

Hong Kong Police and ICAC search warrants



In our last update issued on 2 April 2020 (see [here](#)) we discussed the recent judgment of the Honorable Mr Justice Chow which dismissed challenges to the Securities and Futures Commission's investigatory powers and search warrants to search and seize digital devices.

Continuing on the theme of search warrants, this update looks at two other recent High Court Judgments which considered:

- (i) The lack of information in an Independent Commission Against Corruption search warrant issued under the Prevention of Bribery Ordinance ("**POBO**"); and
- (ii) Whether a third party with a sufficient interest in the search or documents seized has a free standing right to the disclosure of a Hong Kong Police search warrant issued under the Police Force Ordinance ("**PFO**").

As detailed below, both of the law enforcement bodies were successful in dismissing the challenges made against them.

"Y" v COMMISSIONER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION [2020] HKCFI 161.

Background

On 28 August 2018, Y's home was searched by officers of the ICAC under a warrant granted by a Magistrate pursuant to section 17(1A) of POBO which provides:

'Where ... the court is satisfied that there is reasonable cause to believe that in any premises or place there is anything which is or contains evidence of an offence under this Ordinance, the court may by warrant directed to an investigating officer named in the warrant, empower such officer and any other investigating officer, to enter such premises or place, by force if necessary, to search the same.'

The warrant: (i) stated a Magistrate held reasonable cause to believe there were materials which contained evidence of '**offering an advantage and accepting an advantage by a public servant**'¹; and (ii) empowered officers to search the following:

'...reports, correspondence records, accounts records, bank records, mobile phones, computers, documents or data processed or stored in a computers or electronic devices.'

Six items in total were seized including notebook computers and mobile phones.

Y alleged the warrant was invalid and the seizure unlawful. Among his complaints which we explain below, he alleged the warrant failed to specify the '**nature**' of the offence he was suspected of committing.

Nature of the offence: account given at the time by the ICAC was enough

After reviewing the evidence filed, the Judge stated that on gaining entry to Y's home the investigating officer had given a brief description of the allegations against Y firstly to him and then his legal representatives. Both understood and had no complaint at the time.

¹ Section 4(1) and (2) POBO

Warrant only needs to state alleged offence

While it was complained the offence's particulars were not set out in the warrant, the Court found according to section 17(1A) POBO a valid warrant only needed to state what the alleged offence was. The warrant was compliant as it had stated the offence was offering and accepting an advantage.

Time frame of the alleged offence needed

The warrant and ICAC were criticized because the time frame of the alleged offence was not included in the warrant, or provided by the ICAC. The Judge stated it was clear Y was aware of the necessary details, further this was not a requirement of section 17(1A) POBO and at the investigatory stage it is often impractical to give such particulars.

Failure to exhibit copy of warrant card

The warrant was criticized because no copy of the investigating officer's warrant card was exhibited to it. The Judge stated it was sufficient to show the warrant card to Y on entry to his home, which happened.

Further even if it was a requirement to exhibit the warrant card, any non-compliance here caused no prejudice or abuse, so did not invalidate a search.

Too general

The warrant set out various items which were or contained evidenced of the alleged offence. Y criticized this list as being too general and unfair. The Judge stated it was necessary to be pragmatic and depending on the stage of an investigation it may be impossible to specify what needed to be searched.

Access to the material laid before the Magistrate

Y argued the information put before the Magistrate by the ICAC when applying for the warrant should be made available to him so it could be assessed whether the Magistrate in reality had '*reasonable cause to believe*' there was evidence of the offence.

The Judge stated the Court acted in a gate keeping role to vet the ICAC's application and there was no reason to doubt the Magistrate had considered the information and concluded it was appropriate to grant the warrant.

The Judge also stated the information laid before the Magistrate this was subject to public interest immunity therefore Y was not entitled to it.

Conclusion

What must be set out in a search warrant is to be determined by reference to the terms of the empowering statute.

The Judge held the information which should be in a warrant under S17(1A) POBO was: (i) the alleged offence; (ii) that the Magistrate had '*reasonable cause to believe*' that there are materials which are or contain evidence of the alleged offence; (iii) the premises to be searched; (iv) the name of the ICAC officer empowered to do the search; and (v) the materials to be search for.

All the above were present. The search warrant here was valid and therefore the seizure of the items was lawful.

Comment

There are in excess of 60 ordinances in Hong Kong which provide for either warrantless searches or the issue by a judicial officer of a warrant authorizing a search. Because of the different provisions applying, careful scrutiny of the empowering statute will be required for each such warrant and search to determine whether there is compliance with the empowering statute.

