

**For information
4 October 2005**

Legislative Council Panel on Security

Law Enforcement (Covert Surveillance Procedures) Order

Internal Guidelines

Introduction

At the special meeting of the Panel on 15 August 2005 and as subsequently raised by Hon Lau Kong-wah and Hon Audrey Eu, Members have indicated interest in the internal guidelines of the law enforcement agencies under the Law Enforcement (Covert Surveillance Procedures) Order (the Order). This paper provides the internal guidelines of the Police Force and relevant documents, *on a confidential basis*.

Internal guidelines on covert surveillance

2. The latest version of the internal guidelines of the Police on covert surveillance is provided at **Annex A**. Such guidelines are not published. As provided by the Order, regular reviews are conducted on the operation of the Order within each law enforcement department to ensure compliance with the guidelines.

3. A table on the protection provided under the Law Enforcement (Covert Surveillance Procedures) Order, when read with the internal guidelines of the Police on that Order, in the format of the comparison table prepared by the Legal Service Division of the LegCo Secretariat on 12 August 2005 (LC Paper No. LS103/04-05), is provided at **Annex B**.

**Security Bureau
September 2005**

Hong Kong Police
Guideline on Covert Surveillance

AUTHORITY

By virtue of section 17 the Chief Executive Order No. 1 of 2005, Law Enforcement (Covert Surveillance Procedures) Order (the 'Order') made on 30 July 2005, this Guideline provides guidance to the police officers in respect of matters provided for in the 'Order'. It sets out the Force policy and principal guidelines governing applications for authorizations for covert surveillance operations, the handling of surveillance product derived from all such operations, the record as well as source protection.

POLICY

2. According to the 'Order', covert surveillance means the systematic surveillance of any person for the purposes of a specific law enforcement investigation or operation, if the surveillance –

- (a) is carried out in circumstances where the person is entitled to a reasonable expectation of privacy;
- (b) is carried out in a manner calculated to ensure that the person is unaware that the surveillance is or may be taking place; and
- (c) is likely to result in the obtaining of any private information about the person.

3. No officer may, directly or through any other person, carry out any covert surveillance without an authorization granted under the 'Order'.

4. Whenever there is a real possibility that a proposed covert surveillance is likely to interfere with a person's rights of privacy by obtaining private information about that person, a proper authorization provided under this Guideline shall be obtained to ensure that the action is carried out in accordance with legal procedures to achieve the purpose of preventing or detecting crime, or protecting public safety or security, and subject to stringent safeguards against abuse.

5. Covert surveillance will only be conducted if it is proportionate to the purpose sought to be furthered by carrying it out, upon –

- (a) balancing, in operational terms, the need for the covert surveillance against the intrusiveness of the covert surveillance on any person who is to be the subject of or may be affected by the covert surveillance; and
- (b) considering whether the purpose sought to be furthered by carrying out the covert surveillance can reasonably be furthered by other less intrusive means.

APPLICATION PROCEDURES

Conditions for Application

6. Any police officer can apply to the authorizing officer for an authorization for any covert surveillance to be carried out by or on behalf of any officer, and only if, in the circumstances of the particular case :-

- (a) the purpose sought to be furthered by carrying out the covert surveillance is that of –
 - (i) preventing or detecting crime; or
 - (ii) protecting public safety or security; and
- (b) the covert surveillance is proportionate to the purpose sought to be furthered by carrying it out, upon –
 - (i) balancing, in operational terms, the need for the covert surveillance against intrusiveness of the covert surveillance on any person who is to be the subject of or may be affected by the covert surveillance; and
 - (ii) considering whether the purpose sought to be furthered by carrying out the covert surveillance can reasonably be furthered by other less intrusive means.

The Authorizing Officer

7. Subject to the authorization in writing by the Commissioner of Police, a police officer at least of Senior Superintendent rank may act as the authorizing officer for the purpose of the 'Order'.

Approval from Formation Commander

8. When the investigating officer considers that the investigation of any organization or individual warrants the use of covert surveillance, he shall seek the authorization from the authorizing officer for mounting a covert surveillance operation.

