

立法會
Legislative Council

LC Paper No. LS14/04-05

**Legal Service Division Paper for the LegCo Panel on Security
Meeting to be held on 2 November 2004**

**Recent judgments on the powers of the Independent Commission
Against Corruption to search for and seize journalistic material**

The Panel on Security will discuss “Powers of the Independent Commission Against Corruption to search for and seize journalistic material” at its meeting of 2 November 2004. Chairman of the Panel has instructed the Legal Service Division to prepare a paper on two recent judgments related to this topic to assist members. The two judgments are :-

- (1) So Wing Keung v. Sing Tao Limited and Hsu Hiu Yee (HCMP 1833/2004) handed down by Hartmann J. of the Court of First Instance on 10 August 2004, and
- (2) So Wing Keung v. Sing Tao Limited and Hsu Hiu Yee (CACV 245/2004) handed down by Hon Ma CJHC, Stuart-Moore V-P & Stock JA of the Court of Appeal on 11 October 2004.

This paper aims to highlight some of the more salient points in the judgments. The Independent Commission Against Corruption (“ICAC”) has provided full text of the two judgments vide its paper to the Panel (LC Paper No. CB(2) 111/04-05 (03)). The statutory provisions relating to search and seizure of journalistic material are contained in Part XII of the Interpretation and General Clauses Ordinance (Cap. 1). They are enclosed in Annex 1.

The relevant facts

2. The Applicant So Wing Keung is an investigator of the ICAC. The first respondent Sing Tao is one of the newspapers whose premises had been searched and material seized. The second respondent is an editor of Sing Tao.
3. The litigation started from the application by the ICAC for search warrants to enable its officers to enter the premises of seven newspapers and the offices or homes of a number of reporters in order to search for and seize journalistic materials.

4. The events as set out in the judgments are essentially as follows:-
5. On 9 July 2004 a number of persons were arrested by the ICAC for suspected corruption offences. One of the arrested persons agreed to assist the ICAC. This person (“the Participant”) was put into the witness protection programme on 13 July 2004.
6. In the evening of 13 July 2004, lawyers acting on the instructions of people purporting to have spoken to the Participant, sought access to the Participant. When this was denied, on the following day, an application for a writ of habeas corpus was made to the Court of First Instance seeking the Participant’s release from ICAC custody.
7. Details of the habeas corpus proceedings were reported in the press, though many of the relevant hearings were either in Chambers or in camera. Amongst the matters reported were the Participant’s identity and the fact that she was in a witness protection programme.
8. The Court of Appeal, to which one aspect in the habeas corpus proceedings was referred, was so concerned about the press coverage that it requested the Secretary for Justice to look into the matter and consider what appropriate action was merited. The next day, further reports appeared in the press which repeated the fact that the Participant was in the witness protection programme. The result of this was the investigations of the ICAC that formed the immediate background to the search warrants issued by Stone J.

The application for search warrants

9. In the investigation and subsequent application for search warrant, the ICAC was concerned that two offences might be involved : -
 - (a) Disclosure of the identity of a participant of the witness protection programme, in contravention of section 17(1) of the Witness Protection Ordinance; and
 - (b) Conspiracy to pervert the course of public justice, as certain persons may have pursued the *habeas corpus* application not for the *bona fide* purpose of seeking the release of the Participant but for intimidating her and thereby dissuading her from acting as a prosecution witness.

Stone J. determined that the requirements of section 85 of the Interpretation and General Clauses Ordinance had been met and he was obliged to issue the warrants. The learned judge, however, also ordered that any seized materials be sealed as provided under section 85(6) of the Ordinance so that the owner may apply to the court for their return under section 87(1) of the Ordinance within three days of seizure.

10. On 24 July 2004, the two search warrants were executed by the ICAC on the respondents' premises and various materials were seized and sealed. Subsequent to this search and seizure Sing Tao applied for the setting aside of the search warrants and for the return of the material seized.

Judgment of Hartmann J in the application to set aside warrants

11. The application was heard by Hartmann J, whose judgment was handed down on 10 August 2004. The learned judge set aside the search warrants. In the light of this, he considered it unnecessary to make a decision for the return of the materials.

Hartmann J's overview of the statutory provisions

12. In paragraph 58 to 62 of his judgment, Hartmann J summarized the two routes in which law enforcement bodies may access journalistic materials under Part XII of the Interpretation and General Clauses Ordinance. The gist is that, in order of gravity, there are two coercive measures in the statutory scheme under Part XII :-

- (i) The least 'intrusive' application is one made on notice for an order to produce journalistic material pursuant to s.84(2). This procedure does not involve any 'without notice' entry and seizure. Instead, the parties are able to make representations to a judge at an *inter partes* hearing as to whether the journalistic material should be delivered up or the application refused. Service of a notice under section 84 places an obligation on the recipient of the notice to preserve the journalistic material, and does not give to the recipient liberty to destroy confidential material. If that is done, it is subject to sanguine punishment.
- (ii) The procedure of last resort is an *ex parte* application made under section 85 for the issue of a search warrant so that journalistic material may be searched for and seized without notice. This procedure may be subject to the condition that any material seized will be sealed pending a possible application for its return or may allow the investigating agency to have immediate access to it.

