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From : Clerk to the Legislative Council

To : All Members of the Legislative Council

Council meeting of 7 July 2010

**Proposed resolution under
the United Nations (Anti-Terrorism Measures) Ordinance**

Further to LC Paper No. CB(3) 508/09-10 issued on 4 March 2010, the Secretary for Security has given notice to move a proposed resolution at the Council meeting of 7 July 2010 under the United Nations (Anti-Terrorism Measures) Ordinance on the code of practice prepared under the Ordinance. The President has directed that “it be printed in the terms in which it was handed in” on the Agenda of the Council.

2. The proposed resolution is attached for Members’ consideration. The speech, in both English and Chinese versions, which the Secretary for Security will deliver when moving the proposed resolution is also attached.

(Mrs Justina LAM)
for Clerk to the Legislative Council

Encl.

**Motion on code of practice prepared under
United Nations (Anti-Terrorism Measures) Ordinance**

“That the Code of Practice for requiring persons to furnish information or produce material under the new Section 12A of the United Nations (Anti-Terrorism Measures) Ordinance added by Section 12 of the United Nations (Anti-terrorism Measures) (Amendment) Ordinance 2004, be approved.”

Security Bureau
June 2010

**Code of Practice for Requiring Persons to Furnish Information or
Produce Material under Section 12A of the United Nations
(Anti-Terrorism Measures) Ordinance (Cap. 575)**

Preamble

Every person who is required to answer questions, furnish information or produce material pursuant to a notice issued by the Secretary for Justice (a “Secretary for Justice’s Notice”) under section 12A(5) or (6) of the United Nations (Anti-Terrorism Measures) Ordinance (“the Ordinance”)(Cap. 575) should be provided with a copy of this Code of Practice and its Annexes at the time when the Secretary for Justice’s Notice is served.

General

1. This Code of Practice must be readily available in English and Chinese at all places where persons may be required to answer questions or otherwise furnish information, or at which persons may be required to produce material, pursuant to an order made under section 12A of the Ordinance (a “section 12A order”). The Code of Practice will also be made available in Braille and in other languages. It contains important information for authorized officers as defined in the Ordinance, and for members of the public. For the avoidance of any doubt, in the case there is any discrepancy between the Code of Practice and the Ordinance, the provisions of the Ordinance shall prevail.
2. An “authorized officer” is defined in the Ordinance as a police officer, a member of the Customs and Excise Service established by section 3 of the Customs and Excise Service Ordinance (Cap. 342), a member of the Immigration Service established by section 3 of the Immigration Service Ordinance (Cap. 331), or an officer of the Independent Commission Against Corruption (ICAC) established by section 3 of the Independent Commission Against Corruption Ordinance (Cap. 204).
3. An authorized officer shall explain to the person subject to a section 12A order that he or she is not under arrest or detention but that the order requires him or her to answer questions or otherwise furnish information, or produce material, and that if he or she without

reasonable excuse fails to comply with the order, or makes a statement that he or she knows to be false or misleading in a material particular, or recklessly makes a statement that is false or misleading in a material particular, he or she commits an offence under section 14 of the Ordinance and is liable on conviction to a fine and to imprisonment. The authorized officer shall also explain that where the person subject to a section 12A order is under the age of 10, such person and his or her parent, guardian or accompanying adult will not be held liable for an offence if such person fails to comply with the section 12A order. A copy of sections 12A and 14 of the Ordinance is at **Annex A**.

4. The responsibility and privilege of a person subject to a section 12A order are as follows:
 - (a) he or she has an obligation to comply with the requirements to furnish information or produce material under section 12A and if he or she fails to comply without reasonable excuse he will be guilty of an offence (section 14(7E) of the Ordinance);
 - (b) an obligation of secrecy or restriction from furnishing information is not an excuse for refusing to comply with a section 12A order (section 12A(9) of the Ordinance);
 - (c) legal professional privilege and the privilege against self-incrimination are overriding and nothing in the Ordinance would require the interviewee to disclose anything that is subject to legal professional privilege, or anything that is self-incriminating (sections 2(5) and 12A(9) of the Ordinance). A copy of section 2(5) of the Ordinance is at **Annex B**; and
 - (d) if an interviewee does voluntarily furnish information/produce material under a section 12A order, the information/material cannot be used against him or her in criminal proceedings except in proceedings under section 14(7F) or under section 36 of the Crimes Ordinance (Cap. 200) concerning the making of false statements etc. (section 12A(10) of the Ordinance).

