

Statement of the Department of Justice in relation to the ICAC's Investigation against Mr. Tong Hin-ming Timothy

The investigation by the Independent Commission Against Corruption ("ICAC") against Mr. Tong Hin-ming Timothy ("Mr. Tong"), former Commissioner of the ICAC, has attracted substantial public interest. Having considered the nature of the case and all the relevant circumstances including the public interest involved, the Department of Justice ("DOJ") has decided to issue this Statement to summarize the main reasons why it has decided not to initiate criminal proceedings against Mr. Tong. The scope of the investigation has been wide, the amount of materials voluminous, and the number of transactions involved significant. DOJ emphasizes that the reasons outlined below are only the main ones. Any matter not mentioned below does not mean that they have not been considered.

The DOJ's decision

In April 2013, the ICAC received complaints against Mr. Tong. On 14 May 2013, the ICAC established a Special Investigation Unit to conduct a comprehensive investigation into the complaints made against Mr. Tong. After having obtained the investigation report and the relevant materials from the ICAC, the DOJ has carefully considered the case and has also instructed a leading overseas Queen's Counsel (Mr Jonathan Caplan QC) to provide an independent legal opinion as to whether it is appropriate to commence criminal prosecution against Mr. Tong.

The Queen's Counsel submitted his final advice to the DOJ on around 9 October 2015. He advised that there was no sufficient evidence to support a prosecution against Mr. Tong, whether for the offence of misconduct in public office ("MIPO") or any other criminal offence.

Having carefully considered the applicable law, the available evidence and also the legal advice given by the Queen's Counsel, the DOJ concluded that even though some of Mr. Tong's conduct might be perceived to have fallen short of public expectation, there is no reasonable prospect of securing a conviction against Mr. Tong for any criminal offence.

Prosecution criteria

According to the Prosecution Code, a prosecutor must consider two issues in deciding whether to prosecute. First, whether there is in law sufficient evidence to support a prosecution. Second, if there is sufficient evidence, whether the public interest requires a prosecution to be pursued.

A prosecution should not be started or continued unless the prosecutor is satisfied that there is in law sufficient evidence to support a prosecution: that is, evidence that is admissible and

reliable and, together with any reasonable inference able to be drawn from it, likely to prove the offence. The test is whether there is a reasonable prospect of a conviction.

In the present case, the decision not to prosecute Mr. Tong is solely based upon insufficiency of evidence.

The relevant offences

Various relevant offences have been considered in this case. These include the common law offences of MIPO and conspiracy to defraud, “soliciting or accepting an advantage” under sections 3 and 4 of the Prevention of Bribery Ordinance, Cap. 201 (“POBO”) and “offering an advantage to an agent” under section 9 of POBO, “fraud” under section 16A of the Theft Ordinance, Cap. 210 and “the making of false statements on oath” under section 32 of Crimes Ordinance, Cap. 200.

As will be explained below, MIPO is the offence which is most relevant in this case. The elements of MIPO are: (a) a public official; (b) in the course of or in relation to his public office; (c) wilfully misconducts himself; by act or omission, for example by wilfully neglecting or failing to perform his duty; (d) without reasonable excuse or justification; and (e) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities. See *HKSAR and SIN Kam-wah* [2005] 8 HKCFAR 192, in which the Court of Final Appeal also explained “the misconduct must be deliberate rather than accidental in the sense that the official either knew his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful. Wilful misconduct which is without reasonable excuse or justification is culpable”.

The standard for culpability for the offence of MIPO is a high one. Mistakes or negligence do not suffice; nor do errors of judgment –

see *Borron* 1820 3 B & Ald 432; *R v Boulanger* [2006] 2 SCR 49, *R v Chapman and others* [2015] 2 Cr App R 10 and *AG's Reference (No.3 of 2003)* [2004] EWCA Crim 868.

