立法會
Legislative Council

立法會CB(2)2668/04-05號文件

檔　號：CB2/PS/4/04
電　話：2869 9594
日　期：2005年10月3日
發文者：小組委員會秘書
受文者：涂謹申議員(主席)
何俊仁議員
呂明華議員, SBS, JP
吳靄儀議員
黃宜弘議員, GBS
黃容根議員, JP
楊孝華議員, SBS, JP
余若薇議員, SC, JP
林偉強議員, BBS, JP

保安事務委員會

檢討有關搜查及檢取新聞材料的
現行法定條文小組委員會

在2005年5月10日會議上，小組委員會要求立法會秘書處找出審議《1995年釋義及通則條例(修訂)條例草案》的法案委員會(下稱"法案委員會")的有關紀錄，以研究法案委員會是否知悉不可就原訟法庭法官發出搜查令的決定進行司法覆核。

2. 謹附上法案委員會1995年7月6日的會議紀要(只有英文本)，供委員參閱。委員或可參考該會議紀要第21(b)段所載有關資料。

小組委員會秘書

林培生

(林培生代行)

連附件
副本致：梁耀忠議員　)
劉千石議員, JP　)　非委員的議員
劉慧卿議員, JP　)
高級助理法律顧問1

立法會
Legislative Council

LC Paper No. CB(2)2668/04-05

Ref : CB2/PS/4/04
Tel : 2869 9594
Date : 3 October 2005
From : Clerk to Subcommittee
To : Hon James TO Kun-sun (Chairman)
Hon Albert HO Chun-yan
Dr Hon LUI Ming-wah, SBS, JP
Hon Margaret NG
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, JP
Hon Howard YOUNG, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Daniel LAM Wai-keung, BBS, JP

Panel on Security

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

At the meeting on 10 May 2005, the Subcommittee asked the Legislative Council Secretariat to identify the relevant records of the Bills Committee to study the Interpretation and General Clauses (Amendment) Bill 1995 (the Bills Committee) regarding whether the Bills Committee was aware that the decision of a judge of the Court of First Instance on the issuance of a search warrant would not be subject to judicial review.

2. I now attach the minutes of the Bills Committee meeting held on 6 July 1995 (available in English version only) for members' reference. Members may wish to refer to paragraph 21(b) of the minutes for the relevant information.

(Raymond LAM)
for Clerk to Subcommittee

Encl.

c.c. Hon LEUNG Yiu-chung)
Hon LAU Chin-shek, JP) Non-Subcommittee Members
Hon Emily LAU Wai-hing, JP)
SALA1

LegCo Paper No. HB 1225/94-95
(Note: This record has been seen by the Administration)

Ref : HB/C/38/94

Bills Committee to study the Interpretation and General Clauses (Amendment) Bill 1995

Notes of Meeting held on Monday, 6 July 1995 at 4.30 pm in Conference Room B of the Legislative Council Building

Present :	Hon Andrew WONG, OBE, JP (Chairman) Hon Emily LAU Wai-hing Hon James TO Kun-sun Hon Christine LOH Kung-wai
Absent with apologies :	Hon Mrs Selina CHOW, OBE, JP
By invitation:	The Administration
	Mr Jack CHAN Principal Assistant Secretary for Security
	Mr Clement LEUNG Assistant Secretary for Security
	Mr Ian DEANE Senior Assistant Solicitor General
	Mr J L ABBOTT Senior Assistant Law Draftsman
In attendance:	Mr Ray CHAN Assistant Secretary General 2
	Mr Jimmy MA Senior Assistant Legal Adviser
	Mrs Percy MA Clerk to the Bills Committee

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I. Confirmation of the record of the meeting on 3 July 1995

The record was confirmed.

II. Meeting with the Administration

2. The Chairman drew the meeting's attention to a note from Ms Christine LOH on her various concerns on the Bill (tabled at the meeting). The points raised would be included in the ensuing discussion. The meeting then proceeded to discuss the various issues arising from the last meeting.

