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Regulatory Investigations by the SFC – Dawn Raids

For Joint ForensIG-RIF-CFIG Webinar

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18 October 2021

Speaker

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SFC's power to demand information and documents

- Wide power to demand documents, even overriding confidentiality obligations: s.179;
- Supervision of intermediaries – power to enter premises and conduct compliance audits: s.180
- Power to require information relating to transactions: s.181
- Information obtained can be shared by other government bodies
- Publication of investigation reports

Challenging request for documents

S.380(4) Legal Professional Privilege

Nothing in the SFC affects “any claims, rights or entitlements which would... arise on the ground of legal professional privilege.”

Right to confidential legal advice: Art. 35 Basic Law

i.e. – It is perfectly lawful to object production of confidential documents on grounds of LPP

Types of LPP:

- Litigation privilege
- Legal advice privilege



Litigation privilege

- documents and communications for the sole or dominant purpose of assisting a person involved in litigation
- the litigation is either underway or is reasonably in contemplation
- this includes communications between a client and third parties.

Legal advice privilege

- documents and communications made between a lawyer in his/her professional capacity and his/her client
- for the purpose of giving or seeking legal advice



Dawn Raids – Some basic features



- A surprise visit to business or residential premises to identify and remove records and documents
- Warrant granted by a Magistrate to enter and search premises (possibly multiple premises at the same time)
- Legal representation unlikely available if raid takes place in early morning
- Removal of documents and devices containing information specified in the warrant?
- Questioning people unprepared for the questions

Items to be seized – potential disputes

- Relevance of documents - Nature of records and documents usually broadly defined
- Items can be seized if there are reasonable grounds to believe in the relevance of the seized items: question of relevance determined by reference to the scope of the warrant
- Seizing electronic devices containing irrelevant records and documents?
- Disputed items to be sealed pending Court's hearing

Meaning of “record or document”

Cheung Ka Ho Cyril v SFC and Another [2020] HKCFI
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Facts

- During the course of the execution of a search warrant, the SFC seized some digital devices
- that were relevant, or believed to be relevant to the SFC’s investigation
- the SFC asked the owner of the devices for login names/passwords by issuing notices under s. 183 SFO
- the owner challenged the warrant, seizures and the s.183 notice by way of judicial review



Grounds for objecting production:

1. Materials for production were irrelevant to the SFC's investigations, thus falling outside the remit of any record or document which "is, or may be, relevant to the investigation" under s183(1)(a)

Court: relevant, even though the email accounts and digital devices would likely also contain other personal or private materials which are not relevant to the SFC's investigation

2. Digital devices were not "records" or "documents"

Court: "records" and "documents" are given very wide meanings in the SFO, having regard to the way or manner in which information and data are nowadays being created, transmitted, kept and stored by digital devices in all aspects of activities

3. Search warrant lacks specificity

Court: S. 191(1) of the SFO does not require a warrant to state the relevant offence or misconduct. The practice of stating broadly defined classes or categories of documents in search warrants is not unlawful or unconstitutional.



Court's ruling:

- The word 'record' and 'document' are not confined to records or documents in paper form
- SFC has the power to
 - seize digital devices such as mobile phones, computers and tablets
 - issue notices pursuant to s. 183 of the SFO and require provision of ALL the means of access to email accounts and digital devices which contain, or are likely to contain, information relevant to its investigations .

Handling Dawn Raids –Dos and Don'ts

- Inform the management of the company immediately, particularly COO (or Managing Director), the CFO, the Company Secretary, the in-house lawyer (if any) and the IT team:

COO – who probably understands what is going on

CFO – who understands the accounts and perhaps some problematic transactions

Company Secretary – who understands how various records and documents are being kept and who will consider if necessary to make any announcement (assuming it is a listco)

In-house lawyer – who will make sure every aspect of the entry and search will be lawful

IT team – assisting the search officers taking electronic copy of the records and documents; as to the provision of passwords etc, check with the lawyer first



- Do contact your external lawyer immediately and while waiting for his arrival, ask the officers to wait (for a while like 15 min or so)
- Do ask to see the search warrant – what to look for?
 - Address
 - Scope
 - Date
- Take a copy of the search warrant and send it to your lawyer immediately while he is travelling to the office premises – but the officers may take issue on this for fear of tipping off
- Do ask the officers to identify themselves and make a record – who they are and whether it is a joint operation with another law enforcement body like the ICAC



- Be polite and cooperative – need not show hostility and recreate obstructions; search may be conducted by force if necessary
- Do let the officers in while waiting for the lawyer and lead them to a designated waiting or conference room
- Before the arrival of your lawyer, do engage in a constructive dialogue with the officers regarding the conduct of the search
 - Dialogue limited to the logistics of the conduct of the search ONLY
 - NEVER engage in any dialogue relating to the subject of investigation
 - SFC – no right to silence but interviewee entitled to receipt of a s.183(1) before any “interview”
 - ICAC – may start questioning anyone there and then, but interviewee may exercise his right to silence
- During the search, provide all the necessary assistance for identifying and retrieving the records and documents.