13. In paragraph 64 of his judgment, Hartmann J stated that the ICAC did not seek voluntary disclosure nor did it seek delivery up of the material by following the 'production order route'. It went directly to the measure of last resort. In his view there was no material placed before him to justify the ICAC determining that it should proceed directly to seek the issue of search warrants.

The seven principles

14. In considering the case, Hartmann J also reviewed English authorities and stated that the principles set down in them define the principles that must be applied by our courts in determining applications made pursuant to section 85. The seven principles he formulated are summarized as follows :-

- (i) An application for a search warrant constitutes a serious intrusion upon the freedom of the press. The responsibility for ensuring that the procedure is not abused lies with the courts and it is of cardinal importance that judges should be scrupulous in discharging that responsibility.
- (ii) It is for the judge to satisfy himself that there are reasonable grounds for believing the various matters set out in the supporting affidavit. The fact that an investigating officer, who has been investigating the matter, states in the affidavit that he considers that there are reasonable grounds is not enough. The judge must himself be satisfied.
- (iii) An application for a search warrant should not be a matter of common form; the preferred method should be by way of giving notice to seek a production order under section 84 of the Interpretation and General Clauses Ordinance.
- (iv) The fact that the staff of a newspaper or journalists believed to be in possession of journalistic material may themselves be under investigation for the commission of criminal offences is not of itself necessarily a sufficient reason for a judge issuing a warrant. All the circumstances of the individual application must be taken into account.
- (v) The risk that journalistic material may be hidden or destroyed must be a 'real risk'. A judge should not issue a warrant unless material is placed before him demonstrating that in the particular case, if notice is given, there is a real risk, as opposed to a mere possibility, that the journalistic material will be hidden or destroyed.
- (vi) In determining an application made under s.85, a judge should give reasons for his decision even though they need not be elaborate, because the judge is exercising a draconian jurisdiction.
- (vii) An applicant who seeks the issue of a warrant under s.85 of Part XII must act in the utmost good faith and disclose to the court all matters which need to be taken into account by the court in deciding whether or not to grant relief *ex parte*, and if so, on what terms.

15. Applying these principles, Hartmann J was of the view that the ICAC had not been able to demonstrate there was a real risk. On the requirement to act in the utmost good faith and disclose all matters to the court in an *ex parte* application, Hartmann J held that Stone J made the orders without the benefit of the jurisprudence and guidance he himself had.

16. A summary of Hartmann J's decision is contained in paragraph 24 of the judgment of the Court of Appeal. The gist is stated below: -

- (1) Hartmann J held that he had the necessary jurisdiction under O.32 r.6 to hear and determine the summons to set aside Stone J's issue of the search warrants. He was of the view that the decision of Stone J to issue the warrants was an "order" in civil proceedings to which O.32 r.6 applied.
- (2) Having assumed jurisdiction, the Judge then examined the material before him to determine whether the requirements of section 85 of the Interpretation and General Clauses Ordinance had been met. The Judge reached the conclusion that on the materials before him, the ICAC had not made out a sufficient case for search warrants to be issued.
- (3) In arriving at the conclusion that the ICAC had not made out a case under section 85, the Judge referred to the section and various legal principles. He suggested seven legal principles governing section 85 applications (set out in the preceding paragraph)
- (4) The Judge took the view that had Stone J's attention been drawn to the legal authorities that contained these 7 suggested principles, it was highly unlikely that he (Stone J) would have issued the search warrants. The failure to draw Stone J's attention to relevant authorities was ascribed by the Judge to counsel for the ICAC. This was held to be a failure to make full and frank disclosure, although not a deliberate one.
- (5) On the facts, the Judge took the view that it had simply not been demonstrated by the ICAC that there was a real risk of the Respondents destroying the journalistic materials sought in the investigation.
- (6) In summary, the Judge held that the ICAC was wrong in fact and in law in seeking the issue of search warrants when, in terms of the statutory scheme contained within Part XII of the Ordinance, it could equally have achieved its legitimate aim by less intrusive measures. The search warrants must therefore be set aside in terms of O.32, r.6.

The appeal to the Court of Appeal

17. The ICAC appealed against the decision of Hartmann J. The appeal was marked as a civil appeal. The Court of Appeal identified the issues in the appeal as follows : -

Issue 1 : The jurisdiction of the Court of Appeal to hear the appeal.

Issue 2 : Is the appeal academic?

Issue 3 : [Whether Hartmann J had] jurisdiction to set aside under O.32 r.6 or the Court's inherent jurisdiction.