The areas of concern

The main areas which the DOJ and the Queen's Counsel have considered in this case include: (1) entertainment activities paid out of public funds; (2) overseas duty visits; (3) his acceptance of gifts and souvenirs; (4) his offering of gifts and souvenirs; (5) the employment of a Mainland academic; and (6) whether there was any making of false statements on oath.

Main area (1) - Entertainment activities hosted by Mr. Tong and paid out of public funds

In this regard, consideration has been given as to (a) whether any meals or entertainments were offered by Mr. Tong for corrupt

purposes; (b) whether the actual cost of meals was deliberately concealed; and (c) whether public funds were used improperly.

In respect of (a) above:-

- among others, there are complaints that Mr. Tong's appointment as a member of the 12th National Committee ("NC") of the Chinese People's Political Consultative Conference ("CPPCC") in February 2013 was related to some of the meals hosted by him as a "deferred benefit" (延後利益). The Queen's Counsel advises and the DOJ agrees that there was no sufficient evidence to establish such a relation, or that any of the meals were offered for corrupt purposes.
- The relevant Civil Service Regulations ("CSRs") have also been carefully considered¹. The meaning of "making or maintaining

¹ In particular, CSR750(1) and (2) provides that "Heads of Department and officers duly authorized by their Head of Department may be reimbursed expenses arising from entertainment undertaken in the course of duty", and "Expenditure on entertainment may be charged to public funds when it is (a) directly related to the discharge of an officer's duties or a necessary part of making or maintaining contacts in his official capacity; and (b) in the public interest."

contacts” could be subject to different interpretation. Those Regulations left with Heads of Department room for judgment. In addition, the duties of the Commissioner of the ICAC were also wide-ranging, including those as an Executive Committee member of the International Association of Anti-Corruption Authorities (“IAACA”)². Hence, to prove that an entertainment was not a necessary part of “making or maintaining contacts” would face considerable difficulty.

- It is also pertinent to note that blanket permission has been given by the HKSAR government to all directorate officers to take up unpaid work with the Central Authorities of the PRC. Hence, the appointment as members of the NC of CPCCC has never been regarded as an advantage which requires regulation.

- In the circumstances, the Queen’s Counsel has advised and the

² IAACA was established in 2006 which aims to strengthen international cooperation in anti-corruption matters, and the head of ICAC was appointed as an Executive Committee member of IAACA in 2008.

DOJ agrees that there is no sufficient evidence to establish willful misconduct by Mr. Tong for the purpose of establishing MIPO or any other criminal offences.

In respect of (b) above, the Queen's Counsel has concluded and the DOJ agrees that there was no cogent evidence to establish that Mr. Tong had sought to dishonestly conceal the actual cost of entertainments by not including the cost of separately purchased wine or liquor. It is unfortunate that the relevant rules and regulations in this regard at the time were not clear³. Importantly, according to the then Commission Standing Orders of the ICAC, Mr. Tong as the Commissioner in fact had the discretion to authorize entertainment expenses above the prescribed ceilings per head. The evidence is also insufficient to prove that the attention of Mr. Tong had been drawn to the fact that the spending ceiling would have

³ The CSR did not specify whether the expenses of wines or liquor separately purchased for an official entertainment should be reported in the claim of entertainment expenses and counted towards the ceiling for calculating expenditure per head. The then prevailing practice was that it would be up to the Head of Department to decide. Further, the then internal Commission Standing Orders of the ICAC contained no express provision requiring the expenses of wines or liquor separately purchased to be included for the purpose of calculating the ceilings.

been exceeded had the cost of alcoholic beverages procured separately been included. In light of the above, the available evidence is considered not sufficient to show that Mr. Tong had wilfully misconducted himself and/or was otherwise dishonest. In other words, there is insufficient evidence to prove the offences of MIPO, fraud or conspiracy to defraud.