Information to be Set Out in Application for Authorization

9. The investigating officer shall complete an Application for covert surveillance.

10. An Application for authorization for covert surveillance shall :-

- (a) state which of the purposes specified in para. 6a(i) or (ii) is sought to be furthered by carrying out the covert surveillance;
- (b) set out –
 - (i) the form of the covert surveillance and the information sought to be obtained by carrying out the covert surveillance;
 - (ii) if known, the identity of any person who is to be the subject of the covert surveillance;
 - (iii) if known, particulars of any place (including any conveyance and any structure, whether movable or not) where the covert surveillance is to be carried out;
 - (iv) the proposed duration of the covert surveillance, with an indication of when it is to start and finish;
 - (v) the benefits likely to be obtained by carrying out the covert surveillance;
 - (vi) an assessment of the impact, if any, of the covert surveillance on any person other than that referred to in subparagraph (ii);
 - (vii) the details of any confidential information that is likely to be obtained as a result of the surveillance;

(viii) the consideration why the purpose sought to be achieved by carrying out the covert surveillance cannot reasonably be achieved by other less intrusive means; and

(c) identify by name and rank of the officer making the application.

Form of Application

11. Except where an oral application is authorized, an application for authorization or renewal of authorization (as the case may be) for covert surveillance shall be made in writing which includes any mode (whether electronic, mechanical, optical or otherwise) of representing words in a visible form.

Determination of Application for Authorization

12. The Application will be sent to the authorizing officer who has to be satisfied that :-

(a) the purpose sought to be furthered by carrying out the covert surveillance is that of :-

(i) preventing or detecting crime; or

(ii) protecting public safety or security; and

(b) the covert surveillance is proportionate to the purpose sought to be furthered by carrying it out, upon –

(i) balancing, in operational terms, the need for the covert surveillance against the intrusiveness of the covert surveillance on any person who is to be the subject of or may be affected by the covert surveillance; and

(ii) considering whether the purpose sought to be achieved by carrying out the covert surveillance can reasonably be furthered by other less intrusive means.

13. The authorizing officer shall also consider the following factors when determining the appropriateness of the application for authorization :-

(a) the immediacy and gravity of the crime;

- (b) the immediacy and gravity of the public safety or security affected;
- (c) the likelihood of the crime occurring;
- (d) the likelihood of the public safety or security being affected; and
- (e) the likelihood of obtaining the relevant information by the proposed surveillance operation.

14. Upon considering an application for authorization for covert surveillance, the authorizing officer may :-

- (a) grant the authorization sought under the application, whether with or without variation; or
- (b) refuse to grant the authorization.

15. Except where the application for authorization has been an oral application, the authorizing officer shall deliver in writing which includes any mode (whether electronic, mechanical, optical or otherwise) of representing words in a visible form, his determination under para. 14 and the reason for the determination.

Duration of Authorization

16. An authorization for covert surveillance -

- (a) takes effect at the time specified by the authorizing officer when granting the authorization, which in any case shall not be earlier than the time when it is granted ; and
- (b) subject to any renewal of authorization, ceases to have effect upon the expiration of the period specified by the authorizing officer when granting the authorization, which in any case shall not be longer than the period of 3 months beginning with the time when it takes effect.

17. Within the period specified by the authorizing officer, covert surveillance can be conducted continuously or intermittently unless it is discontinued according to paras. 35 and 36.

RENEWAL OF AUTHORIZATION

18. If the existing surveillance operation has to be extended, a renewal application must be made at any time before the authorization for covert surveillance ceases to have effect. Any police officer may apply to an authorizing officer for renewal of the authorization.

Information to be Set Out in Application for Renewal of Authorization

19. An application for renewal of an authorization for covert surveillance shall

- (a) set out :-
 - (i) whether the renewal sought is the first renewal and, if not, each occasion on which the authorization has been renewed previously;
 - (ii) any significant change to the information previously provided for the purposes of any application for the authorization or for renewal of the authorization;
 - (iii) the value of the information so far obtained with the authorization;
 - (iv) the reason why it is necessary to apply for the renewal;
 - (v) the proposed duration of the covert surveillance, with an indication as to when it is to finish;
 - (vi) the anticipated intelligence dividend expected in the forthcoming period; and
- (b) identify by name and rank the officer making the application.

Determination of Application for Renewal of Authorization

20. Upon considering an application for renewal of an authorization for covert surveillance, the authorizing officer may, grant the renewal, whether with or without variation, or refuse to grant the renewal.

21. The authorizing officer shall not grant the renewal unless he is satisfied that :-

- (a) the purpose sought to be furthered by carrying out the covert surveillance is that of :-
 - (i) preventing or detecting crime; or
 - (ii) protecting public safety or security; and
- (b) the covert surveillance is proportionate to the purpose sought to be furthered by carrying it out, upon :-
 - (i) balancing, in operational terms, the need for covert surveillance against the intrusiveness of the covert surveillance on any person who is to be the subject of or may be affected by the covert surveillance; and
 - (ii) considering whether the purpose sought to be furthered by carrying out the covert surveillance can reasonably be furthered by other less intrusive means.