5. A “supervisory officer” is an officer of at least the rank of Chief Inspector of Police, Assistant Superintendent of Customs and Excise, Chief Immigration Officer or Chief Investigator of ICAC, and shall be responsible for the supervision of the interview and treatment of a person subject to a section 12A order, and the handling of material produced under a section 12A order.
6. A “senior officer” is an officer of at least the rank of Superintendent of Police, Superintendent of Customs and Excise, Assistant Principal Immigration Officer or Principal Investigator of ICAC.

Procedures for Requiring Persons to Answer Questions or Otherwise Furnish Information

7. A person subject to a section 12A order who is required to answer questions or otherwise furnish information is referred to below as the “interviewee”.
8. The authorized officer and the supervisory officer must take reasonable measures to protect the identity of the interviewee.
9. The interviewee, if he or she wishes, is allowed to have a barrister and/or a solicitor to be present during the interview and to consult privately with the barrister and/or solicitor. The interviewee may also consult his or her barrister and/or solicitor over the telephone in the presence, but out of the hearing, of an authorized officer. For other telephone calls, they will be made under supervision. The interviewee may make at least one telephone call for a reasonable time. If the interviewee can provide reasonable justification, he or she may make further telephone calls. However, a supervisory officer may refuse the request of an interviewee for making further telephone calls if the supervisory officer has reasonable grounds to believe that undue delay or hindrance is likely to be caused to the processes of the interview and relevant investigations. In such case, the supervisory officer shall make a record stating the grounds for refusal. The time taken for the private consultation and telephone call is not counted as part of the interview period.
10. Regarding the language of the interview :
 - (a) whenever possible, an interview should be conducted in the mother tongue of the interviewee unless he or she chooses to use another language in which he or she is proficient;

- (b) the record of interview should be made in the language used by the interviewee;
 - (c) the interviewee will be provided with a language interpreter qualified for court purposes. Such interpreter will make a record of the interview in accordance with paragraph 17 in the language used by the interviewee; and
 - (d) where an interview is recorded in a language other than English or Chinese, a certified English or Chinese translation should be made.
11. If the interviewee is or appears to the authorized officer to be under the age of 16 years, he or she should be interviewed in the presence of a parent, guardian or other person responsible for his or her care or, if such a person is unavailable, in the presence of an adult who is independent of the investigating authority and, where reasonably practicable, knows the interviewee. Such adult, if he or she so wishes, is allowed to have a barrister and/or a solicitor to be present during the interview and to consult privately with the barrister and/or solicitor.
12. If the interviewee is or appears to the authorized officer to be suffering from mental incapacity and may not understand the nature of questions put to him or her, or his or her replies, that person should only be interviewed in the presence of:
- (a) a relative, guardian or other person responsible for his or her care;
 - (b) or in the absence of such a person, a person who has experience or training in the care of mentally incapacitated persons, and who is independent of the investigating authority and, where reasonably practicable, knows the interviewee.

Such person attending with the interviewee, if he or she so wishes, is allowed to have a barrister and/or a solicitor to be present during the interview and to consult privately with the barrister and/or solicitor.

13. Where an interviewee is or reasonably claims to be or appears to an authorized officer to be a hearing or speech impaired person, he or she should only be interviewed with the assistance of a sign language

interpreter, or a friend or relative who normally communicates with the interviewee. Only those sign language interpreters qualified for court purposes should be engaged.

14. Where an interviewee is or reasonably claims to be or appears to an authorized officer to be visually handicapped, the interview should be audio and/or video recorded. If the interviewee so wishes, he or she should be allowed to have a friend or relative who normally communicates with the interviewee to be present during the interview.
15. The interviewee should be interviewed in reasonable comfort and privacy and adequate refreshment should be provided when reasonably requested. Short breaks shall be provided at intervals of approximately two hours.
16. Pursuant to a Secretary for Justice's Notice, the interview shall last for only a reasonable period. What is a reasonable period depends on all the circumstances of the case, but it shall not exceed a period of 6 hours, except where a further period of not more than 4 hours has been approved by a senior officer who is not personally in charge of the investigation. The reason for any such further period must be recorded by the senior officer.
17. An authorized officer should, as soon as reasonably practicable, make an accurate record of the following matters there and then :
 - (a) the fact that a copy of the Code of Practice (in English and Chinese) has been given to the interviewee. If applicable, specify the language of the translated copy of the Code of Practice provided to the interviewee;
 - (b) the place of interview;
 - (c) the time the interview begins and ends;
 - (d) the time and duration of any breaks for rest, refreshment or other reason;
 - (e) the names of those present;
 - (f) the name and rank of the supervisory officer;