In respect of (c) above, there were complaints that (i) by virtue of the presence of guests who were friends and relatives of Mr. Tong, meals not related to the work of the ICAC were paid out of public funds; (ii) a portion of the meals exceeded the expenditure ceiling; and (iii) a substantial sum was spent on hard liquor. The questions that have been considered included whether each of these matters or the combination of them would in law constitute the offence of MIPO.

The Queen's Counsel points out that MIPO requires a clear demarcation between conduct which is deservedly labelled as

criminal and conduct which is a breach of discipline or of regulations *simpliciter*. He is of the view that none of the matters stated in the preceding paragraph or the combination of them constitutes the offence of MIPO.

First, according to the CSRs as interpreted by the relevant authority, that some or all of the guests were friends or relatives of the officer acting as host of the entertainment should not be the determining factor in deciding whether the expenditure concerned could be charged to public funds. The important question remained whether CSR750(1) and (2) could be satisfied. Having considered all the circumstances, including the identity of the guests, their relationships with Mr. Tong, the nature of the gathering and the relevant rules and regulations, the Queen's Counsel is of the view, which the DOJ agrees, that there is insufficient evidence to prove that Mr. Tong deliberately chose to breach the rules by inviting guests who are his friends or relatives to some of those entertainments. The Queen's Counsel further advises that even if

their presence had, in fact, been a deliberate breach, that would in law only have amounted to a breach of CSRs as opposed to the criminal law because it would not in the circumstances of this case constitute sufficiently serious conduct for the purpose of MIPO.

Second, while a portion of the official entertainment activities hosted by Mr. Tong exceeded the expenditure ceiling, the Queen's Counsel is of the view that no MIPO charges could be preferred. This is particularly so in view of the fact that Mr. Tong, as the Head of Department, had the discretion to authorize expenditure above the limits per head and that there is no cogent evidence that he was acting corruptly for his own advantage. Having considered the relevant factors including the number of meals which exceeded the expenditure ceilings, the amount in excess, the justifications given for the expenditure incurred and whether the hospitality offered was proportionate to the occasion bearing in mind the status of the guests, the DOJ agrees with the Queen's Counsel that no MIPO charges could be preferred in this regard.

Third, as regards the purchase of hard liquor, it is noted that there were neither regulations nor internal rules within the ICAC prohibiting the consumption or purchase of hard liquor including Maotai during Mr. Tong's tenure as Commissioner of the ICAC. It is also noted that even before his tenure, there had been occasions of serving hard liquors at official functions. The Queen's Counsel has concluded and the DOJ agrees that there is insufficient evidence of wilful misconduct.

Main area (2) - Overseas duty visits undertaken by Mr. Tong

In this regard, consideration has been given as to (a) whether during his tenure as Commissioner of the ICAC, Mr. Tong had deliberately concealed mileage points that he had received as a result of overseas duty visits; and (b) whether the sightseeing activities in some of the duty visits were excessive.

In respect of (a) above, the Queen's Counsel takes the view that there is no realistic prospect of proving Mr. Tong practised deceit with intent to defraud after taking into account the facts that (i) when Mr. Tong assumed office, he did report the mileage credits which he had earned from duty visits when he was the Commissioner of Customs and Excise; (ii) he had granted to other ICAC officers the right to access his mileage points account; and (iii) the report of mileage points earned by Mr. Tong was prepared by his subordinate officers. There is therefore insufficient evidence to prove the offence of fraud or other criminal offence. The DOJ agrees with the view of the Queen's Counsel.

Regarding (b) above, the evidence shows that the sightseeing activities were mainly decided by the hosts and the details were only made known to the ICAC very shortly before or even during the visits. The Queen's Counsel considers and the DOJ agrees that there is not sufficient evidence to establish there was any misconduct by Mr. Tong.