22. Except where the application for renewal has been an oral application, the authorizing officer shall deliver in writing which includes any mode (whether electronic, mechanical, optical or otherwise) of representing words in a visible form, his determination under para. 20 and the reason for the determination.

23. Where the application for authorization for renewal has been an oral application, the authorizing officer shall only be required to deliver his determination orally.

24. An authorization for covert surveillance may be renewed more than once.

Duration of Renewal of Authorization

25. A renewal of an authorization for covert surveillance –

- (a) takes effect at the time when the authorization would have ceased to have effect but for the renewal; and

- (a) subject to any renewal of authorization, ceases to have effect upon the expiration of the period specified by the authorizing officer when granting the renewal, which in any case shall not be longer than the period of 3 months beginning with the time when it takes effect.

26. Before the expiration of the period specified by the authorizing officer, covert surveillance can be conducted continuously or intermittently unless it is discontinued according to paras. 35 and 36.

ORAL APPLICATION FOR AUTHORIZATION

27. An application for authorization for covert surveillance or an application for renewal of an authorization for covert surveillance may be made orally, if the officer making the application considers that the particular case is of such urgency as to justify the making of such an oral application.

28. Subject to para. 27, the authorizing officer shall not grant the authorization or renewal sought under the application unless he is satisfied that the particular case is of such urgency as to justify the making of an oral application.

29. The authorizing officer shall not grant the authorization or renewal sought under oral application unless he is satisfied that :-

- (a) the purpose sought to be furthered by carrying out the covert surveillance is that of –
 - (i) preventing or detecting crime; or
 - (ii) protecting public safety or security; and
- (b) the covert surveillance is proportionate to the purpose sought to be furthered by carrying it out, upon –
 - (i) balancing, in operational terms, the need for the covert surveillance against the intrusiveness of the covert surveillance on any person who is to be the subject of or may be affected by the covert surveillance; and
 - (ii) considering whether the purpose sought to be furthered by carrying out the covert surveillance can

reasonably be furthered by other less intrusive means.

30. The authorizing officer may deliver orally his determination to grant the authorization or renewal, or to refuse to grant the authorization or renewal (as the case may be) and the reason for the determination.

31. Where the authorization or renewal sought under the oral application is granted by the authorizing officer, the period specified by the authorizing officer when granting the authorization or renewal (as the case may be), being the period upon the expiration of which the authorization or renewal (as the case may be) ceases to have effect, shall in any case not be longer than the period of 72 hours beginning with the time when the authorization or renewal (as the case may be) takes effect.

32. The authorizing officer shall, as soon as reasonably practicable after his determination of the oral application record in writing :-

- (a) the reason for his being satisfied that the particular case is of such urgency as to justify the making of the application;
- (b) a brief note of all information provided under para. 10 or 19 (as the case may be) for the purposes of the application; and
- (c) such an oral determination to grant the authorization or renewal, or to refuse to grant the authorization or renewal (as the case may be) and the reason so delivered.

33. When the authorizing officer has granted the authorization or renewal as a result of the oral application, the officer making the application shall, within the period of 72 hours beginning with the time when the authorization or renewal (as the case may be) takes effect, provide to the respective authorizing officer a record in writing containing all information provided under para. 10 or 19 (as the case may be) for the purposes of the application.

34. A case is not normally to be regarded as urgent unless the time that would lapse before the authorizing officer was available to grant the authorization, or renewal of authorization would, in the judgement of the person giving the authorization, or renewal of authorization, be likely to endanger life or jeopardize the investigation or operation for which the authorization or renewal of authorization was being given.

DISCONTINUATION OF COVERT SURVEILLANCE OPERATION

35. Where a covert surveillance operation has ceased to meet the criteria upon which it was authorized or where the purpose of it has been achieved, it should be discontinued without delay through the instruction given by the authorizing officer who granted or last renewed the authorization, or the person who has taken over the role of authorizing officer or is acting as an authorizing officer when the authorizing officer is no longer available. In the determination to discontinue the covert surveillance, the officer concerned may reach the decision of his own accord or act upon the recommendation of the investigating officer.

36. When the decision is taken that covert surveillance should be discontinued, an instruction must be given as soon as possible to those involved to stop all surveillance of the subject with proper record, irrespective of the fact that the authorization has not yet expired.

37. In case of a covert surveillance operation being discontinued, a notification for discontinuation of covert surveillance operation is to be completed as soon as possible giving brief reasons why the operation shall cease.

