

立法會
Legislative Council

Ref : CB2/PL/SE/1

LC Paper No.CB(2)133/06-07
(These minutes have been seen
by the Administration)

Panel on Security

**Minutes of special meeting held on Thursday, 16 February 2006,
at 8:30 am in Conference Room A of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Daniel LAM Wai-keung, BBS, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Dr Hon LUI Ming-wah, SBS, JP
Hon Margaret NG
Hon CHEUNG Man-kwong
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, JP
Hon Howard YOUNG, SBS, JP
Hon LAU Kong-wah, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung
Hon CHIM Pui-chung

Members attending : Hon Emily LAU Wai-hing, JP
Hon Alan LEONG Kah-kit, SC
Hon KWOK Ka-ki
Hon Ronny TONG Ka-wah, SC

Member absent : Hon CHOY So-yuk, JP

Public Officers attending : Item I
Mr Ambrose LEE
Secretary for Security

Mr Stanley YING
Permanent Secretary for Security

Miss S H CHEUNG
Deputy Secretary for Security

Mr Ian WINGFIELD
Law Officer (International Law)
Department of Justice

Clerk in attendance : Mrs Sharon TONG
Chief Council Secretary (2)1

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser 1

Mr Raymond LAM
Senior Council Secretary (2) 5

Ms Alice CHEUNG
Legislative Assistant (2) 1

Action

I. Interception of communications and covert surveillance
(LC Paper Nos. CB(2)1097/05-06(01), CB(2)997/05-06(01),
CB(2)971/05-06(01) and (02), CB(2)1071/05-06(01) and LS35/05-06)

Secretary for Security (S for S) briefed Members on the implications of the judgment delivered by the Court of First Instance (CFI) in *Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region*. He stressed that, irrespective of the outcome of the case, the Administration would introduce legislative proposals on interception of communications and covert surveillance. The Administration would introduce the relevant Bill into the Legislative Council (LegCo) shortly. Permanent Secretary for Security (PS for S) briefed Members on the following papers tabled at the meeting -

- (a) Administration's response to issues raised by Members at the meeting on 7 February 2006; and
- (b) a table entitled "Statutory Requirements for Approval of Covert Surveillance - Comparison of the Administration's Proposals and the Australian Regime" provided by the Administration.

Action

(*Post-meeting note* : The papers tabled at the meeting were circulated to members vide LC Paper No. CB(2)1162/05-06 on 16 February 2006.)

2. Ms Audrey EU said that the judgment delivered by CFI in the case concerned reflected that the Law Enforcement (Covert Surveillance Procedures) Order (the Order) and the covert surveillance operations undertaken by law enforcement agencies (LEAs) were unconstitutional. Referring to paragraph 21 of the paper tabled at the meeting, she expressed regret that the Administration had indicated in its response that statistics on covert surveillance operations carried out by LEAs could not be provided. Ms Margaret NG added that the lack of such statistics might reflect that there were numerous covert surveillance operations.

3. S for S responded that there was previously no uniform classification of operations across LEAs. For interception of communications, records were destroyed within three to six months after an operation was completed and thus no longer available. He stressed that there was no abuse of interception of communications and covert surveillance. PS for S added that accurate statistics could not be gathered until there were clear definitions of what constituted interception of communications and covert surveillance.

Adm

4. The Chairman, Ms Audrey EU and Ms Emily LAU requested the Administration to reconsider providing statistics on cases of interception of communication and covert surveillance carried out by LEAs in the past three years.

5. Ms Audrey EU asked whether the Administration had sought the Judiciary's views on whether there would be sufficient resources for implementing the proposed regime. She also asked whether the Administration had provided the Judiciary with past statistics on interception of communications and covert surveillance to facilitate the Judiciary's assessment of its resource needs arising from the proposed regime.

6. PS for S responded that the Administration had discussed with the Judiciary the proposed regime and the associated resource implications. However, the actual resource implications would depend on the regime finally adopted.

Clerk

7. Ms Audrey EU and Ms Margaret NG requested the Clerk to seek the views of the Judiciary regarding the Administration's proposal of appointing a panel of three to six judges at the level of CFI to authorise all interception of communications and more intrusive covert surveillance operations by law enforcement agencies.

8. Referring to paragraph 23 of the Administration's paper tabled at the meeting, Ms Margaret NG queried why the panel of judges authorising interception of communications and the more intrusive covert surveillance would be appointed by the Chief Executive but not the Chief Justice. The Chairman asked whether there was any drawback with the appointment of the panel of judges by the Chief Justice.

Action

9. Law Officer (International Law) (LO(IL)) responded that it should be noted that under the Basic Law (BL), the appointment of judges was made by the Chief Executive on the recommendation of an independent commission. It was therefore appropriate for the panel judges to be appointed by the Chief Executive on the recommendation of the Chief Justice.

10. Ms Margaret NG asked how the need for three to six panel judges was determined.

11. S for S responded that the number of panel judges was determined in consultation with the Judiciary. The panel judges would only perform the authorisation work on a part-time basis. PS for S added that the Administration was discussing the implementation details with the Judiciary.

12. Mr LAU Kong-wah asked about the circumstances under which judicial authorisations or executive authorisations were required. He also asked whether all participants in participant monitoring were law enforcement officers. He added that a person generally had a higher expectation of privacy when inside his home, even if the curtains were open. The use of surveillance devices at such places should thus be classified as more intrusive.

