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Secretary for Security  
(Attn : Mr Ying Yiu Hong, Stanley, JP  
Permanent Secretary for Security)  
Security Bureau  
6/F, Main and East Wings  
Central Government Offices  
Hong Kong

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**BY FAX**

Fax No. : 2868 5074  
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Dear Mr Ying,

**Interception of Communications and Surveillance Bill**

We are scrutinizing the legal and drafting aspects of the above Bill with a view to assist Members. In addition to the questions raised at the meetings of the Bills Committee, we would be grateful for your clarifications of the following:

**Clause 2 Interpretation**

In the definition of “head”, what does “any deputy of the head of the department” mean? Is there any inconsistency between the English and Chinese texts?

In Clause 2(2), why is there no reasonable expectation of privacy in relation to any activity carried out in public place?

In Clause 2(5), what is “data produced in association with the communication”?

In Clause 2(7), who is the person to act in or perform the functions of the panel judge when he is no longer holding office or unable to perform the functions of such office? Does that person need to be appointed by the Chief Executive and subject to integrity checking? What is the purpose of this sub-clause insofar as a panel judge is concerned?

**Clause 3      Conditions for prescribed authorization**

What is the difference between “public security” and “public safety or security” used in the Executive Order? What are the scope and nature of matters intended to be covered by the term “public security”? We enclose for your reference the definition of “terrorist act” in the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575). Would the Administration consider the drafting approach in that definition assist the concern of Members for a clear definition?

How would a panel judge assess “in operational terms” under Clause 3(1)(b)(i)?

**Clause 4      Prohibition on interception**

What kind of telecommunications transmitted by radiocommunications are intended to be covered and excluded by Clause 4(2)(b)?

Please set out the types of interception under other enactments referred to in Clause 4(2)(c).

**Clause 6      Panel judges**

**Schedule 2   Procedures of and other matters relating to panel judge**

Since it is possible to apply for judicial review of decisions of eligible judges, would there be integrity checking of those judges hearing the judicial review and any appeal of the review?

In Clause 6(2), is reappointment also on the recommendation of CJ?

Under section 4 of Schedule 2, is there any conflict for a panel judge to act judicially when he is performing a non-judicial function?

**Clause 8      Application for judicial authorization**

Is there any prohibition against making an application to another panel judge if a previous application has been refused? Has the Administration considered whether there is any need requiring reference to previous application being made?

**Clause 11 Application for renewal of judicial authorization**

**Clause 17 Application for renewal of executive authorization**

If an application for renewal is not made before an authorization ceases to have effect, is there any prohibition against making a fresh application? If not, is there any requirement to refer to previous applications being made?

What would be the arrangements for application for renewal of judicial authorization? Would the same panel judge deal with renewal of application that he has previously approved?

**Clause 23 Application for confirmation of emergency authorization**

Please confirm whether information obtained by carrying out interception or Type 1 surveillance pursuant to an emergency authorization to which no application for confirmation has been made would not be destroyed if it could otherwise be obtained. If not, how would such information be used? Would the same policy apply under Clauses 24, 26 and 27?

**Clause 26 Application for confirmation of prescribed authorization or renewal issued or granted upon oral application**

**Clause 27 Determination of application for confirmation of prescribed authorization or renewal issued or granted upon oral application**

The drafting is not clear if it is the head of department or the relevant authority who would decide the extent to which information would be destroyed under Clauses 26 and 27.

**Clause 29 What a prescribed authorization may authorize or require**

**Clause 30 What a prescribed authorization further authorizes**

Why does Clause 29(6) and (7) use “also authorizes”? This is not consistent with the heading of the clause nor does it reflect the policy intent stated in the Explanatory Memorandum. You may note that “further” is used in Clause 30 and its heading.

**Clause 31 Prescribed authorization may be issued or renewed subject to conditions**

Does Clause 31 intend that the relevant authority may specify any condition in a prescribed authorization that would apply to any subsequent authorizations? What is “further authorization or requirement”? If so, can the relevant authority involved in

the subsequent application for authorization amend or revoke the condition when issuing further authorization or requirement?

**Clause 38 The Commissioner**

Is it possible to apply for judicial review of the decision of the Commissioner?

Is reappointment also on the recommendation of CJ?

Is it possible that the Commissioner may face a conflict of interest situation in his review or examination? If so, what could be the solution?

**Clause 39 Functions of Commissioner**

What other functions are anticipated to be imposed or conferred on the Commissioner under the regulation to be made under Clause 62 and other enactments?

What powers does the Commissioner have in conducting reviews and carrying out examinations? Is it necessary to specify them in the Bill?

**Clause 43 Examination by Commissioner**

Would the applicant be informed that the Commissioner would not give any notice or make any order? Can the Commissioner give notice or make order when it is no longer prejudicial to the prevention or detection of crime or the protection of public security?

**Clause 47 Annual reports to Chief Executive by Commissioner**

What would be the anticipated circumstances that publication of any matter in the annual report would be prejudicial to the prevention or detection of crime or the protection of public security?

**Clause 58 Non-admissibility of telecommunications interception product**

What is the intention of this Clause? What does it mean by proceedings before any court to prove that a relevant offence has been committed? What kind of offence does the term “relevant offence” include? What does “information that continues to be available for disclosure” mean?

**Clause 59 Code of Practice**

Is the Code of Practice to be made public and would it be subject to scrutiny of the Legislative Council? Would the Code be ready at the time when the Bill comes into operation?

**Clause 61 Immunity**

Please confirm that under Clause 61, there is no immunity for liability for entry on to premises or interference with property without permission. What is the purpose of the phrase “only of”?

