAU Kong-wah considered it more appropriate to conduct the review after the relevant court case was concluded.

37. There being no further business, the meeting ended at 1:10 pm.