- Accompany each officer during the process of the search
- Do take a copy of all the records and documents being retrieved and removed
- Do consult your lawyer on issues of legal professional privilege, confidentiality and relevance
- In relation to electronic devices, do consider providing the password if you believe the information contained therein is wholly irrelevant; alternatively, wait until you receive a formal written request from the SFC
- Do ask the officers to do a key word search before they start viewing all the information which may be irrelevant



- In relation to disputed items (on grounds of LPP for example), do make it clear that you will formally make an objection to the removal; they will be kept in a sealed file pending the resolution of the issue at a later stage
- Do make sure the official record of items being retrieved and removed is full and complete; if necessary, make your own record
- After the completion of the search, do hold an internal meeting immediately to discuss all the issues, particularly the sensitivity of the records and documents so removed

Dawn raids of residential premises

Additional problems:

- Usually conducted before or around 7 am in the morning
- Legal representation may not be available
- Removal of personal devices
- No IT support
- Unable to make copy documents
- Caught unguarded, tend to answer questions unnecessarily
- Unable to ensure the lawfulness of the search
- And so on....

4-step Proportionality Test

Hysan Development Co Ltd v Town Planning Board (2016) 19 HKCFAR 372

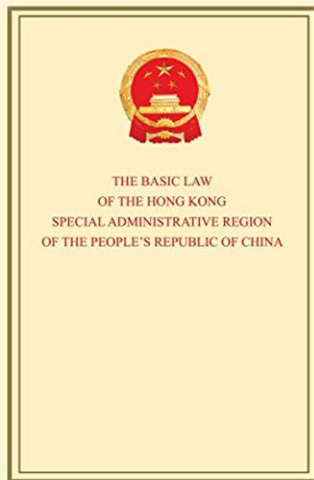
1. “legitimate aim” → legitimate aim being the SFC investigations
2. “rational connection” → seizures being rationally connected to the advancement of that aim
3. “no more than reasonably necessary” → the devices appear to contain materials relevant to the SFC investigations
4. “fair balance” → SFC offered safeguards to protect the privacy of the applicants, such as using keyword searches to identify relevant materials contained in or accessible through the digital devices and/or viewing the contents together with the applicants.


Challenging Search Warrant

- Art.29 of the Basic Law:

“The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of all intrusion into, a resident’s home or other premises shall be prohibited.”

- Also see Art.14 of the Hong Kong Bill of Rights



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- In assessing whether the statutory power was no more than was necessary to achieve the legitimate purpose, the court had to consider the need to protect against executive abuse (*Kleen Llyod Holdings v ICAC* [2020] HKCFI 161)
 - Very serious violations of rights cannot be justified. Where “*the impugned measure has destroyed ‘the essence of the right’*” (*Hysan Development v Town Planning Board* (2016) 19 HKCFAR 372, [113])

Challenging Search Warrant

S 191 Search Warrant

- Application for a search warrant from the Magistrate
 - reasonable grounds to suspect that there are/ likely to be...
 - on premises specified in the search warrant...
 - record/ documents which are/ maybe relevant to the SFC investigation

Apple Daily Ltd v ICAC (No 2) [2000] 1 HKLRD 647:

- a warrant amounts to an erosion of a citizens' rights and must be justified by law;
- the court has a constitutional duty to safeguard citizens against abuse;
- the court adopts a strict and restrictive construction of the relevant empowering statute, resolving any doubt which might arise in favour of the citizens; and
- the court is to balance two competing aspects of the public interest: detection of crimes vs protection of citizens' rights and privacy.

A v SFC & Anor [2007] HKCU 2086

Application to quash a search warrant

Ground 1 :

at the time of search and seizure of documents, s.182(3)
Direction should have been produced

Court's ruling:

- no such requirement as to incorporate the s.182(3) Direction to the search warrant, as the warrant does not serve to delineate the records or documents to be seized under a warrant;

Application to quash a search warrant

Ground 2:

warrant should have identified the company whose shares were involved in the alleged insider dealing and the date(s) on which it took place


Court's ruling:

- provided there was an appropriate description of the offence, and the parameters of the warrant could be determined by the court, such further information was not necessary; Also, it was reasonable for the SFC not to include precise information in the warrant, given that the investigation was on-going

Tang Hanbo v SFC, HCAL 229/2016

Facts:

- SFC commenced investigation against Tang in relation to suspected breaches of the Takeovers Code. Meanwhile, the CSRC was investigating Tang for alleged market misconduct in mainland China.
- In June 2016, the CSRC requested the SFC for investigatory assistance. The SFC obtained a search warrant but did not inform the magistrate about the CSRC's interest in the matter.
- During the execution of the search warrant at Tang's home, the SFC officers kept the CSRC informed as to the materials to be seized/ had been seized.