Issue 4 : Was there justification to issue the search warrants in the present case? (i.e. the merits)

18. In respect of each of the issues identified, the Court of Appeal held that :-

Issue 1 : The jurisdiction of the Court of Appeal to hear the appeal:

The proceedings underlying Hartmann J's decision were not a civil cause or matter, thus the Court of Appeal had no jurisdiction to hear the appeal and the appeal of the ICAC must inevitably be dismissed. The Court of Appeal noted that the only means of appeal would be an appeal to the Court of Final Appeal (section 31(b) of the Hong Kong Court of Final Appeal Ordinance (Cap.484)).

(However, the Court of Appeal did not stop there. It stated in paragraph 33 of its judgment that it was aware of a Privy Council decision that any observations concerning the merits of an appeal which should not be before the court must necessarily be extra-judicial, as it accepted that its conclusions on jurisdiction could be wrong, out of completeness and as the other issues identified have been fully argued, it thought it worthwhile to state its views on them.)

Issue 2 : Is the appeal academic?

The appeal involves the examination of provisions that affect one of the basic freedoms enshrined in the Basic Law. The case is of considerable public importance and interest. A number of other newspapers are in a similar position and are awaiting the outcome of the appeal. There is a very strong case that is made out in the public interest to hear the present appeal.

Issue 3 : [Whether Hartmann J had] Jurisdiction to set aside under O.32 r.6 or the inherent jurisdiction

Section 87 of the Interpretation and General Clauses Ordinance (i.e. application for an order to return seized journalistic material) is the only means by which an affected person can challenge a section 85 decision. Hartmann J was wrong to assume jurisdiction under O.32 r.6 of the Rules of High Court.

Issue 4 : Was there justification to issue the search warrant in the present case?

19. The Court of Appeal analyzed the seven principles suggested by Hartmann J in paragraphs 44 and 45 and dealt with the question whether on the facts the search warrants ought to have been granted in the first place. In gist, its views are that the seven principles were obvious ones having regard to the decision of the Court, the express provisions of Part XII of the Interpretation and General Clause Ordinance and as a matter of judicial commonsense, or they require to be qualified.

20. On the question whether the facts justified for search warrants to have been issued, the Court of Appeal was of the view that the service of notice of application for a production order under section 84 may have seriously prejudiced investigations, as the facts revealed a very disturbing state of affairs, not to mention the possibility of very serious criminal offences having been committed. In other words the Court held that on the facts of the case the issue of warrants was justified.

21. The Court of Appeal also remarked that while fundamental rights are to be broadly construed and respected, the enjoyment of such rights must be balanced against the rights and interests of other persons or society as a whole. The freedom of the press in the present case must be seen against the fact that serious crimes may well have been committed, one in which the Respondents might be involved; the other in respect of which there is prima facie evidence against the Respondents themselves (the section 17 offence). The Court also held that the ICAC did have the necessary locus standi to apply for the search warrants.

22. The appeal is dismissed as a result of Court's conclusion on its jurisdiction, not on the merits. The Court made it clear that had it possessed the necessary jurisdiction, the appeal would have been allowed with costs.

Comments

23. In relation to protection of freedom of the press and issue of search warrants, Hartmann J stated his views in paragraph 60 of his judgment that "Of central importance, is that the legislature, in conferring the discretion to issue production orders under s.84 or search warrants under s.85, requires judges to look not only to the imperatives of a criminal investigation but in each case to consider applications within the broader context

of 'the public interest'; that being the public interest to protect the freedom of the press.”. He then went on to set out the requirements for the issue of a production order and search warrant in paragraphs 61 and 62 of his judgment respectively. His view seems to be that the “production order route” should be used first and the issue of a search warrant is the “measure of last resort”.

24. The Court of Appeal disagreed that there should be a bias in favour of the freedom of the press and to regard it as some sort of paramount consideration. If there is any paramount consideration at all, it is the public interest which is mentioned in sections 84(3)(d), 87(2) and 89(2). The Court is also of the view that the public interest requires the court to consider all aspects of any given case, with no bias or predispositions towards any particular factor. Often, it is a balancing exercise between competing interests between the freedom of the press and the need to investigate and deal with crime effectively (paragraph 43 of its judgment).

25. The Court of Appeal noted in paragraph 33 of its judgment that any observations concerning the merits of an appeal which should not be before the court must necessarily be extra-judicial, but it thought it worthwhile to state its views on them (paragraph 43 of its judgment). The Court of Appeal considered Hartmann J had no jurisdiction to deal with the setting aside application. However, the Court of Appeal did not overturn the judgment of Hartmann J. The views of the Court of Appeal may be considered as *obiter* in this case, but its views on the issues involved could be considered as relevant and persuasive in similar cases in future.