13. PS for S responded that all covert surveillance which involved participant monitoring would require executive authorisation. Covert surveillance involving the use of listening or data surveillance device but no participant monitoring would require judicial authorisation. For covert surveillance involving the use of optical surveillance device but no participant monitoring, judicial authorisation or executive authorisation would be required, depending on whether or not the operation involved entry onto premises or interference with the interior of any conveyance or object without permission. He added that a participant in participant monitoring might not necessarily be a law enforcement officer.

14. PS for S pointed out that the issue of reasonable expectation of privacy had been dealt with by the Law Reform Commission (LRC), which considered that if a person was in a premise where the curtains were open, he would generally be entitled to a lower expectation of privacy from being observed, compared with the case when he had taken measures such as drawing the curtains to protect his privacy.

15. Mr LAU Kong-wah asked what LEAs would do, if a less intrusive covert surveillance operation became a more intrusive one.

16. PS for S responded that under such a situation, the LEA concerned would either have to cease the operation or seek a higher level of authorisation. He stressed that LEAs should anticipate the level of intrusiveness and seek the appropriate authorisation. Where there was any doubt, a higher level of authorisation should be

Action

sought.

17. Mr CHIM Pui-chung asked about the measures to be adopted by the Administration, if the appellants succeeded in the case concerned. He also asked whether the morale of LEAs were affected by the CFI judgment. He questioned whether the Administration regarded LegCo as a rubber stamp in the enactment of legislation on interception of communications and covert surveillance.

18. S for S responded that the Administration would keep the case under close review. He said that the law enforcement capability of LEAs would be seriously undermined, if they lacked the tools of interception of communications and covert surveillance. The Administration sincerely hoped to work closely with LegCo for the enactment of legislation on interception of communications and covert surveillance. There was no question of the Administration regarding LegCo as a rubber stamp.

19. Mr CHIM Pui-chung asked about the number of cases in the past three years where offenders had been convicted as a result of interception of communications.

20. S for S responded that information obtained through interception of communications had not been presented as evidence in court.

21. Mr Albert HO said that the issuance of the Order, which had bypassed LegCo, had aroused wide public concern. He said that BL39 provided that the rights and freedoms enjoyed by Hong Kong residents should not be restricted unless as prescribed by law. He considered that the Administration had made a serious mistake. He added that although the Order had been declared temporarily valid for a period of six months, there might be legal challenges in the six-month period. He queried why the Administration did not bring the Interception of Communications Ordinance (IOCO) into operation.

22. LO(IL) responded that CFI had declared that section 33 of the Telecommunications Ordinance and the Order were temporarily valid for a period of six months. Thus, they would continue to be effective unless the declaration was overturned in an appeal.

23. S for S said that IOCO did not cover covert surveillance and had not been scrutinised by a Bills Committee. Also, LEAs had advised that IOCO would pose serious difficulties to their law enforcement work.

24. Ms Emily LAU said that the United Nations Human Rights Committee had, in its concluding observations of 1999, expressed concern that IOCO had not been brought into operation while section 33 of the Telecommunications Ordinance would continue to be in force, which was in breach of Article 17 of the International Covenant on Civil and Political Rights. She expressed regret that the Administration

Action

had not taken any action since 1999.

Adm

25. S for S responded that although privacy of communication should be protected, exceptions could be allowed for public safety and investigation of crime. He said that the Security Bureau had to accord priority to other more pressing work in the past few years. The enactment of legislation on interception of communication involved much complex information which required considerable time to collate and analyse. Overseas developments in the past few years also had to be taken into account. He stressed that an effective mechanism was in place to monitor interception of communications and covert surveillance. Ms Emily LAU requested the Administration to provide information on the existing regime for monitoring the interception of communications and surveillance conducted by LEAs. S for S agreed to consider Ms LAU's request.

Adm

26. Ms Emily LAU said that judicial authorisation should be required for all types of covert surveillance operations.

27. S for S responded that a proper balance should be struck between the protection of human rights, efficiency of law enforcement and the use of resources of the Judiciary.

28. Mr LEUNG Kwok-hung said that the Administration should have commenced work on the enactment of legislation on covert surveillance after the District Court delivered its judgments in 2005. He queried whether the Administration had conducted studies on interception of communications since reunification.

29. S for S responded that the Administration respected the judgment of the court. The Administration had been working on the enactment of legislation on covert surveillance for some time. He added that since reunification, the Administration had advised that there were difficulties in bringing IOCO into operation and had been working on new legislation on interception of communications.

Adm

30. Mr Ronny TONG requested the Administration -

- (a) to explain whether non-compliance with any code of practice made under the proposed legislation without legal consequences was consistent with the provisions in BL 30;
- (b) to provide a definition of interception of communications and to clarify whether the use of a high technology bugging device to pick up conversations at a distance would be regarded as covert surveillance;
- (c) to explain why the Administration considered that the use of devices involving a party participating in the relevant communications was less intrusive, and to consider the suggestion of vesting the authority to authorise "less intrusive" covert surveillance operations in magistrates;

Action

and

- (d) to provide full justifications for not informing a person whose communication sent to or by him had been intercepted by law enforcement agencies or he himself was the subject of covert surveillance operation after such activities had been completed, and how the person could lodge a complaint when he had not been informed of such activities.

31. Members agreed that another special meeting of the Panel would be held on Tuesday, 21 February 2006 at 10:45 am to continue discussion on the subject with the Administration.

32. The meeting ended at 10:50 am.

Council Business Division 2
Legislative Council Secretariat
20 October 2006