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Paper for the Panel on Security meeting on 7 November 2006

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

Purpose

This paper reports on the deliberations of the Subcommittee on Existing Statutory Provisions on Search and Seizure of Journalistic Material.

Background

2. On 9 July 2004, a number of persons were arrested by the Independent Commission Against Corruption (ICAC) for suspected corruption offences. One of the arrested persons agreed to assist ICAC. This person (the Participant) was put into the witness protection programme on 13 July 2004.
3. In the evening of 13 July 2004, lawyers, who acted on the instructions of people purporting to have spoken to the Participant, sought access to the Participant. When this was denied, an application for a writ of habeas corpus was made to the Court of First Instance (CFI) on the following day seeking the release of the Participant from the custody of ICAC.
4. The application was heard by CFI on 16 July 2004 and dismissed. Details of the habeas corpus proceedings were reported in the press, although most of the relevant hearings were either in Chambers or in camera. Among the matters reported were the identity of the Participant and the fact that she was in the witness protection programme.
5. The Court of Appeal, to which one aspect in the habeas corpus proceedings was referred, was very concerned about the press coverage. The Court requested the Secretary for Justice to look into the matter and consider what appropriate action was merited. On the following day, further reports appeared in the press

which repeated the fact that the Participant was in the witness protection programme.

6. On 24 July 2004, officers of ICAC executed search warrants issued by the court at the offices of several newspaper organisations. On 28 July 2004, Sing Tao Limited, which was one of the newspaper organisations searched by ICAC, sought the remedy that the search warrant should be set aside on the basis that in law it should never have been issued. In its judgment handed down on 10 August 2004, CFI ordered that the search warrant be set aside.

7. ICAC then lodged an appeal to the Court of Appeal over the judgment handed down by CFI. In its judgment handed down on 11 October 2004, the Court of Appeal dismissed the appeal on the ground that it had no jurisdiction to hear the appeal. The Court of Appeal also stated that ICAC had acted entirely lawfully in seeking the search warrants in the case. Had it possessed the necessary jurisdiction, the appeal would have been allowed.

8. The execution of search warrants by ICAC at the offices of several newspaper organisations gave rise to wide public concern. The Panel on Security discussed with the Administration on 2 and 29 November 2004 the power of ICAC to search and seize journalistic material. Some members were of the view that the provisions in the Interpretation and General Clauses Ordinance (Cap. 1) (IGCO) on search and seizure of journalistic material should be reviewed to better protect press freedom.

The Subcommittee

9. At its meeting on 24 January 2005, the Panel formed a subcommittee to review the existing statutory provisions on search and seizure of journalistic material. The terms of reference and the membership of the Subcommittee are in **Appendices I** and **II** respectively.

10. Under the chairmanship of Hon James TO Kun-sun, the Subcommittee has held six meetings with the Administration. The Subcommittee has met with representatives from the Hong Kong Bar Association (the Bar). In addition, the Subcommittee has considered submissions from The Law Society of Hong Kong and the Hong Kong Journalists Association.

Deliberations of the Subcommittee

The scheme on access to journalistic material

11. The Subcommittee notes the three-tier approach under the existing scheme on access to journalistic material by law enforcement agencies in Part XII of IGCO. The scheme is as follows -

(a) Tier One (production order)

Under this tier, an officer may apply to a judge of District Court or CFI for a production order, requiring the person who possesses the journalistic material to produce it or to give the officer access to it. An application for the order shall be made *inter partes*, i.e. with both sides present. The officer has to satisfy the judge that a number of conditions are met before an order can be made. These conditions include, *inter alia*, that the material is likely to be of substantial value to the investigation of an arrestable offence or relevant evidence in proceedings relating to that offence, and that it is in the public interest to grant the order, having regard to the likely benefit to the investigation and the circumstances under which the journalistic material is held.

(b) Tier Two (search warrant, seize and seal pending application for return)

This tier provides that an officer may make an *ex parte* application to a judge of District Court or CFI for a warrant authorising him to enter premises and to search for or seize journalistic material. Such an application shall not be made unless approved personally by a directorate disciplined officer as specified in IGCO. The applicant will have to satisfy the judge that either a production order has not been complied with or, in addition to meeting most of the Tier One conditions, it is not practicable to communicate with any person entitled to grant access to either the premises or the material to which the application applies; or the service of a notice of application for a production order may seriously prejudice the investigation. Any journalistic material seized pursuant to the warrant has to be sealed. The person from whom the material was seized may make an *inter partes* application within three days of seizure for the return of the material. Unless the judge is satisfied that it would be in the public interest that the material be used by the authorities, he shall order it to be immediately returned to the person from whom it was seized.

