

**President's ruling on
Committee Stage Amendments to
Interception of Communications and Surveillance Bill
proposed by Hon Margaret NG, Hon James TO Kun-sun,
Hon Albert HO Chun-yan, Hon LEE Wing-tat
and Hon CHEUNG Man-kwong
(Second Part)**

Introduction

This is the second part of my ruling on Members' Committee Stage Amendments ("CSAs") to the above Bill. It concerns those amendments proposed by Hon Margaret NG and Hon James TO Kun-sun, on which the Secretary for Security ("S for S") has commented.

My opinions

2. In the first part of my ruling, I stated my opinion that it is abundantly clear that the object of the Bill is to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers.

3. My opinions on the two Members' CSAs are in the following paragraphs. Consistent with my usual practice in forming my opinions in making these rulings, I have considered the arguments put forth by S for S and the Members, as well as the advice of the Counsel to the Legislature ("Counsel").

Hon Margaret NG's and Hon James TO's proposed CSAs involving consideration of scope issues

Clause 2(1): Definition of "covert surveillance"

4. Hon Margaret NG's CSA to the definition of "covert surveillance" would extend the regulatory scheme proposed in the Bill to include surveillance carried out by an undercover agent of a department specified in Schedule 1, whether or not any surveillance device is used by the undercover agent. If this CSA were enacted, the undercover agent would have to seek authorization under the regulatory scheme for the carrying out of surveillance even without the use of any surveillance device.

5. The effect of Hon James TO's CSA to the definition of "covert surveillance" is more extensive. His proposed definition would include, apart from undercover agents, "any person on the instruction of or under the control of or with the cooperation of an officer" of the departments specified in Schedule 1. It would also cover surveillance carried out without the use of surveillance devices.

6. Since the scope of the Bill is confined to regulating surveillance carried out with the use of surveillance devices, the CSAs are outside the scope of the Bill.

Clauses 4(1) and 5(1)

7. Hon Margaret NG's CSAs to clauses 4 and 5 seek to add "the Chief Executive, members of the Executive Council, bureau heads insofar as they are not public servants" to the single category of public officers who are prohibited by clauses 4(1) and 5(1) to carry out any interception of communications and covert surveillance respectively. Hon James TO's CSAs to clauses 4 and 5 seek to add "the Chief Executive, bureau heads insofar as they are not public servants" to the clauses. He does not propose to add Members of the Executive Council.

8. Counsel advises that "public officer" and "public servant" are defined in the Interpretation and General Clauses Ordinance (Cap. 1) as "any person holding an office of emolument under the Government, whether such office be permanent or temporary".

9. It is the Administration's view that:

- (i) the Chief Executive is not a public officer because of his constitutional and legal position under the Basic Law;
- (ii) Members of the Executive Council are advisers to the Chief Executive and they do not hold any office of emolument under the Government; and
- (iii) the proposal to regulate the conduct of bureau heads "insofar as they are not public servants" would bring in non-public officers into the Bill.

10. I consider that the Chief Executive is not a public officer. Indeed, if he was, it would not have been necessary for Hon Margaret NG and Hon James TO to seek to subject him to the prohibitions provided in clauses 4 and 5, unless they want the Bill to include non-public officers. Members of the Executive Council are not public officers as they are not employed by the Government. Bureau heads "insofar they are not public servants" appear to

mean non-public officers. The object of the Bill is to regulate the conduct of public officers, and all the three types of persons in the CSAs are not public officers. Therefore, the CSAs fall outside the scope of the Bill.

Hon Margaret NG's and Hon James TO's other CSAs involving consideration of charging effect

Clause 2(1): Proposed amendments to the definition of "intercepting act"

11. "Intercepting act" is defined in the Bill as "in relation to any communication, means the inspection of some or all of the contents of the communication, in the course of its transmission by a postal service or by a telecommunications system, by a person other than its sender or intended recipient". Hon Margaret NG's CSA seeks to add "by a recipient who is an undercover agent of a department specified in Schedule 1" as an additional class of persons whose inspection of the contents of communication would be regarded as an intercepting act. An undercover agent who is the intended recipient of the communication falls within this new class of persons.

12. Hon James TO's CSA goes further, seeking additionally to include "any person on the instruction of or under the control of or with the cooperation of an officer of a department specified in Schedule 1".

