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本司檔號 Our Ref.: DCCC 546/2016  
來函檔號 Your Ref.:  
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24 November 2016

Mr Kenneth Chen  
Secretary General of the Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong

**BY FAX (2877 9600) & BY POST**

Dear Mr Chen,

**Application for Special Leave of the Legislative Council  
for officers of the Council to give evidence**

**HKSAR v Leung Kwok-hung  
Criminal Case No. DCCC 546 of 2016**

This is an application for special leave of the Legislative Council ("LegCo") under section 7 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) ("LCPPO") and rule 90 of the Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Instrument No. A501) for five officers of LegCo to give evidence in the criminal proceedings instituted against Mr Leung Kwok-hung ("the Defendant").<sup>1</sup>

**Background**

The Defendant is charged with the offence of Misconduct in Public Office ("MIPO"), contrary to Common Law and punishable under section 101I(1) of the Criminal Procedure Ordinance (Cap. 221). The charge relates to his failure to declare or disclose to, or his concealment from LegCo between 22 May 2012 and 23 June 2016, his acceptance of a payment of HK\$250,000 from Mr Lai Chee-ying through Mr Mark Herman Simon on 22 May 2012. Among other things, the Prosecution is required to

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<sup>1</sup> The Chinese translation of this application to be provided when it is ready.

prove that the Defendant, without reasonable excuse or justification, wilfully and intentionally committed the offence.

The Defendant was arrested and charged by the Independent Commission Against Corruption on 23 June 2016. On the next day, he appeared in the Eastern Magistrates' Courts with no plea taken and the case was transferred to the District Court. When he appeared at the District Court on 8 July 2016, the Defendant indicated that he would plead not guilty to the charge. A pre-trial review was held before District Judge Lee on 30 September 2016. At that hearing, the Judge directed that a second pre-trial review be held on 25 November 2016. It is anticipated that the date of the trial will be fixed soon.

### Reasons for the Application

The evidence from the five officers of LegCo and the documents specified in the table below are considered as necessary for the Prosecution to substantiate the offence of MIPO by proving that : (1) the Defendant knew about the relevant requirements on declaration or disclosure of interests imposed on LegCo Members; (2) he wilfully and intentionally misconducted himself as a LegCo Member; and (3) his misconduct was serious but not trivial.

Section 7(1) of LCPPO provides,

*"No member or officer of the Council, and no person employed to take minutes or keep any record of evidence before the Council or a committee, shall give evidence elsewhere in respect of the contents of such minutes or record of evidence, or of the contents of any document laid before the Council or committee, as the case may be, or in respect of any proceedings or examination held before the Council or committee, as the case may be, without the special leave of the Council."* (emphasis added)

The officers in respect of whom special leave of the Council is sought are either (i) officers of the Council; or (ii) persons employed to take minutes or keep any record of evidence before the Council or committee. The specified documents are either (i) contents of minutes or records of evidence before the Council or a committee; (ii) contents of document laid before the Council or committee, as the case may be; or (iii) proceedings or examination held before the Council or committee, as the case may be. As such, special leave of the Council is required.

Specified Documents and Witnesses requiring Special Leave

Details of the specified documents to be respectively produced by the five officers of LegCo, namely Mr Wong Kin-man, Mr Chan Che-fai Bosco, Mr Leung Siu-kei, Ms Szeto Siu-wa and Ms Sit Fung-ming Anita, are set out as follows :-

Reference	Specified Document	Witness
WKM/1/E & WKM/1/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 22 January 2014 in respect of "Oral Answers to Questions" session concerning the topic "Hong Kong Marathon" and the debate on the motion "Safeguarding editorial independence and autonomy" (English version: pages 5719-5724, 5737-5751 and 6016-6124) (Chinese version: pages 4107-4111, 4121-4131 and 4322-4394)	Mr Wong Kin-man
WKM/2/E & WKM/2/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 8 February 2006 regarding declaration of interests by the Defendant at the meeting in relation to "Policy on public service broadcasting" (English version: pages 4123-4127, and 4397-4432) (Chinese version: pages 2695-2698, and 2864-2886)	-ditto-
WKM/3/E & WKM/3/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 18 April 2012 regarding declaration of interests by the Defendant at the meeting in relation to "Motion under Rule 49B(1) of the Rules of Procedure" (English version: pages 7965-7969 and 8210-8246) (Chinese version: pages 5561-5564, and 5742-5767)	-ditto-
WKM/4/E & WKM/4/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 6 October 2004 in relation to an affirmation/oath taken by the Defendant as a LegCo Member for 2004-2008 term of office (English version: pages 1-12) (Chinese version: pages 1-11)	-ditto-
WKM/5/E & WKM/5/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 8 October 2008 in relation to an affirmation/oath taken by the Defendant as a LegCo Member for 2008-2012 term of office (English version: pages 1-14) (Chinese version: pages 1-12)	-ditto-