(c) Tier Three (search warrant, seize and immediate use)

In exceptional circumstances, an officer may make an *ex parte* application for a warrant, and for the immediate use of the journalistic material seized. In this case, apart from satisfying all the additional requirements in Tier Two, the officer has to prove to the satisfaction of the judge that the investigation may be seriously prejudiced if immediate access to the material is not permitted.

The test of "real risk"

12. Hon Albert HO, Hon Margaret NG, Hon James TO and Hon Audrey EU have suggested that "a real risk that journalistic material may be hidden or destroyed" put forward in the judgment of Hartmann J of CFI should be adopted as the test for the issue of warrants to search journalistic material.

13. The Administration has responded that the scheme in Part XII of IGCO is intended to and does already provide for sufficient flexibility and scope for the court to examine and balance all the relevant factors in reaching a decision whether to issue a production order or search warrant. Most fundamentally, "public interest" serves as the guiding principle as well as the paramount consideration. In particular, section 89(2) of IGCO stipulates that for the avoidance of doubt, Part XII shall not be construed as requiring a judge to make an order where he considers that, in all the circumstances of the case, it would not be in the public interest to make that order. In addition, sections 84(3)(d)(ii) and 87(2) of IGCO require the court to consider the circumstances under which the journalistic material is held. Taken in its entirety, the scheme already allows the court to take into account all relevant factors.

14. As such, the Administration has informed members that it has considered the suggestion, and come to the view that it is not necessary to incorporate the element of "real risk" in the legislation. The consideration of a real risk that journalistic material may be hidden or destroyed has already been covered in the consideration of factors that may seriously prejudice the investigation.

15. Hon Margaret NG has pointed out that if the element of giving consideration to whether there is such a real risk has already been encompassed in existing legislation, the Administration should have no objection to making it explicit.

16. The Administration has responded that the real risk that journalistic material that may be hidden or destroyed is only one of the situations where serious prejudice to investigation may arise, which is dealt with under section 85 of IGCO. There is no need to expressly provide for a separate element of "real risk" in the legislation.

17. Regarding members' question whether statutory guidelines should be prescribed on the meaning of "public interest" in Part XII of IGCO, the Administration has advised that consideration of public interest involves a careful balancing exercise. It requires the court to consider all aspects of any given case, with no bias or predisposition towards any particular factor. The circumstances of each case before the court will be unique, and factors to be considered different. Hence, it would not be appropriate or possible to prescribe by law exhaustively the meaning of public interest and how it should be applied in each case.

The test of "may seriously prejudice the investigation"

18. Members have asked about the criteria adopted for satisfying the test of "may seriously prejudice the investigation" in section 85(5)(c) of IGCO. Hon Audrey EU considers that the criteria should be clearly set out in legislation.

19. The Administration has explained that situations where the serving of notice of an application for a production order may seriously prejudice the investigation vary from case to case. It would be impracticable to list them out exhaustively. Each case has to be considered on its own merits and with regard to its particular facts and circumstances. Whether a particular situation may seriously prejudice the investigation is a matter for the judge to decide, after taking into consideration all the relevant facts and circumstances of the case.

20. Hon James TO is of the view that the test of "may seriously prejudice the investigation" comprises an element about the likelihood of occurrence and an element about the degree of prejudice. Mr TO has suggested that the word "may" be amended along the lines of words such as "reasonably likely" or "very likely".

21. The Administration has responded that the word "may" has to be read in conjunction with "seriously prejudice the investigation". The court has to be satisfied that the prejudice to investigation is serious. The existing provision in section 85(5)(c) is appropriate, and there is no need for amendment.

All material seized to be sealed

22. Under section 85(6) of IGCO, 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 authorised or required under section 87. Section 85(7) provides that section 85(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. Some members have queried the need for the provision for immediate use of the material seized. They consider that all material seized should be sealed on seizure until opening is authorised by the court.

23. The Administration has responded that it cannot preclude that there will be exceptional circumstances where law enforcement agencies require immediate access to the material seized, such as where lives are in imminent danger. "Tier Three" caters for such contingencies and a very high threshold is required for the issuance of a "Tier Three" warrant. Apart from fulfilling all the requirements in "Tier Two", the officer has to prove to the satisfaction of the judge that the investigation may be seriously prejudiced if immediate access to the material is not permitted. According to the Administration, no "Tier Three" warrant has been executed since Part XII of IGCO came into force in 1995.

Review or appeal of search warrants issued

24. Under the scheme in Part XII of IGCO, an officer can apply to a judge of District Court or CFI for a search warrant. A decision of a District Court judge is subject to judicial review, but not a decision of a CFI judge. Members have questioned the reasons for providing such a choice, and the factors considered by law enforcement agencies in choosing between the two levels of court. Some members share the view of the Bar that an application for a search warrant under IGCO should be submitted to a District Court judge only in order to invoke the jurisdiction of judicial review. The Bar is of the view that an appeal procedure was unnecessary if judicial review is available. Appeals against the issue of coercive orders such as production orders are not desirable as a matter of legal policy.