Hearing for application of warrant

3. Mr J CHAN said that the Administration had considered Members' proposal concerning the mode of hearing on an application for warrant, and after consultation with the enforcement departments, had come to a view that Members' proposal could be accepted with some modifications. He briefly introduced the Administration's revised proposal on a three-tier approach as contained in the paper tabled at the meeting. In brief, the application procedures under scenario one and scenario two were the same as those proposed by Members, i.e. an inter partes application for a production order in all general cases, and where inter partes application was not practicable, an ex parte application for a special warrant which required the sealing of any material seized pending the outcome of an application for the return of the material through an inter partes hearing. The procedure under scenario three was a revised proposal by the Administration to cater for urgent and sensitive cases which warranted the immediate use of the seized material.

4. Members in general felt that the revised proposal could address their concern. However, they pointed out that

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the test for both scenario two and scenario three cases appeared to be the same, i.e. non compliance with the production order and impracticability to make an inter partes application because it would seriously prejudice the investigation. It was therefore not clear what the specific criteria were for invoking the procedure under scenario three. There should probably be another test which an applicant for a warrant had to pass in order to satisfy a judge that the immediate use of the material seized was necessary. Otherwise, all or the majority of the cases could fall under scenario three.

5. In response, the Administration said that the paper was prepared for Members to have some basis for discussion. Subject to Members' agreement to the principle of the revised proposal, the Law Draftsman would work out details of the provisions and revert to Members. On the points Members raised, the Administration had the following comments:

(a) For an ex parte application under scenario three, firstly, an application had to be approved by a directorate disciplined officer who had to be satisfied that the ex parte application procedure and the immediate use of the material seized were warranted; and secondly, a judge must also be satisfied that the criteria for resorting to scenario three procedure were met. Hence, an application under scenario three would have to overcome two hurdles.

(b) The criteria for the issue of a warrant under scenario three would be worded in a way such that a judge had to be satisfied that it was necessary for the material seized to be used immediately in order not to prejudice the investigation. It was not certain if the criteria could be identified in more specific way than a general provision. However, it would be clear that this kind of warrant would only be granted

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when the other kind of warrant would prejudice the investigation.

6. In response to Ms Christine LOH, the Administration said that the conditions for issuing a warrant for search and seizure of journalistic material were specified in section 84(4). A judge had to be satisfied, among other things, that there was reasonable cause to suspect that the journalistic material was likely to be of substantial value to the investigation of the arrestable offence or relevant in proceedings for the arrestable offence. Hence, the question of "fishing" for evidence would not arise.

7. The Administration agreed to let Members have the draft Committee Stage amendments as soon as possible. Admin

Section 82

Definition of "journalistic material", "journalism" and "premises"

8. Ms LOH said that the Personal Data (Privacy) Bill proposed that the working material of a journalist which had not become part of any news reporting would be excluded. However, the definition of journalistic material under this Bill covered any material acquired and created for the purpose of journalism, which she considered to be too wide. She also had similar observations on the definition of "journalism" and "premises".

9. The Administration said that the definition of "journalistic material" and "journalism" was taken from the UK Police and Criminal Evidence Act 1984 (PACE). The fact that no case law would be found on the definition could prove that there had not been a problem with it. The Bill proposed that, for the purpose of search and seizure of journalistic material, an enforcement agency could no longer resort to existing law but had to apply for a special warrant. If the definition proposed in the Personal Data (Privacy) Bill

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was adopted, it would reduce the scope for protection. Similarly, the scope for protection might be reduced by further defining "journalism".

10. In response to Members, SALA was of the view that if the definition proposed in the Personal Data (Privacy) Bill was adopted, it would certainly narrow the scope of protection. He recommended that the definition in the Bill be retained. Members agreed.