Main area (3) - Acceptance of gifts and souvenirs by Mr. Tong

Mr. Tong has retained some gifts and souvenirs received by him in his capacity as the Commissioner of the ICAC. At the material time, he had a blanket permission to personally retain any gift with an estimated value of below HK\$200 or, in respect of any gift which was personally inscribed with his name or received by him at official functions as the guest of honour/officiating guest, below HK\$400. The DOJ has seen no evidence of any under-valuation of gifts. Further, taking into account the estimated value of the gifts involved, the occasions when the gifts were presented, the state of record of the circumstances under which the gifts were presented, and the absence of any evidence showing corrupt motive, the Queen's Counsel advises and the DOJ agrees that there is no sufficient evidence of any criminal conduct in this regard.

Main area (4) - Offering of gifts and souvenirs by Mr. Tong

There are two relevant aspects: (a) whether the evidence is sufficient to substantiate any offence under the POBO (and in particular section 9(2)), and (b) whether the evidence is sufficient to substantiate any offence of MIPO.

In respect of (a) above, consideration has been given as to whether Mr. Tong had offered gifts to Mainland officials and/or other persons for corrupt purposes. The Queen's Counsel takes the view, and the DOJ agrees, that there was none. Despite the personal nature of some of the gifts, there is simply no evidence to show that those gifts were offered as an inducement to or reward for or otherwise on account of the recipients doing or not doing anything as proscribed by section 9(2). Nor can any corrupt purposes be inferred in the circumstances.

In respect of (b) above, the ICAC Standing Orders state that the ICAC's policy is to limit the exchange of gifts on official occasions to

a minimum and to exchange only on organization to organization level rather than on a personal basis. However, there was no CSR or guideline at the time governing the amount of spending on gifts by the Commissioner of the ICAC at official functions. Mr. Tong, as the head of the ICAC and controlling officer designated under the Public Finance Ordinance, Cap. 2, was entrusted with discretionary powers in incurring expenditure. In the circumstances, whilst some of the gifts appear to be personal in nature and inappropriate, the Queen's Counsel concludes, and the DOJ agrees, that there was insufficient evidence of wilful misconduct in the context of the offence of MIPO.

Area (5) - Employment of a Mainland academic

The allegation is that Mr. Tong circumvented established procedures to employ a Mainland academic in September 2010 for the Centre of Anti Corruption Studies (a research institute set up by the ICAC in 2009). According to the applicable guidelines, Mr. Tong, as the

Head of Department, had the full authority and discretion to decide on the employment of staff under the Non-Civil Service Contract scheme. Besides, there is no evidence that the appointment of the academic was motivated by any corrupt purpose. Nor is there any evidence to suggest that Mr. Tong derived any direct or indirect benefit from the employment of the academic in question. The Queen's Counsel concludes that there is no evidence in support of any criminal charge, which conclusion the DOJ agrees.

Area (6) - Making of false statements on oath

Consideration has been given as to whether Mr. Tong had made false statements on oath at the Legislative Council Public Accounts Committee hearings. Taking into account all the relevant circumstances, including the lapse of time between the relevant events, the Queen's Counsel takes the view that there is insufficient evidence to show that Mr. Tong wilfully made false statements on oath and that he knew or believed the statements were false.

Accordingly, the Queen's Counsel concludes and the DOJ agrees that there is insufficient evidence to support any criminal charge in this regard.

Conclusion

When considering whether any offence was committed in this case, it is important to take into account all the relevant circumstances surrounding the alleged misconduct as well as the intricacies and inadequacies of the governing rules and regulations applicable at the time. We can well understand that some of Mr. Tong's conducts under investigation might attract suspicions or even criticisms. However, the role of the Prosecutions Division of the DOJ is to decide whether criminal prosecution should be commenced in accordance with the Prosecution Code; besides, a prosecution may only ever be instituted on the basis of sufficiency of evidence. Accordingly, the fact that the DOJ decides not to commence prosecution on the ground of insufficiency of evidence should not

be interpreted as an endorsement of Mr. Tong's conduct or any part thereof.