13. Adding these classes of persons into the definition enlarges the number of cases that will be brought into the regulatory scheme. S for S has stated that it would not be unreasonable to assume that the number of cases would easily multiply by a few times more than that envisaged under the Bill, thus increasing the expenditure by the same multiple. I consider that the CSAs would involve expenditure that I cannot ignore, hence there is charging effect.

Hon Margaret NG's other proposed CSAs

Proposed new clause 6(3C)

14. The CSA provides that "panel judges shall not sit as ordinary judges during their appointment as panel judges". Under clause 6(5), panel judges are judges of the Court of First Instance. Under section 4 of Schedule 2, a panel judge is "for all purposes not regarded as a court or a member of a court" when he is performing any of his functions in the capacity as a panel judge. When a panel judge is not performing those functions, he may perform the ordinary functions of a judge in respect of which public funds have been provided for. The effect of the CSA would be that the panel judges would be prevented from rendering the ordinary judicial service for which public funds have been authorized. The Administration estimates that the proposal would mean two to five additional Court of First Instance judge posts each costing

about \$4 million a year. There is charging effect in this CSA.

Proposed new clause 39(b)(v)

15. Counsel advises that Clause 39 provides the functions of the Commissioner on Interception of Communications and Surveillance (the Commissioner). Clause 39(a) provides the function in broad terms: "to oversee the compliance by departments and their officers with the relevant requirements". Clause 39(b) (i) to (v) goes on to provide the functions couched in more specific terms than in subclause (a). The CSA seeks to provide the Commissioner with the function to "investigate complaints made by any person in relation to any interception or surveillance carried out whether with or without authorization". The proposed specific function is to investigate complaints in relation to any intercepting acts or surveillance which include matters not covered by the Bill. This is a new function for the Commissioner which goes beyond what is provided in the Bill. The CSA would have charging effect.

16. I accept Counsel's advice.

Proposed new clause 43(2A)

Commissioner's power to order compensation by the Government

17. Counsel advises that the effect of the proposed new clause 43(2A) has to be examined in conjunction with other related amendments proposed to clause 43.

18. Under the original clause 43(1), the Commissioner is only required to carry out an examination when he receives an application made under clause 42. The CSA to clause 43(1) would add a new situation under which the Commissioner is required to carry out an examination. The situation is: "where the Commissioner, in the course of performing any of his functions under this Ordinance considers or suspects that there is any case in which any interception or covert surveillance has been carried out in contravention of this Ordinance ... he shall ...". The Commissioner would become proactive instead of responsive regarding whether an examination has to be carried out.

19. As to when the Commissioner is obliged to notify the applicant of his findings in the latter's favour, the original clause 43(2) provides that it is only when the Commissioner determines that a prescribed authorization should have been, but has not been, issued or renewed under this Ordinance. The CSA to clause 43(2) would change this to when "the Commissioner determines that a prescribed authorization was issued or renewed in contravention of this Ordinance or should not have been issued or renewed or the interception or covert surveillance alleged has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance".

20. Furthermore, the CSA to clause 43(2) would require the Commissioner to also notify, apart from the applicant for the examination concerned, the subject of interception or surveillance.

21. The CSA to clause 43(2)(b) would impose a new obligation on the Commissioner to give a notice to the applicant for the examination concerned or the subject of interception or surveillance (who may or may not be the applicant), "inviting the subject of interception or surveillance or the applicant to confirm whether the latter wishes to seek an order for the payment of compensation under the application, and if so, to make written submissions to him for that purpose". Under the original clause 43(2)(b), the Commissioner does not have to do these before he decides to order compensation.

22. The proposed new clause 43(2A) provides that "upon receiving confirmation from the applicant that an order for the payment of compensation is sought, the Commissioner, upon taking into account any written submissions made to him for the purpose, may make any order for the payment of compensation by the Government to the applicant". The proposed confirmation is from the applicant only. The subject of interception or surveillance is not required to give that confirmation. His only substantive role in the consideration of compensation by the Commissioner would be to make submission to the Commissioner upon the Commissioner's invitation.

23. The CSA would require the Commissioner to take a proactive approach to conduct examination; notify not just the applicants originally provided in clause 43, but also the subject of interception or surveillance, of irregularities in a prescribed authorization; and invite the applicant or the subject of interception and surveillance to confirm if the applicant wishes to seek compensation and to make submissions. This would change the mode of operation provided in clause 43.

