立法會
Legislative Council

LC Paper No. CB(2)2611/04-05
(These minutes have been seen by the Administration)

Ref : CB2/PS/4/04

Subcommittee on
Review of Existing Statutory Provisions
on Search and Seizure of Journalistic Material

Minutes of meeting
held on Tuesday, 10 May 2005 at 4:30 pm
in Conference Room B of the Legislative Council Building

Members present	:	Hon James TO Kun-sun (Chairman) Dr Hon LUI Ming-wah, JP Hon Margaret NG Hon WONG Yung-kan, JP Hon Audrey EU Yuet-mee, SC, JP
Members absent	:	Hon Albert HO Chun-yan Dr Hon Philip WONG Yu-hong, GBS Hon Howard YOUNG, SBS, JP Hon Daniel LAM Wai-keung, BBS, JP
Public Officers attending	:	Ms Winnie NG Principal Assistant Secretary for Security E Mr Kevin ZERVOS, SC Senior Assistant Director of Public Prosecutions Department of Justice Ms Roxana CHENG Senior Assistant Solicitor General Department of Justice Mr Philip WONG Chief Superintendent of Police (Crime Headquarters) (Crime)

		Mr Michael John BISHOP Principal Investigator Independent Commission Against Corruption
Clerk in attendance	:	Mr Raymond LAM Senior Council Secretary (2)5
Staff in attendance	:	Mr LEE Yu-sung Senior Assistant Legal Adviser 1 Ms Alice CHEUNG Legislative Assistant (2)1

Action

I. Meeting with the Administration
(LC Paper Nos. CB(2)1300/04-05(01), CB(2)1455/04-05(01) and (02))

Members noted the judgment on the case of *R v. Leeds Crown Court, ex parte Switalski*, which was tabled at the meeting.

(*Post-meeting note* : The judgment tabled at the meeting was circulated to members vide LC Paper No. CB(2)1538/04-05 on 11 May 2005.)

2. At the invitation of the Chairman, Principal Assistant Secretary for Security E (PAS(S)E) briefed members on the Administration's response to issues raised by members at the meeting on 8 March 2005. She also informed members of the Administration's preliminary response to the issues raised in the submission from the Hong Kong Bar Association (the Bar) as follows -

(a) the Administration noted that the Bar generally considered that the existing statutory provisions on search and seizure of journalistic material were in order;

(b) even though a choice was available, law enforcement agencies which had on previous occasions applied for warrants under Part XII of the Interpretation and General Clauses Ordinance (IGCO) had chosen to approach the Court of First Instance (CFI) rather than a District Court, in order to allow a higher level of judicial scrutiny of the case concerned;

(c) the fact that a judgment of CFI could not be judicially reviewed applied

Action

not only to rulings made under Part XII of IGCO. The Bar's suggestion regarding legal procedures would not only affect Part XII of IGCO but had wide implications on the legal system in Hong Kong; and

(d) the threshold for the issue of a search warrant under the Police and Criminal Evidence Act 1984 of the United Kingdom (UK), which was referred to in the Bar's submission, had been amended to "indictable offence" with the recent enactment of the Serious Organized Crime and Police Act 2005 in UK. The Joint Committee on Human Rights in UK had commented that the amendment had the effect of lowering the threshold for the issue of a search warrant.

3. Ms Margaret NG disagreed that the Bar was in general supportive of the existing mechanism on search and seizure of journalistic material. She pointed out that it could be noted from the submission that the Bar suggested an application for a search warrant to be made to a District Court because such a decision was subject to judicial review. The Bar agreed with the suggestion in Hartmann J's judgment that the test of "a real risk that journalistic material may be hidden or destroyed" should be adopted. It could also be noted that the Bar considered the existing threshold of "arrestable offence" too low.

4. PAS(S)E responded that although the Bar had pointed out in the first paragraph of its submission that Part XII of IGCO was in need of revision, it could be noted from the rest of their submission that the Bar was generally content with the design and modus operandi of the existing mechanism for search and seizure of journalistic material by law enforcement agencies.

5. Senior Assistant Director of Public Prosecutions (SADPP) said that one of the issues raised by the Bar was whether a CFI judge should be empowered to issue a search warrant under Part XII of IGCO in order that an affected party could seek judicial review. As it involved a number of policy issues, the matter had to be further studied. To his knowledge, a search warrant was to be issued by a CFI judge because it involved an important decision that should be made by a high level judicial officer. It could be noted from the submission that the Bar considered such a warrant should be subject to judicial review. The Bar also considered that an appeal mechanism was unnecessary, if judicial review was available.

6. Referring to paragraph 7 of the submission, the Chairman asked whether the Administration considered that there was an urgent need to introduce some form of redress for affected persons.

