

立法會
Legislative Council

Ref : CB2/PL/SE/1

LC Paper No. CB(2) 225/06-07
(These minutes have been seen
by the Administration)

Panel on Security

**Minutes of special meeting held on Tuesday, 21 February 2006,
at 10:45 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
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, JP
Hon Howard YOUNG, SBS, JP
Hon LAU Kong-wah, JP
Hon CHOY So-yuk, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung

Members attending : Hon Emily LAU Wai-hing, JP
Hon Albert CHAN Wai-yip
Dr Hon KWOK Ka-ki
Hon Ronny TONG Ka-wah, SC

Members absent : Hon CHEUNG Man-kwong
Hon CHIM Pui-chung

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

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I. Interception of communications and covert surveillance

(LC Paper Nos. CB(2)971/05-06(01) and (02), CB(2)997/05-06(01), CB(2)1071/05-06(01), CB(2)1097/05-06(01), CB(2)1162/05-06(01) and (02), CB(2)1184/05-06(01) and LS35/05-06)

Secretary for Security (S for S) and Permanent Secretary for Security (PS for S) briefed Members on the Administration's response to issues raised at the special meeting held on 16 February 2006. S for S said that the Administration sincerely hoped to work with the Legislative Council (LegCo) to seek for the enactment of legislation on interception of communications and covert surveillance within the current legislative session. The Administration would introduce the relevant Bill into LegCo as soon as possible.

2. Mr Ronny TONG asked whether the legislation to be introduced would contain provisions that prohibited the use of information obtained for other purposes. He considered that there should be penalties for breach of such provisions.

3. S for S responded that law enforcement officers who abused their powers could be prosecuted under the common law.

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4. Mr Ronny TONG said that the scope of interception of communications should not be confined to interception of telecommunications and postal interception. He considered that the recording of conversations inside a person's home should be regarded as more intrusive. He added that the target of interception of communications or covert surveillance should be informed afterwards of the activities conducted.

5. S for S responded that legislation on interception of communications and surveillance might in future be extended to cover non-government parties. There might be serious implications on non-government parties, if a very broad definition was adopted for "interception of communications".

6. Referring to paragraph 2 of the Administration's paper, Ms Emily LAU queried why there were no statistics on cases of interception of communications and covert surveillance carried out by law enforcement agencies (LEAs) in the past. She questioned why the Judiciary had not been provided with such statistics.

7. PS for S responded that the current regulatory regime for interception of communications and covert surveillance was different from the proposed regime. Nevertheless, the Administration had asked LEAs to start keeping statistics on the basis of the new regime from 20 February 2006 onwards.

8. The Chairman said that the Administration should provide information on the number of cases of interception of communications and covert surveillance in the past. His view was shared by Ms Emily LAU, Mr Albert HO and Mr Howard YOUNG. PS for S agreed to consider the request.

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9. Dr KWOK Ka-ki queried why the Administration had not done anything in the past eight years to enact legislation on interception of communications. He said that the enactment of legislation to regulate non-government parties should not be deferred merely because the issue was controversial. He considered it not appropriate to classify some covert surveillance operation as less intrusive. He queried how privacy and the rights of an individual could be protected, if the target of interception of communications or covert surveillance was not notified afterwards of the activities conducted.

10. S for S said that the Security Bureau had to accord priority to other more pressing work in the past few years, but he did not agree that the Administration had not done anything on the legislative work in respect of interception of communications. The enactment of legislation on interception of communications 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 said that many parties whom the Administration had consulted, including LegCo Members, considered that legislation should be enacted to deal with

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government parties first, while non-government parties should be dealt with at a later stage.

11. S for S added that the legislation to be enacted should strike a balance between law enforcement and the protection of privacy of communication as well as human rights. Notification of the target of interception of communications or covert surveillance might not be appropriate from a law enforcement point of view. He stressed that there would be a code of practice for LEAs and a monitoring mechanism. Interception of communications and the more intrusive covert surveillance operations would require judicial authorisation. Hence, there would be adequate protection for privacy of communication and human rights.