24. In view of the differences of the relevant provisions identified above, the power being proposed in the proposed new clause 43(2A) imposes a new contingent liability on the Government and therefore has charging effect.

Proposed new clause 46A

Commissioner's notification of relevant persons

25. Counsel advises that, under the regulatory scheme proposed in the Bill, no mechanism is provided to notify a person that he may apply to the Commissioner for an examination under clause 42. That person may apply for the examination if he believes that any communication transmitted to or by him has been intercepted by a department concerned or that he is the subject of any covert surveillance that has been carried out by a department. The Commissioner's power to order compensation may only be exercised if there

has been an application for an examination following which he finds the case in the applicant's favour in accordance with clause 43(2).

26. The CSA provides that the Commissioner is obliged to give notice to a "relevant person" if in the course of performing any of his functions the Commissioner considers that there is any case in which any interception or covert surveillance has been carried out by mistake or without the authority of a prescribed authorization issued or renewed under or in material contravention of the Bill. The notice has to state that there has been a case as described above. The notice has also to indicate whether the case is one of interception or covert surveillance and the duration of the interception or covert surveillance. Moreover, the Commissioner has to inform the relevant person in the notice of his right to apply to the Commissioner for an examination. "Relevant person" is defined in proposed new clause 46A(7) as "any person who is the subject of the interception or covert surveillance concerned or such person as being affected by interception or covert surveillance carried out". The "subject of interception or covert surveillance" is further proposed to be defined in clause 2 to mean "any person whose activity is being monitored by interception of his communications or surveillance".

27. The CSA seeks to impose a new function on the Commissioner, requiring him to give notice to the relevant person under the conditions specified in proposed new clause 46A(1). It is a new function not provided in the Bill. Such function could not be considered as incidental to any function provided in the Bill. A proposed CSA which creates a new function is normally regarded as having charging effect unless the public expenditure required for performing that function is so small that it could be ignored. In view of the rather broad definition of "relevant person" provided in proposed new clause 46A(7), the CSA has charging effect.

Hon James TO's proposed CSAs

Clauses 14 to 19

District Court authorizations instead of executive authorization for Type 2 surveillance

28. I have no doubt that the CSAs for achieving the objective of requiring District Judges to determine application for authorizations in respect of Type 2 surveillance would have charging effect. These CSAs would create a new function for District Judges with the result that existing public resources already provided to the Judiciary have to be diverted in order to perform this new function. The CSAs have charging effect.

29. In paragraph 24 of the First Part of my ruling, I ruled that Hon James TO may move his amendments which seek to confer a discretion on the authorization authority to invite the Privacy Commissioner for Personal Data to

make submissions as a special advocate. As I consider that his amendment to replace the executive authorization authority with District Judges has charging effect, he may not therefore move his CSAs to clauses 15(1A) and 18(1A) which concern District Judges.

Proposed new clause 39(b)(iia)

30. Counsel advises that the CSA seeks to create a new function for the Commissioner to "investigate complaints made by any person in relation to any interception or covert surveillance carried out whether with or without authorization" under a new clause 46AA proposed also by Hon James TO.

31. As the definitions of "interception" and "covert surveillance" in clause 2(1) are not confined to public officers, the proposed function may include interceptions or covert surveillance conducted by non-public officers and therefore would go beyond the scope of the Commissioner's primary function specified in clause 39(a), which is to oversee the compliance by departments and their officers with the relevant requirements. Based on the reasons explained in paragraphs 15 and 16 above in respect of Hon Margaret NG's proposed new clause 39(b)(v), this CSA also has charging effect.

32. I accept Counsel's advice.

*Proposed new clauses 43(1A) and 43 (2A)
Commissioner finding cases in applicants' favour*

33. Counsel advises that these proposed new provisions should be considered together with new clause 43(2B) also proposed by Hon James TO, since they are connected and related to giving the Commissioner the power to make a compensation order.

34. The proposed power to order compensation is a new power because, among others, the persons who may be covered by such an order would include any person who has sustained any damage caused by any interception or covert surveillance either carried out by public officers covered by this Bill or any other persons outside the regulatory scheme proposed in this Bill. These provisions therefore clearly have charging effect for creating a contingent liability for the Government which is not provided for in the Bill.