- (g) the material points covered in the interview;
 - (h) the time the record is made; and
 - (i) any special request made and action taken (e.g. interpretation services, etc.)
18. The record shall be signed by the authorized officer conducting the interview and countersigned by the supervisory officer. Where the record is made by an interpreter under paragraph 10, the interpreter shall also sign the record.
19. The interviewee must be given the opportunity to read the record and be invited to sign it; to record whether he or she considers it accurate; and, if not, to indicate where he or she considers it inaccurate and to make the necessary alterations.
20. The following persons must also be given an opportunity to read and sign the record:
- (a) an adult attending with an interviewee who is or appears to an authorized officer to be under 16;
 - (b) a person attending with an interviewee who is or appears to an authorized officer to be suffering from mental incapacity;
 - (c) a person attending with an interviewee who is or reasonably claims to be or appears to an authorized officer to be a hearing or speech impaired person;
 - (d) a person attending with an interviewee who is or reasonably claims to be or appears to an authorized officer to be visually handicapped;
 - (e) a barrister and/or solicitor present with the interviewee.
21. A refusal of the interviewee or any of the persons referred to in paragraph 20 above to sign the record must be recorded by an authorized officer.
22. The interviewee is entitled, as soon as reasonably practicable, to receive a copy of the record made in accordance with paragraph 17 there and then. Where the interview is video or audio recorded by the

investigating authority, the interviewee is entitled, as soon as reasonably practicable, to receive a copy of the tape there and then. However, the above procedure does not apply if a supervisory officer has reasonable grounds for believing that the provision of a copy of the interview record or a copy of the tape is likely to prejudice the investigation of a relevant offence or any criminal proceedings. In this case, the supervisory officer must make a record of the grounds and supply a copy of such record to the interviewee.

Production of Material

23. "Material" is defined in the Ordinance to include any book, document or other record in any form whatsoever, and any article or substance.
24. Material produced under a section 12A order shall be retained only for as long as is necessary in the circumstances. It may be retained, amongst other purposes:
 - (a) for use as evidence in proceedings for a relevant offence as defined in the Ordinance;
 - (b) for forensic examination or for other investigation in connection with a relevant offence as defined in the Ordinance; or
 - (c) where there are reasonable grounds for believing that it has been stolen or unlawfully obtained, in order to establish its lawful owner.
25. Where material is retained, the person who produced it in accordance with a section 12A order shall be given a receipt as soon as reasonably practicable, and must on request be provided with a list or description of the material so retained within a reasonable time.
26. A person who has produced material in accordance with a section 12A order or his representative must be allowed supervised access to the material to examine it or have it photographed or copied, or must be provided with a photograph or copy of the material. The person is normally entitled to this within a reasonable time of his or her request and at his or her own expense. However, this does not apply if a supervisory officer has reasonable grounds for believing that this is likely to prejudice the investigation of a relevant offence or any criminal proceedings. In this case, the supervisory officer must

make a record of the grounds and supply a copy of such record to the person who produced the material or his or her representative.

Supervision and Complaints

27. A person subject to a section 12A order may complain to a supervisory officer if any provision of this Code has not been complied with.
28. A record of the time and details of the complaint must be made and signed by the maker of the record and the supervisory officer to whom the complaint has been made.
29. The person making the complaint must be provided with an opportunity to read and sign the record of complaint. A refusal to sign the record of complaint must be recorded by the supervisory officer. The supervisory officer shall report the complaint to a senior officer as soon as reasonably practicable. A copy of the record of complaint should, as soon as reasonably practicable, be provided to the person making the complaint there and then.