12. Mr Andrew LEUNG said that besides striking a balance between law enforcement and protecting privacy of communication, the legislation to be enacted on interception of communications and covert surveillance should seek to safeguard the security of Hong Kong. He hoped that this principle would be adhered to in the enactment of the relevant legislation in the coming months. He asked whether there was any threat to the security of Hong Kong before the relevant legislation was enacted. He also asked whether the Administration would introduce the relevant legislation into LegCo as soon as possible.

13. Law Officer (International Law) (LO(IL)) responded that the court had declared that section 33 of the Telecommunications Ordinance (TO) and the Law Enforcement (Covert Surveillance Procedures) Order (the Order) were temporarily valid and of legal effect for a period of six months, although there could still be legal challenge on the admissibility of evidence collected during the six-month period.

14. S for S said that the Administration had sought to introduce the relevant legislative proposals as soon as possible. The Administration intended to introduce the relevant Bill into LegCo within one or two weeks.

15. Dr Philip WONG asked whether the legislative proposals to be introduced would cover tape-recording of the statements taken by LEAs and tape-recording of the conversations between non-government parties by a non-government party.

16. PS for S responded that the legislative proposals to be introduced would not cover interception of communications or covert surveillance carried out by non-government parties. S for S said that, to his knowledge, a person from whom a statement was taken and tape-recorded would be provided with a copy of the tape record, if the person so requested.

17. Dr Philip WONG asked whether the legislative proposals to be introduced would prohibit suspects or witnesses from recording conversations with law enforcement officers, without the latter's knowledge, during the taking of statements.

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18. S for S responded that the legislative proposals to be introduced would not cover such an issue. The Chairman requested the Administration to advise whether there were any guidelines prohibiting such an act.
19. Mr LAU Kong-wah asked how the Commissioner on Interception of Communications and Surveillance (the Commissioner) or the target of interception of communications or covert surveillance would be made aware of any mistake made by LEAs, if there was no notification after the operation concerned was completed. He also asked how the target of interception of communication or covert surveillance could lodge a complaint with the Commissioner, if the information obtained from the operations had been destroyed.
20. PS for S responded that the issue had been discussed at length by the Law Reform Commission (LRC), which had come to the conclusion that if there was such a notification, the information obtained would have to be retained for a longer period of time, thus posing a greater threat to privacy. He stressed that an authorisation mechanism would be established to minimise mistakes. LEAs would be required to conduct reviews, rectify any mistake and submit a report to the Commissioner, whose annual report would be made public.
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21. The Chairman requested the Administration to reconsider the suggestion of notifying the targets of interception of communications or covert surveillance operations after such activities had discontinued, and applying to the court for not notifying the target.
22. Ms Audrey EU expressed reservations whether the court had the power to declare the temporary validity of certain provisions in legislation. She asked whether the Administration had drawn up contingency plans to deal with the situation where the temporary validity was overturned in an appeal. She also asked whether the Administration would undertake not to seek extension of the six-month temporary validity period.
23. S for S responded that the Administration hoped to work with LegCo to enact the relevant legislation as soon as possible within the six-month validity period. However, he was not in a position to undertake not seeking an extension of the temporary validity period. He stressed that the Administration had been working hard on the enactment of legislation.
24. Ms Audrey EU asked whether adequate resources would be provided to the Judiciary for implementing the Administration's legislative proposals.
25. S for S responded that the Administration was discussing the issue with the Judiciary, which would be provided with adequate resources for implementing the legislative proposals.

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26. Ms Audrey EU asked whether there would be any reference in the legislative proposals to information protected by legal professional privilege.

27. PS for S responded that LEAs would be required to examine whether the information to be obtained involved legal professional privilege. Ms Audrey EU said that the legislative proposals to be introduced should contain specific provisions on legal professional privilege.

28. Mr Albert HO said that the Democratic Party would not support the completion of the three-readings procedure of the relevant Bill in one Council sitting. He asked why the panel judges had to be appointed by the Chief Executive (CE). He also asked whether a judicial authorisation issued under the proposed regime would be subject to judicial review.

29. PS for S responded that the reasons for the appointment of the panel judges by CE had been explained in the Administration's paper for the last meeting. He said that as the authorisation of a panel judge would not be issued under the High Court Rules, the authorisation would be subject to judicial review. Mr Albert HO expressed reservations about the proposed arrangement of authorisation by a panel judge.