RECORD OF AUTHORIZATIONS

38. The authorizing officer shall keep a record of all authorizations granted in respect of any covert surveillance to be carried out by or on behalf of any of his officers, and of any renewal of such authorizations or discontinuation of covert surveillance operations.

39. The record kept in respect of any authorization shall be retained :-

- (a) at all times when it has effect; and
- (b) where it has ceased to have effect, for a period of at least 3 years after the date when the authorization ceased to have effect.

40. The record kept in respect of any authorization shall set out :-

- (a) the date the authorization was granted or refused and, where the authorization has been renewed or covert surveillance operation has been discontinued, the date of the renewal or discontinuation;
- (b) the name and rank of the authorizing officer granting or refusing the authorization and, where the authorization has been renewed or covert surveillance has been discontinued, the name and rank of the authorizing officer making the determination.
- (c) the file reference of the investigation or operation covered;
- (d) whether an oral application was made for the authorization and, where the authorization has been renewed, whether an oral application was made for the renewal;
- (e) where the authorization has ceased to have effect, why and when it has ceased to have effect;
- (f) whether confidential information has been obtained as a result of the surveillance; and
- (g) a record of the result of any review conducted in respect of the authorization.

REGULAR REVIEWS

41. Major Formation Commander charged to supervise covert surveillance shall issue standing instructions to ensure the proper accounting, secure storage and destruction of the applications, determinations, authorizations and the surveillance product, and effective review of the authorizing officer's determinations regarding authorizations, renewals, refusals, discontinuations and variations.

42. Regular reviews by officer senior to the authorizing officer of covert surveillance authorizations should be conducted. The reviewing officer should, as far as practicable, be an officer who is or was not directly involved in the investigation or operation in question. Otherwise, the record of review should highlight such an involvement. He should determine how often a review should take place. This should be as frequently as is considered necessary and practicable. The reviewing results should be recorded and brought up to the

attention of the Major Formation Commander charged to supervise covert surveillance.

43. Covert surveillance operations should be subject to housekeeping inspection by the Major Formation Commander charged to supervise covert surveillance.

Retention of Applications, Determinations and Authorizations

44. The set of applications, determinations and authorizations shall be destroyed 3 years after the completion of the covert surveillance operation unless expected to be required for the purpose of court proceedings.

SOURCE PROTECTION

45. Owing to the sensitive nature of these operations, any leakage of such will jeopardize the police investigation. To protect the source from possible compromise and ensure no leakage, details of covert surveillance operation are made known only to those specified in the authorization or those authorized by the authorizing officer on a strict 'need to know' basis.

46. All surveillance product derived from covert surveillance shall be properly graded according to the sensitivity of the product. It must be securely destroyed as soon as it is no longer needed for any of the authorized purposes after the completion of surveillance operation to protect a person's rights to privacy, unless expected to be required for the purpose of court proceedings.

47. Provisions for the destruction of classified materials are contained in SR 227-234 and 377-378 of the Security Regulations 1998 (updated September 2004) for compliance.

COLLATERAL INTRUSION

48. Extra care should be given if the covert surveillance is likely to acquire knowledge of confidential information, in particular information consists of matters subject to legal privilege, and confidential journalistic material. In case of doubt, CSP CIB should be consulted.

49. Officers should be alert to the possibility that the covert surveillance may acquire knowledge of information protected by legal professional privilege (LPP)¹. The common law regards LPP as a fundamental human right and in Hong Kong it is guaranteed by Article 35 of the Basic Law. The courts are vigilant in protecting this right and regard as very serious any attempt to undermine it.

50. LPP does not apply to communications made with the intention of furthering a criminal purpose. In this limited situation it will be lawful to conduct covert surveillance that is expected to capture information that would otherwise be protected by LPP. But this exception does not apply to communications for the purpose of obtaining legal advice in respect of a crime after it has already been committed unless the purpose of obtaining the advice was to embark upon conduct constituting a perverting of the course of justice.

51. Confidential journalistic material includes material acquired or created for the purposes of journalism and held subject to an undertaking to hold it in confidence, as well as communications resulting in information being acquired for the purposes of journalism and held subject to such an undertaking.

52. All applications for covert surveillance must include an assessment of how likely it is that confidential information, in particular information consists of matters subject to legal privilege, and confidential journalistic material, will be acquired, and whether the purpose of covert surveillance is to obtain confidential information.

53. When there is any doubt as to the capturing, handling and dissemination of confidential information, legal advice should be sought.

¹ Items subject to legal professional privilege are:

- (a) communications between a professional legal adviser and his client or any person representing his client made for the purpose of giving legal advice to the client;
- (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
- (c) items enclosed with or referred to in such communications and made -
 - (i) for the purpose of giving legal advice; or
 - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them, but excludes any such communications or items held with the intention of furthering a criminal purpose.