Means of obtaining material

11. The Administration reiterated that the means of obtaining the material would not have any bearing on the protection given under the Bill. The Administration agreed to consider Members' request that the Policy Secretary make a statement to this effect when the Bill resumed its Second Reading debate. Admin

Section 83

12. Members noted that a list of the legislative provisions which authorized entry into premises for the purpose of search and seizure was tabled.

Section 84(4)(b)

13. Ms LOH considered that one of the conditions for issue of warrant stipulated in section 84(4)(b)(ii), i.e. the journalistic material was likely to be "relevant in proceedings for the arrestable offence" was a bit ambiguous and asked if consideration would be given to replacing it with "relevant evidence in proceedings for the arrestable offence".

14. SALA said that in UK, the expression was in more specific terms than that proposed under the Bill. The condition imposed was that the material had to be relevant

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evidence, and relevant evidence was further defined to mean anything that would be admissible in evidence at trial for the offence. He felt that this condition was an important one bearing in mind that it was an alternative condition to subsection 4(b)(i).

15. Mr ABBOT said that the policy intention was that the material had to be relevant as evidence in proceedings for the arrestable offence. What the drafting tried to avoid was to require an applicant to prove the admissibility of the evidence. To address Members' concern, the Administration agreed to move a Committee Stage amendment to include the word "evidence" under subsection 4(b)(ii). Admin

Section 84(4)(c)

16. The Administration said that it had considered Members' view and would improve the wording of the section by following the provisions in PACE and the Canadian provision. The drafting would reflect that any other methods for obtaining the material had been tried without success or had not been tried because they were bound to fail. Admin

Section 84(4)(d)

Public interest grounds

17. On Members' suggestion to include a provision in subsection (4)(d) to the effect that in inter partes hearing, a targeted person/organization could raise other matters on the ground of public interest, Mr ABBOTT was of the view that to add the requirement into the subsection as a further limb of that paragraph would impose quite a burden on an applicant. In fact, the burden would be open-ended, and difficult to discharge because the points under subsection 4(d) were quite specific. He would propose that the provision be re-drafted to leave it open for a judge not to Admin

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grant an application where he considered that it was not in the public interest to do so. Although that was the position at the moment, the drafting could be improved to make it more clear.

18. In response to Mr TO, Mr ABBOT confirmed that the provision to be included would be to the specific effect that, apart from the grounds under section 84(4), a targeted person opposing to the issue of a search warrant could argue on general public interest grounds, having regard to any circumstances of the case.

Open proceeding for inter partes hearing

19. On whether inter partes hearings could be held in public, Mr J CHAN said that it was the Administration's view that it would be more desirable to leave the decision to the judge. Ms LAU suggested to state in the Bill that inter partes hearings should normally be held in public, but in case of special circumstances, it would be for the judge to decide. Mr ABBOT said that generally speaking, both parties involved might not want the hearing to be held in public, such as for operational reasons on the part of the applicant, and privacy reasons on the part of the news organization. If objective criteria such as special circumstance were introduced, it could then be a question of whether the judge was satisfied with the criteria, bearing in mind the proposed stipulation in the Bill that such hearings should normally be held in public. However, if no particular provision was included as drafted, the matter would basically be left to the discretion of the parties concerned.

20. At Ms LAU's request, the Administration agreed to reconsider the question of an open proceeding for inter partes hearing and would revert to Members at the next meeting. Admin

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Clauses 5 and 6

21. SALA briefed Members on LegCo Paper No LS 155/94-95 tabled at the meeting, which was a comparison between the proposed section 84 of the Bill and the two provisions (i.e. section 21 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) (DTRPO) and section 5 of the Organized and Serious Crimes Ordinance (Ord No 84 of 1994) (OSCO)) referred to in Clauses 5 and 6 of the Bill. It was proposed in the Bill that the two provisions would not be affected by what was being proposed in the Bill. The following points were highlighted:

(a) The comparison must be looked at from the perspective that the three pieces of legislation dealt with different subject matters.