Prepared by

LEE Yu-sung
Senior Assistant Legal Adviser
Legislative Council Secretariat
1 November 2004

第 XII 部

新聞材料的搜查及檢取

(由 1995 年第 88 號第 2 條增補)

81. 釋義

在本部中，除文意另有所指外——

“處所”(premises)包括任何地方，尤其包括——

- (a) 任何車輛、船隻、飛機或氣墊船；
- (b) 任何帳幕或可移動的構築物。

(由 1995 年第 88 號第 2 條增補)

82. “新聞材料”的涵義

(1) 在符合第(2)款的規定下，在本部中，“新聞材料”(journalistic material)指為新聞傳播的目的而取得或製備的任何材料。

(2) 就本部而言，如材料由某人管有，而該人是為新聞傳播的目的而取得或製備該材料的，該材料方屬新聞材料。

(3) 凡某人自另一人處收取材料，而該另一人的意願為該收取材料的人須為新聞傳播的目的而使用該材料，則該收取材料的人須被視為是為該目的而取得該材料。

(由 1995 年第 88 號第 2 條增補)

83. 進入處所及搜查或檢取的權力

凡任何條例的條文賦權予任何人進入任何處所及搜查該處所或任何在該處所發現的人或檢取任何材料(不論是一般的或特定的種類，亦不論是否在該條文內使用“材料”一詞)，或授權發出賦權予任何人作出以上作為的手令或令狀，則如無明文的相反規定，該條文不得解釋為賦權予任何人或授權發出手令或令狀以賦權予任何人為搜尋或檢取被知為或被懷疑是新聞材料的材料的目的而進入處所。

(由 1995 年第 88 號第 2 條增補)

84. 就新聞材料申請交出令

(1) 任何獲第 83 條所適用的條文賦權或可能獲該條文賦權進入任何處所及搜查該處所或任何在該處所發現的人或檢取任何材料的人，均可就被知為或被懷疑是新聞

PART XII

SEARCH AND SEIZURE OF JOURNALISTIC MATERIAL

(Added 88 of 1995 s. 2)

81. Interpretation

In this Part, unless the context otherwise requires—

“premises”(處所) includes any place and in particular, includes—

- (a) any vehicle, vessel, aircraft or hovercraft;
- (b) any tent or movable structure.

(Added 88 of 1995 s. 2)

82. Meaning of “journalistic material”

(1) Subject to subsection (2), in this Part “journalistic material”(新聞材料) means any material acquired or created for the purposes of journalism.

(2) Material is only journalistic material for the purposes of this Part if it is in the possession of a person who acquired or created it for the purposes of journalism.

(3) A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes.

(Added 88 of 1995 s. 2)

83. Power to enter and search or seize

A provision in any Ordinance which confers on, or authorizes the issue of a warrant conferring on, any person the power to enter any premises and to search the premises or any person found on the premises or to seize any material (whether of a general or particular kind and whether or not the word “material” is used in that provision) shall not, in the absence of an express provision to the contrary, be construed as conferring, or authorizing the issue of a warrant conferring, a power to enter premises where such entry is for the purpose of searching for or seizing material which is known or suspected to be journalistic material.

(Added 88 of 1995 s. 2)

84. Application for production order in respect of journalistic material

(1) A person on whom there is or may be conferred under a provision in any Ordinance, being a provision to which section 83 applies, the power to

材料的材料向原訟法庭法官或區域法院法官申請第 (2) 款下的命令。(由 1998 年第 26 號第 33 條修訂)

(2) 在有申請根據第 (1) 款作出後，如法官信納第 (3) 款內的條件已獲符合，即可命令看似管有申請書所指明的新聞材料的人，在由命令的日期起計的 7 日期間完結之前或在命令所指明的較長期間完結之前——(由 1998 年第 26 號第 37 條修訂)

- (a) 將該項新聞材料交予申請人帶走；或
 - (b) 讓申請人取用該項新聞材料。
- (3) 為施行第 (2) 款而須予符合的條件如下——
- (a) 有合理理由相信——
 - (i) 有人已犯可逮捕的罪行；
 - (ii) 申請書所指明的處所內有構成或包括被知為或被懷疑是新聞材料的材料；
 - (iii) 有關材料相當可能——
 - (A) 對就該可逮捕的罪行而進行的調查有重大價值；或
 - (B) 在就該可逮捕的罪行而進行的法律程序中為有關證據；
 - (b) 若非有第 83 條的規定，申請人即會或本可根據第 (1) 款所述的條文獲授權進入申請書所指明的處所及搜查該處所或在該處所發現的人或檢取申請書所指明的材料；
 - (c) (i) 已嘗試用其他方法獲取該材料，但已失敗；或
 - (ii) 因相當可能會不成功或相當可能會嚴重損害調查而並未嘗試用其他方法獲取該材料；及
 - (d) 有合理理由相信在顧及以下因素後，作出該命令是符合公眾利益的——
 - (i) 該命令相當可能會為該項調查帶來的利益；及
 - (ii) 管有該材料的人是在甚麼情況下持有該材料。
- (4) 第 (2) 款下的命令的申請須屬各方之間的申請。

enter any premises and to search the premises or any person found on the premises or to seize any material, may apply to a judge of the Court of First Instance or District Court for an order under subsection (2) in relation to material which is known or suspected to be journalistic material. (Amended 26 of 1998 s. 33)