UNITED NATIONS (ANTI-TERRORISM
MEASURES) (AMENDMENT) ORDINANCE

Ord. No. 21 of 2004

12A. Requirement to furnish information or produce material

(1) The Secretary for Justice may, for the purpose of an investigation into a relevant offence, make an ex parte application to the Court for an order under subsection (2) in relation to a particular person or to persons of a particular description.

(2) The Court may, if on such an application it is satisfied that the conditions referred to in subsection (4)(a), (b) and (d) or subsection (4)(a), (c) and (d) are fulfilled, make an order complying with subsection (3) in respect of the particular person, or persons of the particular description, to whom the application relates.

(3) An order under subsection (2) shall—

- (a) give particulars of the relevant offence under investigation;
- (b) identify the particular person, or state the particular description of persons, in respect of whom the order is made;
- (c) authorize the Secretary for Justice to require the person or persons in respect of whom the order is made—
 - (i) to answer questions or otherwise furnish information with respect to any matter that reasonably appears to an authorized officer to be relevant to the investigation; or
 - (ii) to produce any material, or any material of a class, that reasonably appears to the Secretary for Justice to be relevant to the investigation,or both; and
- (d) contain such other terms (if any) as the Court considers appropriate in the public interest, but nothing in this paragraph shall be construed as authorizing the Court to order the detention of any person in custody without that person's consent.

(4) The conditions referred to in subsection (2) are—

- (a) that there are reasonable grounds for suspecting that the relevant offence under investigation has been committed;
- (b) where the application relates to a particular person, that there are reasonable grounds for suspecting that the person has information, or is in possession of material, likely to be relevant to the investigation;

- (c) where the application relates to persons of a particular description, that—
- (i) there are reasonable grounds for suspecting that some or all persons of that description have such information or are in possession of such material; and
 - (ii) the relevant offence could not effectively be investigated if the application was required to relate to a particular person, whether because of the urgency of the investigation, the need to keep the investigation confidential or the difficulty in identifying a particular person who has the relevant information or material;
- (d) that there are reasonable grounds for believing that it is in the public interest, having regard—
- (i) to the seriousness of the relevant offence under investigation;
 - (ii) to whether or not the relevant offence could be effectively investigated if an order under subsection (2) is not made;
 - (iii) to the benefit likely to accrue to the investigation if the information is disclosed or the material is obtained; and
 - (iv) to the circumstances under which the person or persons may have acquired, or may hold, the information or material (including any obligation of confidentiality in respect of the information or material and any family relationship with a person to whom the information or material relates),
- that an order under subsection (2) should be made in respect of that person or those persons.

(5) Where an order under subsection (2) authorizes the Secretary for Justice to require a person to answer questions or otherwise furnish information with respect to any matter that reasonably appears to an authorized officer to be relevant to an investigation, the Secretary for Justice may by one, or more than one, notice in writing served on that person require him to attend before an authorized officer at a specified time and place, or at specified times and places, and answer questions or otherwise furnish information with respect to any matter that reasonably appears to the authorized officer to be relevant to the investigation.

(6) Where an order under subsection (2) authorizes the Secretary for Justice to require a person to produce any material that reasonably appears to the Secretary for Justice to be relevant to the investigation or be of a class that is so relevant, the Secretary for Justice may by one, or more than one, notice in writing served on that person require him to produce at a specified time and place, or at specified times and places, any specified material that reasonably appears to him to be so relevant or any material of a specified class that reasonably appears to him to be so relevant.

(7) A notice in writing imposing a requirement on a person under subsection (5) or (6) shall—

- (a) state that a court order has been made under this section and include—
 - (i) the date of the order;
 - (ii) the particulars of the relevant offence under investigation;
 - (iii) where the order is made in respect of that particular person, a statement to that effect;
 - (iv) where the order is made in respect of persons of a particular description and that person is of that particular description, a statement to that effect;
 - (v) a statement of the authorization given to the Secretary for Justice by the order; and
 - (vi) a statement of any other terms of the order relevant to that person;
- (b) have annexed to it a copy of the order under this section, but there may be excluded from such copy—
 - (i) any reference in the order to a particular person other than that person, or to persons of a particular description not including that person; and
 - (ii) any details in the order that relate only to such particular person or persons of a particular description; and
- (c) be substantially in the form specified in Schedule 2 in relation to such notice and in addition shall set out or have annexed to it subsection (8) and section 12E.