25. The Administration has responded that the effect of providing a choice is allowing suitable flexibility to cater for the different circumstances of different cases. Each time when it was considered necessary that journalistic material be obtained for the purposes of a criminal investigation, the law enforcement agency has sought the advice of the Department of Justice. In all the four cases where Part XII of IGCO were invoked, i.e., three cases of application for search warrant by ICAC and one for a production order by the Police, the offences involved were serious. The maximum penalties of these offences range from seven years to life imprisonment. In all these cases where it was decided that search warrants should be obtained to secure the material sought, the application was made to CFI taking into account -

- (a) the seriousness of the case and the material sought related to journalists who were suspects; and
- (b) the desirability of subjecting the application to a higher level of judicial scrutiny.

Furthermore, in the operations of ICAC where search warrants are sought in respect of journalistic material under IGCO, it may also be necessary for ICAC to apply for search warrant under the Prevention of Bribery Ordinance (POBO). For

instance, in *Apple Daily Ltd. V. Commissioner of the Independent Commission Against Corruption (No.2)*[2001] 1 HKLRD 647, search warrants under Part XII of IGCO and section 17 of POBO were respectively sought and obtained. Search warrants under POBO may only be issued by a magistrate's court or CFI. In these circumstances, it is logical for ICAC to apply to the same level of court, i.e. CFI, for search warrants relating to IGCO and POBO in the same case.

26. The Administration has pointed out that all CFI decisions, and not just CFI decisions under Part XII of IGCO, are not subject to judicial review. Means of redress other than judicial review are available. For instance, section 87 of IGCO provides for a party to seek the return of material seized under a search warrant, which is a form of review. In addition, an application could be made for setting aside the final orders of the High Court on the ground of fraud/perjury in a separate action. An aggrieved party could claim damages for the tort of malicious procurement of a search warrant, institute proceedings for any civil wrong or lodge a complaint with the law enforcement agency concerned in a separate action, or apply for the discretionary exclusion of evidence at any subsequent criminal trial.

27. Hon James TO and Hon Audrey EU are of the view that it is very difficult to seek the means of redress mentioned by the Administration. Hon James TO has pointed out that malicious procurement of a search warrant is difficult to prove, as all relevant information is kept by the law enforcement agency concerned. Fraud on the part of the law enforcement agency is also difficult to prove, given that the aggrieved party does not have any power of search. Hon Albert HO, Hon Margaret NG, Hon James TO and Hon Audrey EU consider that CFI's decisions in respect of application for search warrant not being subject to judicial review is very undesirable. They have suggested that a mechanism to review or appeal against the decisions of CFI should be provided in Part XII of IGCO.

28. The Administration has responded that a number of remedies are already available under the scheme. Apart from the means of redress other than judicial review as set out in paragraph 26 above, for production orders issued under section 84 of IGCO, Rule 3 of Order 118 of the Rules of the High Court (Cap. 4A) provides that the application has to be made *inter partes*. The party from whom the journalistic material is required may therefore make his case before the court before a decision is made as to whether the application should be approved. Appeal channel is also provided for under section 31(b) of the Court of Final Appeal Ordinance (CFAO). The Administration explains that under section 31 of CFAO, an appeal to the Court of Final Appeal can be initiated by a party to the proceedings from any final decision of the Court of Appeal or CFI from which no appeal lies to the Court of Appeal. A person from whom material is seized and who has made an application for return of the material under section 87 of IGCO may be considered as a party to the proceeding, and as no appeal lies to the Court of Appeal, he may appeal to the Court of Final Appeal under section 31(b) of CFAO.

29. The Administration is of the view that given the safeguards and remedies available, subjecting the CFI's decisions under Part XII of IGCO to an additional review or appeal mechanism is not proportionate and unnecessary. Nevertheless, having regard to members' concern, the Administration has proposed that in future, all applications under Part XII of IGCO should be made to the District Court, unless the circumstances clearly warrant seeking a decision from CFI at the outset. Specifically, all applications for production orders will be submitted to the District Court. For search warrants applied for under sections 85(6) and 85(7) of IGCO, i.e. "Tier Two" and "Tier Three" warrants, applications will also be made to the District Court as far as possible unless the matter is of such importance to warrant a decision from CFI upfront. For instance, where there is an imminent risk of serious harm to life and limb, or when it involves cases of utmost sensitivity where confidentiality is of grave importance in the interests of the investigation, such as serious corruption allegations against senior government servants holding sensitive posts, an officer may apply to CFI. The advice of the Department of Justice should be sought if officers consider it necessary to submit a case to CFI, and such application shall not be made unless the making of it has been approved by the directorate officers of the law enforcement agencies concerned and the Prosecution Division of the Department of Justice respectively.