Note, many of these ordinances like the POBO, do not contain provisions requiring a warrant to be executed within a specified time. Following KEEN LLOYD HOLDINGS LTD V COMMISSIONER OF CUSTOMS AND EXCISE AND ANOR [2016] 2 HKLRD 1372, the absence of a time limit being required by the empowering statute did not mean the search warrant would be valid forever. There, the Court held in most cases a warrant will only be valid for execution by the law enforcement body it was issued to for days to one to two weeks.

"K" v COMMISSIONER OF POLICE AND ANOR [2019] HKCFI 3048

Background

On 11 August 2019, K suffered a serious eye injury when in the vicinity of Tsim Sha Tsui Police Station. She said the injury was caused by a bean bag round fired by anti-riot Police deployed to deal with demonstrations happening at the time.

K was taken to Queen Elizabeth Hospital ("QE^H") and admitted for treatment. The serious nature of her injuries meant the Police wanted to investigate, but because they didn't know who K was all they could do was to write to QE^H asking the hospital to request her to make contact.

K did not make contact. Therefore, on 21 and 29 August 2019, search warrants were obtained from a Magistrate under section 50(7) of PFO which provides:

'Whenever it appears to a magistrate upon the oath ... that there is reasonable cause to suspect that there is in any building ... any ... book or other document, or ... article or chattel which is likely to be of value (whether by itself or together with anything else) to the investigation of any offence that has been committed, or that is reasonably suspected to have been committed such magistrate may by warrant directed to any police officer empower him ... as may be necessary by day or by night-

(a) to enter and if necessary to ... forcibly enter such building ... to search for and take possession of any such ... book or other document ... or any such other article or chattel which may be found therein'

K's personal information and medical records were obtained from QE^H by the Police. She objected to such disclosure and repeatedly requested copies of the second search warrant from the Police so it could be challenged.

The Police did not disclose the search warrant and Judicial Review proceedings challenging their failure to do so were commenced by K.

K claimed a free standing right to inspect the a warrant and argued that: (i) because the Police knew she intended to challenge the search warrant it should not have been executed; (ii) although the search warrant was not executed at her home or against her she still had a sufficient interest in it to be shown the warrant; and (iii) by failing to produce to her the search warrant she was obstructed from access to the courts and from protecting her rights.

Confidentiality

The Police responded that giving K a copy of the warrant would compromise confidentiality and it was not their practice to disclose to anyone that they were applying for or had executed a search warrant.

The Police stated only when an investigation is over and when a prosecution happens would they normally provide the material placed before the Magistrate to obtain the search warrant and a copy of the warrant itself.

The above meant if there was no prosecution, the confidentiality of the parties being investigated and/or searched could be maintained.

Basic Law

There was no free-standing right under Article 35² of the Basic Law requiring the Police to disclose documents of any kind relating to an on-going criminal investigation. Privacy rights under the Basic Law related to the integrity of our homes and offices from unlawful interference and didn't mean the Police must notify an affected person of their intention to get or to execute a warrant at a place elsewhere.

It was stated if there were a free standing right allowing K to obtain such documents, a potential suspect who had got wind of an investigation would be able to find out the direction and progress of it prejudicing the Police's effectiveness.

PFO and common law

The PFO was silent about production of the search warrant to anyone.

Unless it was an emergency, all the common law required when the Police were executing a search warrant was for the warrant to be produced to the occupants of the premises. The purpose of this was so they could satisfy themselves that the officers who were demanding access were acting lawfully.

Nothing in the PFO or common law required that a search warrant be produced to a person who was related in some way to the documents that were being seized.

Access to justice

K alleged she was prevented from accessing the Courts because she'd had no sight of the search warrant. In response it was argued and accepted by the Court that she could have applied for discovery, pre-action or otherwise on: (i) showing she had a prima facie case; (ii) the documents sought were relevant to the case; and (iii) the documents were necessary for the fair disposal of that case.

The Judge stated that proceedings to impugn the search warrant and the return of the materials seized could be commenced if valid grounds existed. It was further stated while K had stated early on in her interactions with QEH and the Police that she intended to take such a step, she still had not identified the basis of the application. K argued she was not able to raise her grounds to attack the warrant without seeing it which the Judge did not accept for the reasons explained above.

Conclusion

The Judge therefore rejected K's assertion she had a free standing right to production of the warrant on demand from the Police.

The fact the Police did not produce the warrant to her did not mean her right of access to justice was infringed, as alleged.

If discovery of the warrant was needed before substantive proceedings were commenced, there were legitimate grounds to seek the warrant in the context of proper or intended proceedings to challenge it.

This article was written by Ian Childs, Partner of Stephenson Harwood's Hong Kong Litigation team.

² 'Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.'

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