

政府總部
香港下亞厘畢道



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15 July 2005

Clerk to Panel on Security
Legislative Council Building
8 Jackson Road
Central
(Attn : Mrs Sharon TONG)

Dear Mrs TONG,

Surveillance

I wrote on 23 May regarding Members' question on the implications of a 22 April District Court ruling. We understand that Members have since also enquired about the implications of the District Court ruling delivered on 5 July on the use of surveillance by the Independent Commission Against Corruption (ICAC) and, more generally, other law enforcement agencies.

It would be inappropriate for the Administration to comment at the moment on the details of the two ICAC cases concerned as they may involve further legal proceedings. We have attempted to set out in the attached paper the Administration's position on the subject in general and provide Members with an update. I should be grateful if you would bring this to the attention of Members.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Miss Cheung Siu Hing'.

(Miss Cheung Siu Hing)
for Secretary for Security

Surveillance by Law Enforcement Agencies

Purpose

This note sets out the brief background to two recent court cases that have touched upon the carrying out of surveillance by the Independent Commission Against Corruption (ICAC) and outlines the considerations involved in taking the matter forward.

The Two Cases

2. On 22 April 2005, the District Court delivered its ruling on, *inter alia*, the admissibility of surveillance evidence, in the form of recordings, against two defendants in the trial against Li Man-tak and three others. The court ruled that the evidence was admissible. However, in delivering the ruling, the judge expressed the view that the recordings were not “in accordance with legal procedures”.

3. On 5 July 2005, the District Court delivered its ruling on applications by Shum Chiu and three others for a permanent stay of proceedings on the ground that the ICAC had carried out a covert recording of a meeting subject to legal professional privilege. The court granted the applications. In delivering the ruling, the judge expressed the view that “regulations for lawful covert surveillance” should be introduced.

Legal Professional Privilege

4. The Administration attaches the utmost importance to protecting Hong Kong residents’ right to confidential legal advice. Legal professional privilege is firmly established under the common law and it is the unequivocal position of the Administration that law enforcement agencies should exercise the greatest care in carrying out their duties to ensure the protection of this privilege. All law enforcement agencies have always been given strict instructions that they should seek legal advice if there is any risk that their investigations will impact upon this important right.

Regulations on Surveillance

5. Although the judges' views on the need for regulations on surveillance in the two cases concerned are not binding, we respect these views and have been studying them carefully. In addition, we fully appreciate the public's interest in the subject, given that it involves the privacy of individuals' communications. We have therefore been reviewing the matter with a view to formulating a way forward.

6. The product of surveillance has been introduced as evidence in our criminal proceedings in the past on many occasions. We also believe that the community agrees that law enforcement agencies should be able to deploy this useful investigation technique to investigate crime and to protect the public. The concern, rightly, is how to balance this against the need to protect privacy.

7. Hong Kong residents' privacy of communications is protected by the Basic Law and the Hong Kong Bill of Rights Ordinance applying the International Covenant on Civil and Political Rights. The need to examine in detail the various aspects of the law on the protection of privacy has long been recognized. For the purpose, the Law Reform Commission (LRC) has set up a Privacy Sub-committee to look into various privacy-related issues, including surveillance by both public entities (law enforcement agencies) as well as private parties (such as the media and private detectives). We understand that the LRC is still continuing its deliberations on the subject.

8. In this connection, in 1997, the Legislative Council considered a private member's bill, the Interception of Communications Bill. The proponent of the bill withdrew the provisions regarding oral communications from the bill in view of the impending report from LRC on the subject of surveillance, and asked the Government to consider the issue once the LRC report was ready.

9. The jurisprudence in this area of human rights law is evolving. In light of recent developments, the Administration is actively considering what should be done to provide a clearer legal basis for surveillance operations by our law enforcement agencies. The Security

Bureau is taking the lead in the review in consultation with the Department of Justice and the key law enforcement agencies, including the ICAC. Our target is to be able to complete our review in around one month's time and report our position to the Panel on Security of the Legislative Council then.

10. Meanwhile, the law enforcement agencies will take appropriate account of the views expressed by the judges in carrying out their duty to investigate crime and to protect the public.

15 July 2005
Security Bureau

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