(2) If on an application under subsection (1) a judge is satisfied that the conditions in subsection (3) are fulfilled he may make an order that the person who appears to be in possession of journalistic material specified in the application shall—

- (a) produce it to the applicant to take away; or
- (b) give the applicant access to it,

not later than the end of the period of 7 days from the date of the order or the end of such longer period as the order may specify.

(3) The conditions to be fulfilled for the purposes of subsection (2) are that—

- (a) there are reasonable grounds for believing—
 - (i) that an arrestable offence has been committed;
 - (ii) that there is material which consists of or includes material known or suspected to be journalistic material on premises specified in the application;
 - (iii) that the material is likely to be—
 - (A) of substantial value to the investigation of the arrestable offence; or
 - (B) relevant evidence in proceedings for the arrestable offence;
- (b) but for section 83 the applicant would be or could have been authorized under the provision mentioned in subsection (1) to enter onto the premises specified in the application and to search the premises or a person found on the premises or to seize the material specified in the application;
- (c) other methods of obtaining the material—
 - (i) have been tried and failed; or
 - (ii) have not been tried because they were unlikely to succeed or would be likely to seriously prejudice the investigation; and
- (d) there are reasonable grounds for believing that it is in the public interest that an order should be granted, having regard to—
 - (i) the benefit likely to accrue to the investigation; and
 - (ii) the circumstances under which a person in possession of the material holds it.

(4) An application for an order under subsection (2) shall be made *inter partes*.

(5) 任何人無合理理由而不遵從根據第 (2) 款所作出的命令，即屬犯罪，可處第 6 級罰款及監禁 1 年。

(由 1995 年第 88 號第 2 條增補)

85. 申請檢取新聞材料的手令

(1) 任何獲第 83 條所適用的條文賦權或可能獲該條文賦權進入任何處所及搜查該處所或任何在該處所發現的人或檢取任何材料的人，均可向原訟法庭法官或區域法院法官申請發出第 (3) 款下的手令，以授權他為搜尋或檢取被知為或被懷疑是新聞材料的材料的目的而進入該處所。(由 1998 年第 26 號第 34 條修訂)

(2) 本條下的手令的申請，須經附表 7 指明為紀律部隊首長級人員批准方可作出。

(3) 在有申請根據第 (1) 款作出後，如法官——(由 1998 年第 26 號第 37 條修訂)

(a) 信納——

(i) 第 84(3)(a)、(c) 及 (d)(i) 條所指明的條件已獲符合；及

(ii) 第 (5) 款所列的進一步條件的其中一項亦已獲符合；或

(b) 信納第 84 條下的與該材料有關的命令並沒有獲得遵從，

即可在符合第 (4) 款的規定下發出手令，授權申請人進入該處所及搜查該處所及在該處所發現的人及檢取任何材料。

(4) 根據第 (3) 款發出的手令不得就任何進入、搜查或檢取作出授權，但若非有第 83 條的規定即會或本可根據第 (1) 款所述的條文獲授權的進入、搜查或檢取則除外。

(5) 第 (3)(a)(ii) 款所述的進一步條件如下——

(a) 與任何有權批准進入有關申請所涉及的處所的人溝通並不切實可行；

(b) 與有權批准進入該處所的人溝通雖然可能切實可行，但與任何有權批准取用該有關材料的人溝通並不切實可行；

(5) Any person who without reasonable cause fails to comply with an order made under subsection (2) commits an offence and is liable to a fine at level 6 and to imprisonment for 1 year.

(Added 88 of 1995 s. 2)

85. Application for warrant to seize journalistic material

(1) A person on whom there is or may be conferred under a provision in any Ordinance, being a provision to which section 83 applies, the power to enter any premises and to search the premises or any person found on the premises or to seize any material, may apply to a judge of the Court of First Instance or District Court for the issue of a warrant under subsection (3) authorizing him to enter those premises for the purpose of searching for or seizing material which is known or suspected to be journalistic material. (Amended 26 of 1998 s. 34)

(2) An application for a warrant under this section shall not be made unless it has been approved by a person specified in Schedule 7 to be a directorate disciplined officer.

(3) If on an application under subsection (1) a judge—

(a) is satisfied—

(i) that the conditions specified in section 84(3)(a), (c) and (d)(i) are fulfilled; and

(ii) that one of the further conditions set out in subsection (5) is also fulfilled; or

(b) is satisfied that an order under section 84 relating to the material has not been complied with,

he may, subject to subsection (4), issue a warrant authorizing the applicant to enter onto the premises and to search the premises and any person found on the premises and to seize any material.