(b) The authority for issuing a search warrant under the three provisions was the same. On judicial review of decisions to issue a warrant, the decision of the District Court was reviewable by the High Court. In the case of the High Court, the judicial review process was not available because the higher court was a superior court itself.

(c) On the mode of hearing on an application of a search warrant, Members had earlier discussed a revised proposal by the Administration.

(d) On the conditions under which a search warrant might be issued, there were more similarities than differences under the three provisions in question. However, the conditions under the DTRPO and the OSCO appeared to be more stringent than those proposed in the Bill, and from the perspective of protection for journalistic material, more protection would be available.

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(e) On the "public interest" conditions, in the case of the proposed section 84(4)(d) of the Bill, the judge had to be satisfied that "it is in the public interest" whereas in the other two provisions the expression used was "there are reasonable grounds for believing that it is in the public interest". While the two expressions did not appear to have different legal effect, it could be synchronised for the sake of consistency.

(f) One of the conditions in the proposed section 84(4)(c) was that "other method of obtaining the material may compromise the investigation". The conditions in the other two provisions were more specific. The Administration had earlier agreed to improve the wording of the subsection.

(g) Under the proposed Bill, section 84(4)(b) provided that there had to be reasonable cause to suspect that the journalistic material was likely to be (i) of substantial value to the investigation of the arrestable offence or (ii) relevant in proceedings for the arrestable offence. However, under the other two provisions, the only condition imposed was related to "substantial value to the investigation". It would appear that the inclusion of an alternative condition in paragraph (b)(ii) in the Bill implied a lowering of threshold. In a similar provision in the UK PACE, all the conditions specified had to be satisfied.

22. Mr TO was concerned about the disparity in the mode of hearing on the application for a warrant under the Bill vis-à-vis those under the DTRPO and the OSCO. He said that the three-tier approach Members considered earlier seemed to be a better one.

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23. In reply to Ms LOH, SALA advised that an enforcement department seeking a warrant under the DTRPO and the OSCO was not given a choice to resort to Cap 1 and would have to comply with the more stringent requirements under these two Ordinances even though the material involved was journalist material.

24. Mr ABBOT said that, in view of the need to re-draft the main provisions in the Bill, it would be necessary to consider whether the new threshold on the mode of hearing now proposed for the Bill was higher than that of the DTRPO and OSCO. He would take into account Members' view in finalizing the drafting. Admin

Concerns of the Hong Kong Journalists Association

25. The Chairman said that Members had taken note of the concerns of the HKJA at the last meeting, but did not support its position in total.

26. The Administration would give a written reply on the points raised by the HKJA. Admin

27. On paragraph 9 of Ms LOH's note which was tabled, Mr TO clarified that he did not agree with the HKJA's request that all confidential journalistic material should be exempted from the provisions of the Bill because journalistic material should not have absolute privilege.

28. Members noted the Administration's advice that the effect of the Bill was to restrict Government's ordinary powers in relation to search and seizure of journalistic material, hence to give more protection to journalistic material. Mr DEANE supplemented that the Bill already provided that the judge would have to take into account the "circumstances under which a person in possession of the material holds it" before granting the warrant.

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29. While Ms LAU appreciated the position, she urged the Policy Secretary to say a few words to address the concerns of the HKJA in his speech on resumption of Second Reading debate. This would go a long way towards reassuring the journalists about the Government's commitment in the protection of press freedom. The Administration took note of her suggestion. Admin

III. Way forward

30. Members noted that, for the Bill to resume Second Reading debate at the last sitting on 26.7.95, the Bills Committee had to make a report to the House Committee on 14.7.95.

31. It was agreed that the next meeting would be held at 10.45 am on 12.7.95 to consider outstanding issues and the various Committee Stage amendments proposed by the Administration.

32. The meeting was adjourned at 6.00 pm.

(Post-meeting note: All papers tabled at this meeting were re-circulated to Members vide LegCo Paper No HB 1134/94-95.)

LegCo Secretariat
7 August 1995