(8) An authorized officer may photograph or make copies of any material produced in compliance with a requirement under this section.

(9) Subject to section 2(5)(a), (b) and (c), a person is not excused from furnishing information or producing any material required under this section on the ground that to do so would breach an obligation as to secrecy or another restriction upon the disclosure of information or material imposed by statute or otherwise.

(10) A statement by a person in response to a requirement imposed by virtue of this section may not be used against him in criminal proceedings against him except in evidence in proceedings under section 14(7F) or under section 36 of the Crimes Ordinance (Cap. 200).

(11) Where an order under subsection (2) has been made, the Secretary for Justice, or a person authorized in writing by the Secretary for Justice for the purpose of this subsection, may, after satisfying any conditions that may be prescribed by rules of court in this respect, obtain a copy of the order; but subject to the foregoing part of this subsection and to subsection (7)(b), no person is entitled to obtain a copy of the order or any part of the order.

(12) Where a requirement imposed on a person under this section relates to material which consists of information recorded otherwise than in legible form—

- (a) the requirement shall have effect as a requirement to produce the material in a form in which it can be taken away; and

- (b) an authorized officer may, by notice in writing served on the person, require the person to produce at a specified time and place, or at specified times and places, the material in a form in which it is visible and legible and can be taken away, and may by like notice release the person from any obligation under the requirement to produce the material in the form in which it is recorded.

(13) An application for the revocation or variation of an order under this section may be made by any person on whom a requirement is imposed under the order.

(14) The Secretary shall prepare a code of practice in connection with—

- (a) the exercise of any of the powers conferred; and
 (b) the discharge of any of the duties imposed,

by this section, and any such code shall be laid before the Legislative Council and shall not be promulgated until the code has been approved by the Legislative Council.

14. Offences

(1) Section 14(2) is amended by adding “knowingly” before “contravenes”.

(2) Section 14(4) is amended by repealing “or (2)” where it first appears.

(3) Section 14 is amended by adding—

“(7A) Any person who contravenes section 11B(1) or (2) commits an offence and is liable on conviction to imprisonment for life.

(7B) Any person who contravenes section 11E(1), (2)(b) or (3) or 11F(1), (2)(b) or (3) commits an offence and is liable—

- (a) on conviction on indictment to a fine and to imprisonment for 14 years;
 (b) on summary conviction to a fine at level 6 and to imprisonment for 2 years.

(7C) Any person who contravenes section 11E(2)(a) or 11F(2)(a) commits an offence and is liable on conviction to imprisonment for life.

(7D) Any master of a Hong Kong ship who, without reasonable excuse, contravenes section 11H(2), (3) or (4) commits an offence and is liable on conviction to a fine at level 2.

(7E) Any person who without reasonable excuse fails to comply with a requirement imposed on him under section 12A commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 1 year.

(7F) Any person who, in purported compliance with a requirement under section 12A—

- (a) makes a statement that he knows to be false or misleading in a material particular; or
 - (b) recklessly makes a statement that is false or misleading in a material particular,
- commits an offence and is liable—
- (c) on conviction on indictment to a fine of \$500,000 and to imprisonment for 3 years;
 - (d) on summary conviction to a fine at level 6 and to imprisonment for 1 year.

(7G) Any person who without reasonable excuse fails to comply with an order under section 12B(2) commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 1 year.

(7H) Any person who intentionally and without reasonable excuse hinders or obstructs an authorized officer in the execution of a warrant issued under section 12C commits an offence and is liable—

- (a) on conviction on indictment to a fine of \$250,000 and to imprisonment for 2 years;
- (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

(7I) A person who contravenes section 12E(1) commits an offence and is liable—

- (a) on conviction on indictment to a fine and to imprisonment for 7 years;
- (b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

(7J) Any person who intentionally and without reasonable excuse obstructs any person in the exercise of his powers under a warrant issued under section 12G(1) commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 6 months.”.

UNITED NATIONS (ANTI-TERRORISM MEASURES) ORDINANCE

2. Interpretation

- (5) Nothing in this Ordinance shall-
 - (a) require the disclosure of any items subject to legal privilege;
 - (b) authorize the search or seizure of any items subject to legal privilege; or
 - (c) restrict the privilege against self-incrimination.