(4) A warrant issued under subsection (3) shall not authorize any entry, search or seizure other than such entry, search or seizure as, but for section 83, would be or could have been authorized under the provision mentioned in subsection (1).

(5) The further conditions mentioned in subsection (3)(a)(ii) are—

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises to which the application relates;

(b) that while it might be practicable to communicate with a person entitled to grant entry to the premises, it is not practicable to communicate with any person entitled to grant access to the material;

(c) 送達申請第 84(2) 條下的命令的通知可能會嚴重損害有關調查。

(6) 除第 (7) 款另有規定外，根據本條發出的任何手令，須附有一項條款，內容為依據手令檢取新聞材料的人須在檢取材料後將之密封及持有該密封材料，直至根據第 87 條另有授權或規定為止。

(7) 凡法官信納不允許申請人立即取用該材料可能會嚴重損害有關調查，第 (6) 款即不適用。 (由 1998 年第 26 號第 37 條修訂)

(8) 任何獲根據本條發出的手令賦權的人可——

- (a) 使用必需的武力以進入手令所指明的處所；
- (b) 在該處所檢取所發現而若非有第 83 條的規定他即會或本可根據第 (1) 款所述的條文獲授權接管的材料 (包括新聞材料)；
- (c) 將任何在該處所發現並可能管有或控制該材料的人扣留一段合理時間，而該人須屬若非被如此扣留即可能損害搜尋的目的者。

(由 1995 年第 88 號第 2 條增補)

86. 為第 85 條所訂手令而訂定的進一步條文

(1) 除第 85(7) 條適用的手令外，根據第 85 條發出的手令須——

- (a) 指明申請人的姓名及發出手令的法院；
- (b) 載有一項陳述，列明——
 - (i) 憑藉該條第 (6) 款而適用的手令條款；
 - (ii) 根據第 87 條而賦予於指明期間內申請立即交還根據手令檢取的新聞材料的權利，以及該條所規定沒有如此申請的後果。

(2) 執行或尋求執行該手令的人須遵從下述規定——

- (a) 如所進入的處所的佔用人不在場，則將該手令的副本交給該佔用人；
- (b) 如該處所的佔用人不在場，但看似掌管該處所的其他人在場，則將該手令的副本交給該人；

(c) that service of notice of an application for an order under section 84(2) may seriously prejudice the investigation.

(6) Subject to subsection (7), it shall be a term of any warrant issued under this section that a person who seizes journalistic material pursuant to the warrant shall seal the material upon seizure and shall hold the sealed material until otherwise authorized or required under section 87.

(7) Subsection (6) shall not apply where the judge is satisfied that there may be serious prejudice to the investigation if the applicant is not permitted to have immediate access to the material.

(8) Any person empowered by a warrant issued under this section may—

- (a) use such force as may be necessary to enter the premises specified in the warrant;
- (b) on the premises, seize such material, including journalistic material, as may be found and as but for section 83 he would be or could have been authorized under the provision mentioned in subsection (1) to take possession of;
- (c) detain for a reasonable period any person found on the premises who may have such material in his possession or under his control and who if not so detained may prejudice the purpose of the search.

(Added 88 of 1995 s. 2)

86. Further provision for warrants under section 85

(1) A warrant issued under section 85, other than a warrant to which subsection (7) of that section applies, shall—

- (a) specify the name of the applicant and the court issuing the warrant;
- (b) contain a statement setting out—
 - (i) the terms of the warrant applying by virtue of subsection (6) of that section;
 - (ii) the rights conferred under section 87 to apply within a specified period for the immediate return of journalistic material seized under the warrant, and the consequences provided for in that section of not so applying.

(2) A person executing or seeking to execute such a warrant shall—

- (a) where the occupier of the premises being entered is present, supply the occupier with a copy of the warrant;
- (b) where the occupier of the premises is not present but some other person who appears to be in charge of the premises is present, supply that person with a copy of the warrant;

(c) 如並沒有看似掌管該處所的人在場，則將該手令的副本留在該處所的顯眼地方。

(3) 如檢取的材料依據該手令須予密封及持有，執行該手令的人須在該手令上作出批註，列明該材料的細節，並須將手令交還發出該手令的法院。

(由 1995 年第 88 號第 2 條增補)

87. 與密封材料有關的程序

(1) 凡依據根據第 85 條發出的手令(該條第(7)款所適用的手令除外)自某人處檢取新聞材料，該人或聲稱是該材料的擁有人的人，可於該項檢取 3 日內向發出該手令的法院申請第(2)款下的命令。

(2) 凡有材料自某人處檢取，在有申請根據第(1)款作出後，除非法官信納將有關材料作調查之用符合公眾利益，否則他即須命令將之立即交還該人；而法官根據本款作出裁定時須顧及的事宜包括於檢取有關材料時該材料被持有的情況。