7. SADPP said that although it was an issue that should be addressed, it should be noted that the application for a search warrant involved the presentation of sensitive and confidential information to court. It was related to the investigation of serious

Action

crime where immediate action had to be taken.

8. The Chairman asked what the Administration had done after the Court of Appeal (CA) delivered its judgment on the case of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee* on 11 October 2004.

9. SADPP responded that the cases of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee* and *Apple Daily v. Commissioner of the Independent Commission Against Corruption* reflected that some form of redress was already in place. He said that Part XII of IGCO empowered a CFI judge to issue a search warrant in order that law enforcement agencies would be subject to a high level of judicial scrutiny.

10. Ms Margaret NG said that the Bills Committee to study the Interpretation and General Clauses (Amendment) Bill 1995 (the 1995 Bills Committee) might not have considered the fact that judicial review could not be sought on a decision of CFI regarding whether a search warrant should be issued under Part XII of IGCO. Referring to the Annex to the Administration's paper, she expressed concern that the Force Procedures Manual only set out the procedures to be followed, without highlighting the importance of protecting press freedom.

11. PAS(S)E responded that she had studied the records of the 1995 Bills Committee. On the issue of empowering CFI judges and District Court judges to issue a search warrant under Part XII of IGCO, the 1995 Bills Committee was aware that the decision of a CFI judge would not be subject to judicial review. The Chairman asked the Legislative Council Secretariat to identify the relevant records of the 1995 Bills Committee for members' reference.

Clerk

Adm

12. The Chairman requested the Administration to provide a written response to the issues raised in the Bar's submission. Ms Audrey EU also requested the Administration to provide information on the impact of the recent enactment of the Serious Organised Crime and Police Act 2005 in UK on the law enforcement agencies' powers in relation to the search and seizure of journalistic material.

13. The Chairman asked why the Administration had a different observation on the case of *R v. Leeds Crown Court, ex parte Switalski* from that given in paragraph 65(v) of Hartmann J's judgment.

14. SADPP responded that in the case of *R v. Leeds Crown Court, ex parte Switalski*, the judge did not adopt the "real risk" criterion as cited by Hartmann J, but the criterion of "may seriously prejudice the investigation". The phrase "substantial probability" was only used by the prosecution in the case concerned to describe the likelihood of loss or destruction of material in that particular case.

15. Referring to paragraph 44(5) of the judgment delivered by CA on the case of *So*

Action

Wing-keung v. Sing Tao Limited and Hsu Hiu Yee, PAS(S)E said that the interpretation of CA regarding the judgment on the case of *R v. Leeds Crown Court, ex parte Switalski* was consistent with that of the Administration. The Chairman requested the

Adm

Administration to provide a written response highlighting the relevant paragraphs in the judgment on the case of *R v. Leeds Crown Court, ex parte Switalski* and the judgment delivered by CA on the case of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee* which were consistent with the Administration's views.

16. The Chairman said that although members were unable to read ICAC's affirmation in its application for a search warrant in the case concerned, it could be noted from paragraph 69 of the CFI judgment that there was no evidence or explanation provided by ICAC regarding how investigation might be seriously prejudiced, if the production order route was adopted. He considered that if this was the case, the threshold for the issue of a search warrant under Part XII of IGCO was too low.

17. PAS(S)E responded that it was for the court to decide whether the requisite conditions were met in each of the individual cases including whether investigation might be seriously prejudiced. As could be noted from paragraph 49 of CA's judgment, the court considered the issue of search warrant in the case justified. She stressed that law enforcement agencies had to comply with the requirements in Part XII of IGCO and it was ultimately for the court to decide whether a search warrant should be issued.

18. The Chairman said that the threshold for the word "may", which referred to a mere possibility, was too low. The interpretation given by CA in the case of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee* reflected that legislative amendments were necessary.

19. SADPP disagreed that CA had adopted the threshold of a mere possibility in the case concerned. He said that it would ultimately be the court which decided, having regard to all materials presented, whether the adoption of a production order route might seriously prejudice investigation. The word "may" had to be read in conjunction with "seriously prejudice investigation". The court had to be satisfied that the prejudice to investigation was serious. He considered that the meaning of the phrase "may seriously prejudice investigation" was already very clear.

20. The Chairman said that the test of "may seriously prejudice" might comprise a part about the likelihood of occurrence and a part about the degree of prejudice. He asked the Administration to draw reference from the terms used in existing legislation

Adm

for different levels of likelihood and consider amending the word "may" in section 85 of IGCO along the lines of words such as "likely" or "very likely".

21. Ms Audrey EU asked whether the condition in section 85(5)(c) of IGCO would

Action

be considered as being satisfied, if the person who was the source of journalistic material had committed an arrestable offence.