35. In addition to the charging effect problem identified above, these proposed CSAs may be considered as outside the scope of the Bill to the extent that they would require the Commissioner to perform examinations to determine if any person has sustained damages arising from interception or covert surveillance which is outside the ambit of the regulatory scheme proposed in the Bill because it is carried out by persons who are not public officers.

36. I accept Counsel's advice.

Proposed new clause 46AA
Commissioner's new general powers

37. Counsel advises that the CSA seeks to give the Commissioner four general powers.

38. Under the proposed new clause 46AA(a), the power is to investigate any complaint of alleged cases of interception or covert surveillance. Such complaints may include those about interception or covert surveillance carried out by persons outside the regulation of the Bill. As the Commissioner does not have the function to investigate such complaints, the exercise of this power would incur public expenditure for matters not provided for in the Bill, it should be considered as having charging effect.

39. Under the proposed new clause 46AA(b), the power is to require any department to investigate any person within that department, if the Commissioner has reasonable grounds to believe that the person has either provided false or misleading information in obtaining an authorization, or has contravened any provision of the Bill. He has also the power to require the submission of a report from such department on the outcome of any investigation and any disciplinary action taken. The Commissioner's functions in the Bill include conducting reviews on compliance by departments and their officers with the relevant requirements. Such function is underpinned by powers given to him under clause 51 to require any public officer or any other person to answer questions and to provide information etc. and to require any officer of a department to prepare any report on any case of interception or covert surveillance handled by the department. This proposed power may result in the department being required to conduct investigations under the circumstances specified and prepare reports of a kind substantially different from those which may be required under the provisions of the Bill. As the proposed new power would result in public money being required for conducting investigations by a department pursuant to the Commissioner's requirement and for producing reports on the outcome of investigations or disciplinary actions taken in circumstances not provided for in the Bill, this CSA creates a new duty, and therefore has charging effect.

40. Under the proposed new clause 46AA(c), the power is to investigate any complaint made by any person alleged to have been aggrieved or adversely affected by either the execution of any prescribed authorization or any interception or covert surveillance carried out without the authority of a prescribed authorization or in excess of any prescribed authorization. As the Commissioner does not have the function to receive such complaints, the addition of this investigatory power should be considered as having charging

effect.

41. Under the proposing new clause 46AA(d), the power is to conduct any criminal, administrative or disciplinary investigation as he considers necessary into the conduct of any person, apart from a judge of the Court of First Instance or a District Judge, and to refer any matter to the Director of Public Prosecutions upon conclusion of such investigation. As the Commissioner's main function is to oversee the operation of the departments, a power couched in such broad terms, and seeking to apply to persons of any description except the judges identified in the provision, would have charging effect.

42. I accept Counsel's advice.

Proposed new clause 46AB

Notification to relevant persons by head of department

Proposed new clause 46A

Notification to relevant persons by the Commissioner

43. Counsel advises that the CSAs seek to impose a new function on the heads of departments and the Commissioner respectively requiring them to give notice to the relevant persons under the conditions specified in the relevant proposed new clauses. The function to notify is a new function. It is not provided in the Bill, and such proposed function could not be considered as reasonably incidental to any which is in the Bill. As explained in paragraphs 25 to 27 above, concerning Hon Margaret NG's proposed new clause 46A, a proposed CSA which creates a new function is normally regarded as having charging effect unless the public expenditure required for performing that function is so small that it could be ignored. However, in view of the persons covered by the definition of "relevant persons" in proposed new clauses 46AB(4) and 46A(6) and interpreted in accordance with the proposed definition of "subject of interception or covert surveillance" which covers any person whose activity is being monitored by interception of his communication or covert surveillance, it would be reasonable to consider the CSAs as having charging effect.

44. I accept Counsel's advice.

Ruling

45. On the basis of the opinions which I have expressed in the foregoing paragraphs, I rule that the respective CSAs proposed by Hon Margaret NG and Hon James TO Kun-sun, as detailed above, are either not relevant to the subject matter of the Bill (hence may not be moved in view of Rule 57(4)(a) of the Rules of Procedure) or have charging effect (hence under Rule 57(6)(c) require the consent in writing of the Chief Executive for their proposal). I also rule that the other CSAs proposed by the Members which are either consequential upon or related to the CSAs that I have ruled as inadmissible, may also not be proposed.

(Mrs Rita FAN)
President
Legislative Council

1 August 2006