(3) 在有申請根據第(1)款作出後，如法官裁定不根據第(2)款作出命令，或如沒有任何申請在第(1)款指明的期間內根據該款作出，則有關材料可予以開封。

(4) 為裁定根據第(1)款作出的申請，法官可要求檢取有關材料的人將該材料交予他查驗。

(5) 第(1)款下的命令的申請須屬各方之間的申請。

(由 1995 年第 88 號第 2 條增補。由 1998 年第 26 號第 37 條修訂)

88. 第 84 條的補充條文

(1) 就由藏於電腦的資料所構成的材料而言——

(a) 第 84(2)(a) 條下的命令所具有的效力，如同其為規定將材料以可帶走以及可看見及可閱讀的形式交出的命令一樣；及

(b) 第 84(2)(b) 條下的命令所具有的效力，如同其為讓申請人取用以可看見及可閱讀形式出示的材料的命令一樣。

(c) if there is no person present who appears to be in charge of the premises, leave a copy of the warrant in a prominent place on the premises.

(3) Where pursuant to such a warrant material is seized which is required to be sealed and held, the person executing the warrant shall make an endorsement on the warrant setting out details of such material and shall return the warrant to the court from which it was issued.

(Added 88 of 1995 s. 2)

87. Procedure in relation to sealed material

(1) A person from whom journalistic material has been seized pursuant to a warrant issued under section 85, other than a warrant to which subsection (7) of that section applies, or a person claiming to be the owner of such material, may within 3 days of such seizure apply to the court from which the warrant was issued for an order under subsection (2).

(2) On an application under subsection (1), unless the judge is satisfied that it would be in the public interest that the material be made use of for the purposes of the investigation, he shall order that the material be immediately returned to the person from whom it was seized; and in making a determination under this subsection the judge shall have regard to, among other things, the circumstances under which the material was being held at the time of its seizure.

(3) If on an application under subsection (1) the judge determines not to grant an order under subsection (2), or where no application has been made under subsection (1) within the period specified in that subsection, the material may be unsealed.

(4) For the purpose of determining an application under subsection (1) a judge may require the person who seized the material to produce it to the judge for examination by him.

(5) An application for an order under subsection (1) shall be made *inter partes*.

(Added 88 of 1995 s. 2)

88. Provisions supplementary to section 84

(1) In relation to material consisting of information contained in a computer—

(a) an order under section 84(2)(a) shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible; and

(b) an order under section 84(2)(b) shall have effect as an order to give an applicant access to the material in a form in which it is visible and legible.

(2) 申請根據第 84(2) 條作出命令的通知書，可藉將通知書交付有關人士、將通知書留在該人的適當地址或將通知書以掛號郵遞方式寄給該人的方式予以送達。

(3) 上述通知書——

(a) 可藉送達予《公司條例》(第 32 章) 第 2(1) 條所指的法人團體的高級人員的方式送達該法人團體；及

(b) 可藉送達予合夥的其中一名合夥人的方式送達該合夥。

(4) 為施行第 84 條，有關人士的適當地址如下——

(a) 如該人屬法人團體的高級人員，適當地址為該法人團體的註冊辦事處或主要辦事處的地址；

(b) 如該人屬商號的合夥人，適當地址為該商號的主要辦事處的地址；及

(c) 如屬其他情況，適當地址為須獲送達通知書的人最後為人所知的地址。

(5) 凡申請根據第 84 條作出命令的通知書已經送達某人，則除非——

(a) 取得法官的許可；或 (由 1998 年第 26 號第 37 條修訂)

(b) 取得申請人的書面批准，

否則該人不得將與該項申請有關的材料隱藏、銷毀、更改或處置，直至——

(i) 該項申請已遭駁回或放棄；或

(ii) 該人已遵從應該項申請而根據第 84 條作出的命令。

(6) 任何人明知而違反第 (5) 款，即屬犯罪，可處第 6 級罰款及監禁 1 年。

(由 1995 年第 88 號第 2 條增補)

89. 雜項條文

(1) 根據本部作出的任何申請的訟費，及依據根據本部作出的命令而作出或將予作出的任何事情之訟費，均由法官酌情決定。

(2) 為免生疑問，現聲明：本部任何條文均不得解釋為規定法官在他認為根據本部作出命令在有關個案的所有情況下不會符合公眾利益的情況下，仍須作出該項命令。

(3) 除非法官另有指示，否則根據本部進行的各方之間的法律程序，均須在公開法庭進行。

(4) 法院規則可就適用於根據本部進行的法律程序的常規及程序訂定條文。

(由 1995 年第 88 號第 2 條增補。由 1998 年第 26 號第 37 條修訂)

(2) Notice of an application for an order under section 84(2) may be served on a person either by delivering it to him or by leaving it at his proper address or by sending it by post to him in a registered letter.