Reference	Specified Document	Witness
WKM/6/E & WKM/6/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 19 May 2010 in relation to an affirmation/oath taken by the Defendant as a LegCo Member for 2010-2012 (by-election) term of office (English version: pages 8373-8382) (For Chinese version: pages 5707-5714)	Mr Wong Kin-man
WKM/7/E & WKM 7/C	Copy of <u>Official Record of Proceedings of the Council meeting</u> on 10 October 2012 in relation to an affirmation/oath taken by the Defendant as a LegCo Member for 2012-2016 term of office (English version: pages 1-16) (Chinese version: pages 1-14)	-ditto-
CCF/1/E & CCF/1/C	Two DVDs containing <u>video recording of the Council meeting</u> of LegCo on 22 January 2014 (English interpretation version & Floor version)	Mr Chan Che-fai Bosco
LSK/15/1 & LSK/15/2	<u>Report of the Committee on Members' Interests</u> on complaints against Hon LEE Cheuk-yan and the Defendant attached with a CD-ROM storing the transcripts of the meetings/hearings and the transcripts (Chinese version)	Mr Leung Siu-kei
SSW/1/E & SSW/1/C	Copy of extract of the final version of <u>Minutes of the meeting of the Panel on Housing</u> held on Thursday, 4 January 2007, at 2:30pm in the Chamber of the LegCo Building (Ref: CB1/PL/HG/1) [LC Paper No. CB(1)1235/06-07] (English version: pages 1-15) (Chinese version: pages 1-15)	Ms Szeto Siu-wa
SSW/2/E & SSW/2/C	Copy of extract of the final version of <u>Minutes of the meeting of the Panel on Housing</u> held on Monday, 7 May 2007, at 2:30pm in the Chamber of the LegCo Building (Ref: CB1/PL/HG/1) [LC Paper No. CB(1)2225/06-07] (English version: pages 1-11) (Chinese version: pages 1-11)	-ditto-

Reference	Specified Document	Witness
SFM/1/E & SFM/1/C	Copy of the final version of <u>Minutes of the 19<sup>th</sup> meeting of the Finance Committee of the Council held at the LegCo Chamber on 6 June 2008, at 5:05pm (Ref: CB1/F/1/2) [LC Paper No. FC14 08-09] (English and Chinese versions)</u> (English version: pages 1-6) (Chinese version: pages 1-5)	Ms Sit Fung-ming Anita

### The application of Sections 3 and 4 of LCPPO

Sections 3 and 4 of LCPPO provide,

***“3 Freedom of speech and debate***

*There shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Council.*

***4 Immunity from legal proceedings***

*No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or a committee, or by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise.” (emphasis added)*

Section 3 provides for freedom of speech and debate in LegCo or any committee and for the corresponding immunity of the proceedings being questioned in any court or place outside LegCo. Section 4 confers immunity upon LegCo Members from civil or criminal proceedings in respect of matters said, or documents brought before, LegCo or any committee. Section 3 relates to privilege attached to LegCo while section 4 relates to immunity enjoyed by Members of LegCo<sup>2</sup>.

It is appreciated that the specified documents may only be used in court in a manner consistent with the statutory provisions in light of the principles developed in decided cases governing parliamentary privilege. We consider that sections 3 and 4 are not infringed as far as the intended use of the specified documents is concerned. The specified documents will be used to prove that the relevant parliamentary proceedings took place and that the Defendant participated in the proceedings. The Prosecution is

<sup>2</sup> See second reading of the Legislative Council (Powers and Privileges) Bill 1985 (p.1113)

not seeking to question or challenge the veracity or propriety of anything said by the Defendant as recorded in the relevant records of proceedings or reports. Rather, the Prosecution is seeking to adduce the documents as evidence of the fact that such statements were made by the Defendant. The allegation of impropriety relates to his failure to declare or disclose, or concealment of the receipt in question. The words said by the Defendant are not the cause of prosecution action or the foundation of criminality liability, and he is not exposed to any criminal liability in respect of what he said in LegCo proceedings. As such, the use of the material is consistent with parliamentary privilege. There is nothing in the allegations against the Defendant which relates to the legislative or deliberative processes of LegCo or its Members.

In any event, as with any legislative instrument, the legal meaning and application of the statutory provisions is a matter for the Court to determine. We consider that the correct approach would be for the Council to grant leave for the above mentioned officers of LegCo to give evidence, without prejudice to any argument concerning the true scope of sections 3 and 4 of LCPPO. It will then be for the Court seized of the criminal proceedings to determine the content of the sections, and to decide any issues concerning the use of the material. We consider that the adoption of this approach will facilitate the administration of justice without derogating from any privilege of LegCo, or of its Members.

#### Way Forward

As the second pre-trial review will be held on 25 November 2016, it is expected that the Court will fix the hearing date of the trial in the near future. The Prosecution is required to inform the Court and parties concerned of the nature of evidence to be adduced and the availability of prosecution witnesses including the officers of LegCo named in this application. We would therefore invite you to accord priority to this matter, and look forward to receiving your favourable reply at your earliest convenience.

Please do not hesitate to contact me (2867 2331) or Mr Jonathan Lin (2867 1048) if we can be of any further assistance.

Yours sincerely,



(Anna YK Lai, SC)

Deputy Director of Public Prosecutions (Ag)

c.c. Commissioner for ICAC (Attn: Mr Remus Lau, CI/SD)  
(Ref: IF/2014/1885) (by fax only)