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30. The Chairman and Mr Albert HO requested the Administration to explain why the panel judges were proposed to be appointed by CE, and the differences between the proposed framework and that for authorising the issuance of search warrants by judges in terms of the role of judges, the procedures involved and the appeal or judicial review of the authorisations of the panel judges.

31. Mr Howard YOUNG asked about the implications of the proposed authorisation mechanism on the resource of LEAs and the Judiciary.

32. PS for S responded that the additional resources required would depend on the final provisions of the legislation to be enacted. Where necessary, approval for additional financial provision would be sought from the Finance Committee. The Chairman requested the Administration to advise, in quantifiable terms, the resource implications of the implementation of the proposed legislation on LEAs.

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33. The Deputy Chairman said that legislation on interception of communications and covert surveillance should be enacted as soon as possible to prevent any legal vacuum. He hoped that the legislation to be enacted would regulate law enforcement while protecting privacy of communication and human rights.

34. Referring to paragraph 10 of the Administration's paper, the Chairman said that the surveillance of oral communications was in no way less intrusive than the interception of telecommunications or postal service. Referring to paragraph 13 of the paper, he queried why covert surveillance involving a party participating in the

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relevant communication was considered less intrusive.

35. PS for S responded that information obtained from the interception of a telephone line for a certain period of time might include conversations between the target and other persons unrelated to the case. Such operation was thus regarded more intrusive. As any disclosure made by a target person to a participating party would be done in the full knowledge of the participating party, surveillance involving such a party was considered less intrusive. Such conclusions were shared by LRC and many other common law jurisdictions.

36. Mr LEUNG Kwok-hung said that he could not see how legislation on interception of communications and covert surveillance could be enacted within a six-month period. He queried why the Administration had not brought the Interception of Communications Ordinance into operation. He also queried why the Administration had not introduced its legislative proposals soon after the District Court delivered its judgments in 2005. He considered that the target of interception of communications or covert surveillance should be notified afterwards of the activities conducted.

37. S for S responded that the Administration was of the view in 2005 that the Order had legal effect. It had nevertheless conducted consultation on its legislative proposals in 2005 before finalizing them. There was no delay in the legislative process.

38. Ms Margaret NG expressed reservations about the temporary validity period declared by the court for section 33 of TO and the Order. She queried why the panel judges were to be appointed by CE. Ms Emily LAU added that the panel judges should not be appointed by CE.

39. LO(IL) responded that under Article 48 of the Basic Law (BL48), it was a function of CE to appoint or remove judges of the courts at all levels. Thus the proposed mechanism for appointment of the panel judges was not inconsistent with BL.

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40. Ms Margaret NG requested the Administration to explain why the panel judges were to be appointed by CE, to clarify the functions of the panel judges, and to explain whether the decisions of the panel judges were subject to judicial review and whether the panel judges were subject to any rules or procedures of the court. She added that the number of panel judges should not be less than two.

41. Ms Margaret NG asked whether the Judiciary would have sufficient manpower to cope with the increased workload arising from the proposed regime.

42. S for S responded that sufficient manpower would be provided to the Judiciary for implementing the proposed regime. Ms Margaret NG and Ms Emily LAU

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considered that the resource implications of the relevant Bill on the Judiciary should be followed up by the Panel on Administration of Justice and Legal Services.

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43. Mr Ronny TONG suggested that some highly intrusive covert surveillance operations, such as those involving the use of bugging device to pick up communications, should require a higher threshold as in the case of interception of communications which required offences to be punishable with a maximum imprisonment of not less than seven years. He requested the Administration to consider the suggestion.

44. Ms Emily LAU opposed completion of the three-readings procedure of the relevant Bill within one Council meeting. Referring to paragraph 13 of the Administration's paper, she said that covert surveillance operations which involved participant monitoring should not be regarded as less intrusive.

45. PS for S responded that the concept of reasonable expectation of privacy was used for determining the level of intrusiveness of an operation in many common law jurisdictions. In some of these jurisdictions, operations involving participant monitoring did not require any statutory authorisation at all.

46. The Chairman said that another special meeting of the Panel would be held to continue discussion on the subject with the Administration.

47. The meeting ended at 1:00 pm.

Council Business Division 2
Legislative Council Secretariat
31 October 2006