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- Eventually, the SFC seized notebook computers, mobile phones and documents.
 - The SFC passed some of the seized materials to the CSRC. Tang was later convicted of committing certain market misconduct crimes and was fined a sum of RMB1.2 billion.

Application to challenge the search warrant

Ground 1:

by failing to inform the Magistrate about the CSRC's investigation when applying for the warrant, the SFC deliberately misled the Magistrate

Court's Ruling:

- the SFC being under a statutory duty to cooperate with the CSRC
- unnecessary to mislead the Magistrate; failing to include such information was not intentional



Ground 2:

the SFC should not have passed the seized materials to CSRC

Court's ruling:

The SFC is entitled to pass on materials to the CSRC, even if the same had been seized by the SFC for its own investigations in the first place.

Re Messrs Ip and Willis [1990] 1 HKLR 154

Application to challenge the search warrant on the ground that the terms of the warrant was too wide: reason to believe there might be anything evidence of an offence against s. 10 of the ICAC Ordinance

Court's Ruling:

- Warrant should describe the alleged offence in respect of which the search is authorised so as not to mislead the reader as to the nature of the alleged offence;

Court's Ruling:

- Search should only cover those things believed to be evidence of the commission of the particular offence;
- Must be sufficiently specific to enable the occupier, if necessary, to obtain legal advice about the permissible limits of the search;
- The warrant being silent as to (i) the particular offence in respect of which it was issued; (ii) the documents or material to be seized; (iii) the likelihood of the existence the privileged documents;
- The warrant was too wide to be valid and therefore it was quashed.

Philip KH Wong, Kennedy YH Wong & Co v ICAC (No 2) [2009] 5 HKLRD 379

Facts:

when applying for a search warrant, the ICAC gave an undertaking to the Magistrate that any material seized from the law firm for which legal professional privilege was claimed would be sealed for seven days; such undertaking was not endorsed on the warrant.

Application to quash a search warrant:

Failure to endorse the warrant with such undertaking rendered the warrant invalid



Court's Ruling:

- When applying for the warrant, the ICAC was duty bound to disclose any fact material to the magistrate's decision, including the likelihood of obtaining privileged material from the targeted premises. Failure to make such disclosure would render the warrant liable to be quashed.
- A magistrate could not authorise a search for privileged materials.
- However, a warrant is not invalid if such undertaking did not appear on the face of it.

Y v ICAC [2020] HKCFI 161

Application to challenge the search warrant on the ground it does not contain sufficient information

- The warrant only specified the statutory provisions without any particulars of the suspected offence, time frame and parties involved.

Court: Applied general principle laid down by the Court of Appeal in Apple Daily Ltd v Commissioner of ICAC [2000] 1 HKLRD 647 that a warrant would be held valid so long as it contains the basic details which are provided for in the statute.



Other complaints

- (i) he should be entitled to read the information laid before the magistrate in support of the warrant application;
- (ii) he should be informed of whether the investigation was ongoing or completed; and
- (iii) the officer who executed the search warrant failed to exhibit her ICAC officer warrant card.

→ Dismissed by the Judge after considering the coverage of the public interest immunity and assessing the relevant provisions of the POBO.



Court's ruling:

What basic information needs to be included in a valid search warrant?

- (1) the alleged offence;
- (2) the magistrate has reasonable cause to believe that there are materials which are or contain evidence of the alleged offence;
- (3) the premises to be searched;
- (4) the officer empowered to search; and
- (5) the description of the materials to be searched.

Based on the above, the Judge held that the warrant in question contains all the basic information stated above and thus is lawful.

So Wing Keung v Sing Tao Ltd [2004] HKCU 1177

Application to set aside search warrant to seize journalistic material

- The balancing exercise focuses on the freedom of the press seen against the need effectively to investigate and deal with crime.
- The court in discharging this constitutional duty must balance two competing aspects of the public interest
 - The interest in the detection of crimes and bringing criminals to justice on the one hand and
 - the interest in the protection of the citizens' rights and privacy on the other.

So Wing Keung v Sing Tao Ltd [2004] HKCU 1177

Whether the search of a media office can be considered reasonable will depend on a number of factors:

- The nature of the objects to be seized
- the manner in which the search is to be conducted
- the degree of urgency of the search.



Thank you!



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