22. SADPP responded that section 85(5)(c) of IGCO had to be read in conjunction with the other pre-conditions in the section. It could be noted from the case of *Roemen and Schmit v. Luxemburg* that under certain circumstances, a source of information might have to be revealed for public interest. There might be situations where the source had to be identified in view of the serious criminal offence involved. It was a matter to be addressed in the affirmation and it would be for the judge to decide whether a search warrant should be issued.

23. SADPP said that if a person maliciously provided to a media organisation information which was criminally damaging or intended for undermining the investigation of crime by law enforcement agencies, there was no reason why law enforcement agencies could not carry out investigation to identify the person who had provided the information concerned. He pointed out that in the case of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee*, the source of information was a matter of concern because there was a suspected breach of section 17(1) of the Witness Protection Ordinance.

24. Ms Audrey EU considered that the factors to be considered by the court should be set out clearly in legislation. There would be many grey areas, if the scope of a provision was too broad.

25. SADPP responded that press freedom was not the freedom to break the law. There might be situations where a journalist was involved in corruption and a search warrant was needed for obtaining the relevant evidence. He added that section 89(2) of IGCO provided that nothing in Part XII of IGCO should be construed as requiring a judge to make an order where it would not be in the public interest to do so. It would ultimately be for the judge to decide whether a search warrant should be issued, having regard to public interest. He cautioned that attempts to draw up provisions for different situations would only result in a piece of legislation with many qualifications that rendered it meaningless. He stressed that law enforcement agencies had acted responsibly and the power of search and seizure under existing legislation had been exercised a few times only.

26. Ms Margaret NG said that the protection provided under Part XII of IGCO was inadequate. Although the issue of a search warrant had to be considered having regard to the provisions in sections 85 and 89(2) of IGCO, the conditions in section 85 could be easily met, if there was any arrestable offence. It would be inadequate to rely solely on the protection provided under section 89(2). She expressed concern that judicial review could not be sought and appeal could not be lodged against a decision of CFI to issue a search warrant under Part XII of IGCO.

Action

27. PAS(S)E responded that issues relating to the protection of the source of journalistic material had been discussed at meetings of the 1995 Bills Committee. At the time, the 1995 Bills Committee agreed with the Administration's view that journalistic material should not enjoy absolute immunity. She pointed out that besides section 89(2) of IGCO, confidential journalistic material was dealt with under sections 84(3)(d)(i) and 87(2) of IGCO.

28. Ms Margaret NG said that the case of *So Wing-keung v. Sing Tao Limited and Hsu Hiu Yee* reflected inadequacies in existing legislation in that the conditions in section 85 of IGCO could be easily met. ICAC's search on a number of media organisations had aroused much public concern. There was thus a need to review Part XII of IGCO.

29. PAS(S)E responded that law enforcement agencies had seldom exercised the powers of search and seizure under Part XII of IGCO after it came into operation in 1996. Exercise of such powers had only been made by ICAC on three occasions, all of which involved serious criminal offences.

30. Ms Audrey EU said that it could be noted from the cases where the powers of search and seizure under Part XII of IGCO had been exercised that there were grey areas in existing legislation and that existing provisions could not provide adequate protection. She considered that if Part XII of IGCO was intended for dealing with situations where a journalist had committed an offence, it should be set out clearly in the provisions.

31. SADPP responded that before a search warrant was issued, a judge had to be satisfied that the requirements in section 84(3)(a) of IGCO, which were more stringent than the requirements for the issue of a search warrant in general, were met.

32. The Chairman said that as legal practitioners were entitled to legal professional privilege, there was no reason why the provisions could not be amended to the effect that a search warrant should not be issued unless the journalist concerned had committed crime. Ms Margaret NG said that it might not be necessary to raise the protection of journalistic material to a level comparable to that of legal professional privilege.

33. Principal Investigator, ICAC informed members that ICAC had only exercised its powers under Part XII of IGCO three times since the enactment of the relevant legislation in 1996. In all the three cases, the journalists were suspected of having committed serious criminal offences.

II. Date of next meeting

Action

34. Members agreed that the next meeting would be scheduled, pending the availability of the information to be provided by the Administration.

35. Referring to paragraph 10 of the submission, Ms Audrey EU queried why the Bar did not consider it necessary to have the test posed by Hartmann J to be cast in statutory form, although it considered that the test should be adopted. She suggested that representatives of the Bar should be invited to attend the next meeting to explain the Bar's views. She added that the Bar should be informed of her queries regarding paragraph 10 of the submission and provided with the Administration's response to the issues raised in its submission as well as the information to be provided by the Administration on the Serious Organized Crime and Police Act 2005 of UK. Members agreed.

Clerk

36. The meeting ended at 6:45 pm.

Council Business Division 2
Legislative Council Secretariat
21 September 2005