**Clause 65 Transitional arrangements**

What is the policy intent of this Clause?

**Schedule 5 Consequential Amendments**

**New Section 33 of the Telecommunications Ordinance**

What are the reasons for this new section, in particular the power of the Chief Executive to order that any class of messages to be intercepted for the execution of prescribed authorizations?

**New section 58A of the Personal Data (Privacy) Ordinance**

Please clarify why section 57 (personal data held for the purposes of safeguarding security, defence or international relations) and 58 (personal data for the purposes of the prevention or detection of crime) of the Personal Data (Privacy) Ordinance would not duplicate the new section 58A.

**Section 17 of the Official Secrets Ordinance**

Why does the amendment cover only interception product and not surveillance product?

We are still studying the Bill and may seek further clarifications from you if necessary.

Yours sincerely,

(Lee Yu-sung)  
Senior Assistant Legal Adviser

Encl

c.c. D of J (Attn : Ms Sherman Chan) (Fax : 2869 1302)  
LA  
CCS(2)1

“恐怖分子財產”(terrorist property)指——

- (a) 恐怖分子或與恐怖分子有聯繫者的財產；或
- (b) 由下述資金組成的任何其他財產——
  - (i) 擬用於資助或以其他方式協助作出恐怖主義行為的資金；或
  - (ii) 曾用於資助或以其他方式協助作出恐怖主義行為的資金；

“恐怖主義行為”(terrorist act)——

- (a) 除 (b) 段另有規定外，指作出或恐嚇作出行動，而——
  - (i) 該行動是懷有達致以下結果的意圖而進行的，或該恐嚇是懷有作出會具有達致以下結果的效果的行動的意圖而進行的—— (由 2004 年第 21 號第 3 條修訂)
    - (A) 導致針對人的嚴重暴力；
    - (B) 導致對財產的嚴重損害；
    - (C) 危害作出該行動的人以外的人的生命；
    - (D) 對公眾人士或部分公眾人士的健康或安全造成嚴重危險；
    - (E) 嚴重干擾或嚴重擾亂電子系統的；或 (由 2004 年第 21 號第 3 條修訂)
    - (F) 嚴重干擾或嚴重擾亂基要服務、設施或系統 (不論是公共或私人的) 的；及 (由 2004 年第 21 號第 3 條修訂)
  - (ii) 該行動的作出或該恐嚇—— (由 2004 年第 21 號第 3 條修訂)
    - (A) 的意圖是強迫特區政府或威嚇公眾人士或部分公眾人士的；及
    - (B) 是為推展政治、宗教或思想上的主張而進行的； (由 2004 年第 21 號第 3 條修訂)
- (b) (如屬 (a)(i)(D)、(E) 或 (F) 段的情況) 不包括在任何宣揚、抗議、持異見或工業行動的過程中作出或恐嚇作出行動；

“處所”(premises)包括任何地方，尤其包括——

- (a) 任何車輛、船隻、航空器、氣墊船或離岸構築物；及
- (b) 任何帳幕或可移動的構築物； (由 2004 年第 21 號第 3 條增補)

“資金”(funds)包括附表 1 所述的資金； (由 2004 年第 21 號第 3 條修訂)

“與恐怖分子有聯繫者”(terrorist associate)指由恐怖分子直接或間接控制或擁有的實體；

“管有”(possession)包括控制； (由 2004 年第 21 號第 3 條增補)

“實體”(entity)指任何屬法人團體或並非屬法人團體的團體 (包括個人)；

“items subject to legal privilege”(享有法律特權的品目) has the same meaning as in section 2(1) of the Organized and Serious Crimes Ordinance (Cap. 455);

“material”(材料) includes any book, document or other record in any form whatsoever, and any article or substance; (Added 21 of 2004 s. 3)

“possession”(管有) includes control; (Added 21 of 2004 s. 3)

“practicable”(切實可行) means reasonably practicable;

“premises”(處所) includes any place and, in particular, includes—

(a) any vehicle, vessel, aircraft, hovercraft or offshore structure; and

(b) any tent or movable structure; (Added 21 of 2004 s. 3)

“prescribed interest”(訂明權益), in relation to any property, means an interest in the property prescribed by rules of court as an interest for the purposes of this Ordinance;

“relevant offence”(有關罪行) means an offence against this Ordinance; (Added 21 of 2004 s. 3)

“Secretary”(局長) means the Secretary for Security;

“terrorist”(恐怖分子) means a person who commits, or attempts to commit, a terrorist act or who participates in or facilitates the commission of a terrorist act;

“terrorist act”(恐怖主義行為)——

(a) subject to paragraph (b), means the use or threat of action where—

(i) the action is carried out with the intention of, or the threat is made with the intention of using action that would have the effect of— (Amended 21 of 2004 s. 3)

(A) causing serious violence against a person;

(B) causing serious damage to property;

(C) endangering a person's life, other than that of the person committing the action;

(D) creating a serious risk to the health or safety of the public or a section of the public;

(E) seriously interfering with or seriously disrupting an electronic system; or

(F) seriously interfering with or seriously disrupting an essential service, facility or system, whether public or private; and (Amended 21 of 2004 s. 3)

(ii) the use or threat is—

(A) intended to compel the Government or to intimidate the public or a section of the public; and

(B) made for the purpose of advancing a political, religious or ideological cause;

(b) in the case of paragraph (a)(i)(D), (E) or (F), does not include the use or threat of action in the course of any advocacy, protest, dissent or industrial action;