30. The Administration has informed the Subcommittee that the proposed arrangements will be promulgated among the law enforcement agencies, including the Police, ICAC, Immigration Department and Customs and Excise Department, by way of a circular. The information contained in the circular will be posted on the website of the Security Bureau for public information. The relevant internal guidelines of the law enforcement agencies will be amended accordingly.

31. Some members, including Hon Margaret NG, Hon James TO and Hon Audrey EU, consider that the proposed arrangements should be provided in the legislation. Hon Howard YOUNG, however, does not consider it necessary to include the proposed arrangements in the legislation.

32. The Administration is of the view that as the proposed arrangements focus on operational details and it would be difficult to exhaust all situations, it is more appropriate to implement the arrangements through administrative directions. At the request of the Subcommittee, the Administration has agreed to publish the proposed arrangements in the Gazette. The arrangements for the application for production orders and search warrants in respect of journalistic material under Part XII of IGCO, which were gazetted on 8 September 2006, are in **Appendix III**.

Advice Sought

33. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
1 November 2006

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Legislative Council

Ref : CB2/PS/4/04

Panel on Security

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

Terms of Reference

To review the existing statutory provisions on search and seizure of journalistic material and to make recommendations to the Panel where necessary.

Council Business Division 2
Legislative Council Secretariat
15 April 2005

Panel on Security

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

Membership list

Chairman	Hon James TO Kun-sun
Members	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, SBS, JP
	Total: 9 Members
Clerk	Mrs Sharon TONG LEE Yin-ping
Legal Adviser	Mr LEE Yu-sung
Date	2 July 2005

G.N. 5554

ARRANGEMENTS FOR THE APPLICATION FOR PRODUCTION ORDERS
AND SEARCH WARRANTS IN RESPECT OF JOURNALISTIC
MATERIAL UNDER PART XII OF THE INTERPRETATION
AND GENERAL CLAUSES ORDINANCE (Chapter 1)

Notice is hereby given that the Secretary for Security has promulgated the following arrangements for the application for production orders and search warrants in respect of journalistic material under Part XII of the Interpretation and General Clauses Ordinance (Chapter 1). The arrangements are applicable to the Hong Kong Police Force, the Customs and Excise Department, the Immigration Department and the Independent Commission Against Corruption.

2. Part XII of Chapter 1 provides for access to journalistic material by law enforcement agencies under prescribed circumstances. Under sections 84 and 85 of Chapter 1, an officer may apply to either a District Court or Court of First Instance judge for a production order or a search warrant. Production orders are applied through *inter partes* hearings. Warrants are applied through *ex parte* hearings. The guidelines below apply to the arrangements regarding the level of court for making applications.

3. In general, all applications should be made to the District Court, unless the circumstances clearly warrant seeking a decision from the Court of First Instance at the outset.

Tier One: production order, inter partes hearing, application to District Court

4. An officer may apply for a production order, requiring the person who possesses the journalistic material to produce it or to give the officer access to it. An application for the order shall be made *inter partes*, i.e. with both sides present. The party from whom the journalistic material is required may make his case before the court before a decision is made as to whether the application should be approved. All applications for production orders should be submitted to the District Court.

Tier Two: (seize and seal) search warrant, ex parte hearing, application to District Court or Court of First Instance

5. An officer may make an *ex parte* application for a warrant authorizing him to enter premises and to search for or seize journalistic material. Such applications should under normal circumstances be made to the District Court. Any journalistic material seized pursuant to the warrant has to be sealed. The person from whom the material was seized may make an *inter partes* application for the return of the material. Unless the judge is satisfied that it would be in the public interest that the material be made use of by the authorities, he shall order it to be immediately returned to the person from whom it was seized.

6. In exceptional circumstances, e.g. where there is an imminent risk of serious harm to life and limb, or when it involves cases of utmost sensitivity where confidentiality is of grave importance in the interests of the investigation (for example, serious corruption allegations against senior government servants holding sensitive posts), an officer may apply to the Court of First Instance. The advice of Department of Justice (DoJ) should be sought if officers consider it necessary to submit a case to the Court of First Instance, and such application shall not be made unless the making of it has been approved by the directorate officers of the law enforcement agencies concerned and the Prosecution Division of the DoJ respectively. This is to ensure that the decisions are made at the highest level and that grounds for resorting to this course of action are thoroughly considered and fully justified.

Tier Three: (seize and read) search warrant, ex parte hearing, application to District Court or Court of First Instance

7. If the circumstances so warrant, an officer may go for Tier Three, i.e. to make an *ex parte* application for a warrant and for the immediate use of the journalistic material seized. Applications under this Tier should be made to the District Court, unless requirements in paragraph 6 above are satisfied.