(3) Such a notice may be served—

(a) on a body corporate, by serving it on a person who is an officer of the body within the meaning of section 2(1) of the Companies Ordinance (Cap. 32); and

(b) on a partnership, by serving it on one of the partners.

(4) For the purposes of section 84, the proper address of a person—

(a) in the case of an officer of a body corporate, shall be that of the registered or principal office of that body;

(b) in the case of a partner of a firm, shall be that of the principal office of the firm; and

(c) in any other case, shall be the last known address of the person to be served.

(5) Where notice of an application for an order under section 84 has been served on a person, he shall not conceal, destroy, alter or dispose of the material to which the application relates except—

(a) with the leave of a judge; or

(b) with the written permission of the applicant,

until—

(i) the application is dismissed or abandoned; or

(ii) he has complied with an order under section 84 made on the application.

(6) Any person who knowingly contravenes subsection (5) commits an offence and is liable to a fine at level 6 and to imprisonment for 1 year.

(Added 88 of 1995 s. 2)

89. Miscellaneous

(1) The costs of any application under this Part and of anything done or to be done in pursuance of an order made under it shall be at the discretion of the judge.

(2) For the avoidance of doubt, it is declared that nothing in this Part shall be construed as requiring a judge to make an order under this Part where he considers that, in all the circumstances of the case, it would not be in the public interest to make that order.

(3) Unless a judge otherwise directs, proceedings inter partes under this Part shall be held in open court.

(4) Rules of court may provide for the practice and procedure applying to proceedings under this Part.

(Added 88 of 1995 s. 2)

90. 附表 7 的修訂

行政長官會同行政會議可藉於憲報刊登的命令，修訂附表 7 以更改其內對紀律部隊首長級人員的指明。

(由 1995 年第 88 號第 2 條增補。由 1998 年第 26 號第 37 條修訂)

91-91A. (由 1993 年第 89 號第 27 條廢除)

92. (由 1993 年第 89 號第 26 條廢除)

93-97. (由 1993 年第 89 號第 27 條廢除)

第 XIII 部

雜項

98. 憲報內條例等的文本

(1) 條例的文本如在憲報刊登，須當作該條例在刊登當日的真確文本。(由 1990 年第 51 號第 4 條修訂)

(2) 其他文書的文本如在憲報刊登，或宣稱由政府印務局印刷，則在任何法庭及為任何目的而出示時，均須接受為該文書的表面證據而無須再加證明。

(由 1975 年第 2 號第 5 條代替)

98A. 更正錯誤

(1) 律政司司長可藉憲報刊登的命令，更正在任何依據本條例印刷或刊登的條例中出現的文書或印刷錯誤。(由 1990 年第 51 號第 5 條修訂；由 1997 年第 362 號法律公告第 2 及 3 條修訂)

(2) 根據本條發出的命令須提交立法會會議席上省覽，不得作不合理延擱；如立法會在該命令提交省覽的會議後不少於 27 日舉行的首次會議上，通過決議將該命令作廢，則由當時開始該命令即告無效，但先前已根據該命令而作出的任何事情，其法律效力不受影響，而新命令的頒發亦不受影響。(由 1981 年第 2 號第 3 條修訂；由 1993 年第 89 號第 28 條修訂；由 1998 年第 26 號第 37 條修訂)

90. Amendment of Schedule 7

The Chief Executive in Council may, by order published in the Gazette, amend the persons specified in Schedule 7 to be directorate disciplined officers.

(Added 88 of 1995 s. 2. Amended 26 of 1998 s. 37).

91-91A. (Repealed 89 of 1993 s. 27)

92. (Repealed 89 of 1993 s. 26)

93-97. (Repealed 89 of 1993 s. 27)

PART XIII

MISCELLANEOUS

98. Copies of Ordinances, etc. in Gazette

(1) A copy of an Ordinance shall, if published in the Gazette, be deemed to be an authentic copy of that Ordinance as at the date of such publication. (Amended 51 of 1990 s. 4)

(2) A copy of any other instrument shall, if published in the Gazette or purporting to be printed by the Government Printer, on its production be admitted as prima facie evidence thereof in all courts and for all purposes whatsoever without any further proof.

(Replaced 2 of 1975 s. 5)

98A. Rectification of errors

(1) The Secretary for Justice may, by order published in the Gazette, rectify any clerical or printing error appearing in any Ordinance printed or published pursuant to this Ordinance. (Amended 51 of 1990 s. 5; L.N. 46 of 1991; L.N. 362 of 1997 ss. 2 & 3)

(2) Every order made under this section shall be laid on the table of the Legislative Council without unreasonable delay, and, if a resolution is passed at the first sitting of the Legislative Council held not less than 27 days after the sitting at which the order is so laid that the order be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of a new order. (Amended 2 of 1981 s. 3)