SECURITY CLASSIFICATION

54. In addition to the surveillance product, all correspondence dealing with surveillance operation shall be properly graded according to the sensitivity of the product.

REVIEW

55. This order shall be reviewed as and when necessary.

Hong Kong Police
5 August 2005

**Protection provided under the Law Enforcement (Covert Surveillance Procedures) Order
and the internal guidelines of the Police**

Topic	Information Provided by the Legal Service Division of the LegCo Secretariat (as contained in LC Paper No. LS 103/04-05) <i>(in italics)</i>		Law Enforcement (Covert Surveillance Procedures) Order ("the Order") together with the guidelines of the Police
	Section 33 of the Telecommunications Ordinance (TO)	Interception of Communications Ordinance (IOCO)	
Safeguards for materials obtained	<i>There is no provision on whether the information intercepted pursuant to an order of interception made under section 33 of the TO can be disclosed to other people.</i>	<p><i>Sections 6, 8 and 9 of the IOCO impose restrictions on the disclosure of the intercepted communications.</i></p> <p><i>(a) Section 6(1) provides that a court order authorizing the interception of communications shall specify, among others, the person(s) to whom the intercepted material may be disclosed.</i></p> <p><i>(b) Under section 6(2), a judge shall only authorize that the intercepted materials be disclosed to those other law enforcement officers who are involved in the investigation of the offence or offence(s) in respect of which communications may be intercepted.</i></p> <p><i>(c) Section 8 imposes a duty on an officer authorized by a court order to intercept a postal communication or telecommunication communication to make arrangements to ensure that the extent to which the intercepted material is disclosed and the number of persons to whom disclosure is made are limited to the minimum that is necessary for the purpose of preventing or detecting a</i></p>	<p>Details of covert surveillance operations are made known only to those specified in the authorization or those authorized by the authorizing officer on a strictly "need to know" basis (para. 45).</p> <p>All surveillance products shall be properly graded according to the sensitivity of the product (para. 46).</p>

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	Section 33 of the Telecommunications Ordinance (TO)	Interception of Communications Ordinance (IOCO)	
		<p><i>serious crime or in the interest of the security of Hong Kong. Moreover, the relevant authorized officer is required to ensure that the intercepted material is destroyed as soon as its retention is not necessary for any of the above purposes.</i></p> <p><i>(d) Section 9(4) prohibits a person who is authorized under a court order to intercept a communication to disclose the intercepted material to any other person or persons save for those allowed by the court.</i></p>	
Disposal of material	<i>There is no provision governing the disposal of intercepted material.</i>	<i>Section 7 of the IOCO provides that where a court order authorizing interception has been terminated by the judge or has expired and has not been renewed, all intercepted materials obtained under the court order shall be placed in a packet and sealed by the authorized officer, and that packet shall be kept away from public access. Where no charge is laid against the person named in the court order within 90 days of the termination of a court order, the court may under specified circumstances order the intercepted materials in the sealed packet to be destroyed.</i>	All surveillance products must be securely destroyed in compliance with Security Regulations as soon as they are no longer needed for any of the authorized purposes after the completion of surveillance operation to protect a person's rights to privacy, unless expected to be required for the purpose of court proceedings. (paras. 46-47)
Remedies for unauthorized	<i>Nil</i>	<i>Section 10 of the IOCO provides that the court may on application of an aggrieved person grant</i>	Depending upon the circumstances, if covert surveillance is conducted without

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interception or disclosure		<i>remedial relief in respect of unauthorized interception or disclosure when certain criteria are met.</i>	authorization, an aggrieved person might have a civil remedy under the Hong Kong Bill of Rights Ordinance or under the Personal Data (Privacy) Ordinance.
Other safeguards	-	-	<p>All applications for covert surveillance must include an assessment of how likely it is that confidential information, in particular information consisting of matters which may be subject to legal privilege or confidential journalistic material, will be acquired, and whether the purpose of covert surveillance is to obtain confidential information. (para. 52)</p> <p>Regular reviews by officer senior to the authorizing officer of covert surveillance authorizations are conducted. The reviewing results are recorded and brought up to the attention of the Major Formation Commander. The operations are also subject to housekeeping inspection by the Major Formation Commander. (para. 42-43)</p> <p>Special reminders to officers are given emphasizing that special care must be</p>

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			taken in the handling of confidential information, in particular, information which may consist of matters subject to legal professional privilege or confidential journalistic materials. (paras. 48-53)