

## REQUEST FOR LEGAL REPRESENTATION

1. The subject of legal representation for a suspect under investigation is a matter of major importance. The way each request for representation is handled invariably influences later decisions by criminal courts when deciding on the admissibility of any statements made by a suspect, particularly where a statement has been made by a suspect in custody. Investigating officers are therefore advised to approach this subject with caution, and exercise diplomacy when dealing with requests from legal advisers.

### PRINCIPLES AND PROCEDURES FOR PROCESSING A REQUEST FOR LEGAL REPRESENTATION

2. The Rules and Directions for the Questioning of Suspects, and the Taking of Statements promulgated in October 1992 by the Secretary for Security reiterate the right of a person in custody at any stage of an investigation to communicate and to consult with a solicitor or barrister, in the presence, but out of the hearing, of an officer, provided that no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so.

3. A person in custody, or present in ICAC premises and under investigation, should be provided on request with a current list of solicitors provided by the Law Society if he wishes to consult with a legal adviser.

4. Whenever a legal adviser arrives at the Operations Department for the purpose of representing a detainee, either at the request of the detainee or claiming to have been instructed by a third party to represent the detainee, the Duty Officer of the Detention Centre must be informed. He will establish the legal adviser's identity, firm/chambers, and the reason for the visit, and will record the details

in an Occurrence Book. Likewise, all requests for legal advice by a detainee will be immediately recorded on the Arrest/Detention Sheet.

5. The Duty Officer has no authority to authorize a legal visit but he will provide the legal adviser's name and firm/chambers to the case officer, who if necessary will consult his senior officers to decide on the appropriate course of action to be taken.

6. Following a request for access being received via the Duty Officer, the case officer will satisfy himself that the visiting legal adviser is a genuine legal practitioner acting on the instructions of the detainee, or a person known to the detainee. The following classes of person are entitled to visit a detainee, or a person present in ICAC premises and under investigation :

- (a) solicitors who hold a valid Law Society identity card, the particulars of which tally with those on their Hong Kong Identity Card;
- (b) barristers, accompanied by solicitors or properly authorized and approved solicitor's clerks [see (d) below], who hold a valid identity card of the Hong Kong Bar Association the particulars of which tally with those on their Hong Kong Identity Card;
- (c) Unaccompanied barristers who produce written instructions by a solicitor, or who possess verbal instructions from a solicitor that can be verified prior to the visit;
- (d) solicitor's clerks accompanying solicitors, whose name, Hong Kong Identity Card number and details of their employer appear on a list provided, maintained and updated by the Law Society (a copy of which is kept at the Detention Centre); or in

cases of accompanying a barrister, bearing a letter of authorization signed legibly and personally by their employer and stating the fact that instructions have been issued, the name of the detainee and the name of the solicitor's clerk.

- (e) trainee solicitors (who are not qualified legal practitioners) accompanying solicitors, and holding a Law Society Identity Card the particulars of which tally with those on their Hong Kong Identity Card;
- (f) pupil barristers (who are not qualified legal practitioners) accompanying their pupil masters, and holding Hong Kong Bar Association Pupil Barrister identity cards the particulars of which tally with those on their Hong Kong Identity Card.

7. In cases where there is doubt over the qualification of the visiting legal adviser or the genuineness of the legal representation, the matter will immediately be brought to the attention of a Principal Investigator or a Directorate Officer.

8. Providing that no unreasonable delay or hindrance is likely to be caused to the processes of investigation or the administration of justice, and having satisfied himself as to the qualification of the visiting legal adviser, and obtained the consent of the detainee, the case officer will, without delay, permit the legal adviser to communicate with the detainee, in the presence, but out of the hearing of an investigator. The date, commencing and finishing times, details of person(s) visiting the detainee, together with the letter of authorization, where appropriate, will be entered in or attached to the Arrest/Detention Sheet.

9. If the detainee declines to see the legal adviser, written confirmation on the Arrest/Detention Sheet to that effect will be obtained by the Duty Officer of the Detention Centre. This can be shown to the legal adviser in disputed cases. Where a detainee declines to be seen by a legal adviser, he will be allowed to state, in the presence of the requesting lawyer and an independent officer not below the rank of Investigator, that he does not wish to consult with the lawyer concerned.

10. Where there is an objection to a legal visit from the case officer, a Principal Investigator or Directorate Officer will assess the situation thoroughly to decide whether access should be permitted, delayed or refused.

11. Principal Investigators and Directorate Officers are the only authority for delaying or refusing legal representation to a detainee. A Principal Investigator or a Directorate Officer may only delay or refuse access if there are reasonable grounds for believing that unreasonable delay, or hindrance to the processes of investigation or to the administration of justice, is likely to be caused if access is permitted. The circumstances under which a decision to delay or refuse legal representation to a detainee would be considered justified include :

- (a) where a detainee declines the services of a legal adviser;
- (b) where it is known or reasonably suspected that a detainee is deliberately going to use his legal adviser to transmit messages to other suspects who will then be alerted to impending ICAC action, and the legal adviser is known, or reasonably suspected to be a party to such a conspiracy;

- (c) where the legal adviser is known, or reasonably suspected to be criminally involved in the same matter for which the detainee is being interviewed, or held in custody;
- (d) where the legal adviser is one who is known to have compromised previous criminal investigations;
- (e) where the Principal Investigator dealing with the visiting legal adviser is satisfied that the latter is seeking to obtain professional business by way of 'touting'.
- (f) where there is reason to believe that immediate access would seriously interfere with, or cause delay to the execution of an operation or hinder the recovery of essential evidence. Any such decision will be reviewed by a Principal Investigator and/or the relevant Directorate Officer on a regular basis.

12. All Officers should be conscious of the logical consequences of a decision to delay or to refuse access of a legal adviser to a detainee, and that whenever resorting to such a course, they may be required to explain that decision in subsequent court proceedings. Where such a decision is taken the Principal Investigator will prepare a statement of evidence setting out the reasons for his decision.

13. Where a decision to delay or refuse access is being considered by a Principal Investigator and he has any doubt, he should seek advice from a Directorate Officer who will decide on the matter.

14. All decisions made by a Principal Investigator or a Directorate Officer to delay or to refuse access to legal advice will be entered on the relevant Arrest/Detention Sheet, and the entry signed by the officer making the decision.

#### CONFLICT OF INTEREST

15. In terms of legal representation, a "conflict of interest" would arise if a legal adviser were to represent two suspects who are in opposition to one another, for example, when the account they give may tend to incriminate each other. The Law Society's code of conduct stipulates that a solicitor should not accept instructions to act for both clients in this kind of situation.

16. Where it appears to an investigator that such a conflict of interest exists, this fact will be brought to the attention of either a Principal Investigator or a Directorate Officer, who should attempt to resolve the situation with the legal adviser. A record of any discussion in this regard should always be kept. The request for access, if otherwise justified, should nevertheless be granted, but the fact that the existence of an apparent conflict of interest was drawn to the attention of the legal adviser, together with his response, will be reported to the Head of Operations, who will decide whether the matter should be referred to the Law Society for their attention.

#### RECORD OF LEGAL VISIT

17. For the purpose of recording details of delayed or refused legal visits, a register, containing details of such decisions, is kept in the Detention Centre. This register will be kept up-to-date by the Duty Officer. Apart from providing a centralised record it will serve as a useful source of statistical data.

18. Matters to be recorded in the register are :-
- (a) time and date of occurrence;
  - (b) details of the legal representative and the detainee;
  - (c) details of all action taken by the Duty Officer;
  - (d) reasons for access being delayed or refused (where relevant); and,
  - (e) any complaint or comment made during the visit by the legal adviser(s).

CONDUCT OF LEGAL REPRESENTATIVES

19. If the behaviour of a legal representative, who is present during an interview, is such that in the opinion of the investigating officer, undue hindrance is being caused to the conduct of the interview, to the extent that it cannot properly proceed, he may suspend the proceedings and seek the advice of a Principal Investigator or Directorate Officer who may direct the interviewing officers to conduct the interview in the absence of that legal representative. In taking such a decision, Principal Investigators and Directorate Officers are to consider carefully the effect that any such direction might have on the subsequent admissibility in evidence of any such interview.