For information
6 December 2007

Legislative Council Panel on Security

Annual Report 2006 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance

Responses to issues raised at the Panel meeting held on 6 November 2007

PURPOSE

This paper sets out the respective responses of the Administration and the Commissioner on Interception of Communications and Surveillance (the Commissioner) to the issues raised by Members at the meeting of the Panel on Security held on 6 November 2007.

BACKGROUND

2. Members requested the following information :

(a) a response to the issues raised in Chapter 13 of the Annual Report 2006 to the Chief Executive by the Commissioner; and

(b) the Commissioner's views on whether panel judges have the right to seek the court's judicial interpretation when there are differences in the interpretation of a provision in legislation between panel judges and law enforcement agencies (LEAs).

THE ADMINISTRATION'S RESPONSE TO ISSUES RAISED IN CHAPTER 13 OF THE COMMISSIONER'S ANNUAL REPORT 2006

3. In Chapter 13 of the Annual Report, the Commissioner made a number of recommendations on amendments to the Interception of Communications and Surveillance Ordinance (the Ordinance) for the Administration's consideration when it next reviews the Ordinance. The Commissioner's recommendations sought to address different

interpretations held by the Commissioner, panel judges and the Administration of certain provisions of the Ordinance and a number of practical issues arising from the operation of the new regulatory regime for covert operations. Notwithstanding the possible need to refine the Ordinance when the Administration next reviews the legislation, Members were assured at the Panel meeting on 6 November 2007 that the issues raised by the Commissioner had already been dealt with by pragmatic solutions or did not have any substantial impact on the operation of the existing regime.

4. Regarding the issues arising from different interpretations of certain provisions of the Ordinance, the Administration has sought to address them through pragmatic measures as a matter of priority pending due consideration of proposed legislative amendments. These measures are summarized below –

(a) On the difference in interpretation regarding "partial revocation of authorization" (paras. 13.5-13.7 in the Commissioner's report), the Code of Practice issued by the Secretary for Security under section 63 of the Ordinance has been revised and now requires the LEAs, where interception of part of the facilities authorized by a panel judge should cease, to report the cancellation of those facilities to the panel judges. The LEAs will make a fresh application to the panel judges should they intend to intercept those facilities again;

(b) On "addition" of facilities for "subject-based" authorizations (paras. 13.8-13.11 in the Commissioner's report), the Code of Practice now sets out the detailed procedures for handling such cases, including an express provision that officers should not apply for the inclusion of any facility which had been refused authorization by a panel judge before;

(c) On the panel judges' concern that they could not impose conditions when confirming emergency authorizations (paras. 13.12-13.14 in the Commissioner's report), the Code of Practice now requires the heads of the LEAs, when issuing emergency authorizations, to impose a "standard" condition in the first instance, as would have been imposed by panel judges when issuing judge's authorizations. We also require them to be proactive to have regard to special considerations, such as protection of legal professional privilege, in approving emergency authorizations and to impose additional conditions

where appropriate; and

(d) On the "revocation" of device retrieval warrants (paras. 13.15-13.20 in the Commissioner's report), we require the LEAs to report to the panel judges as and when a device retrieval warrant is "spent" or no longer has effect.

The above-mentioned measures are to address the Commissioner's comments which relate to enhancing the safeguards for the privacy of individuals under the new regulatory regime.

5. Regarding other practical issues arising from the operation of the regulatory regime for covert operations –

(a) We are working with the Commissioner and the LEAs on a pragmatic solution to address the Commissioner's concerns about the application of section 58 of the Ordinance (paras. 13.34-13.44 in the Commissioner's report);

(b) We are also looking into the Commissioner's comments on the examination and notification procedures under sections 44, 45 and 48 of the Ordinance (paras. 13.30-13.33 in the Commissioner's report), and will discuss with the Commissioner practical means to handle the situation should such a case arise; and

(c) As regards the Commissioner's power to obtain information from the panel judges under section 53 of the Ordinance (paras. 13.21-13.29 in the Commissioner's report) and the Commissioner's comment on the requirement under section 49(2) of the Ordinance that he should distinguish between "interception" and "covert surveillance" in the lists to be included in the report for submission to the Chief Executive (paras. 13.45-13.47 in the Commissioner's report), we will consider the matters in the course of our comprehensive review in 2009.

6. A more detailed elaboration of the Administration's responses in paras. 4 and 5 above, including specific issues raised by the Commissioner in Chapter 13 of his Annual Report 2006 and measures instituted by the Administration to address these issues, is at **Annex A**.

7. The Administration will continue to keep under review the operation of the new regulatory regime and is committed to a

comprehensive review of the Ordinance in 2009 after the second full-year report of the Commissioner is available.

THE COMMISSIONER'S RESPONSE TO THE REQUEST RAISED BY THE PANEL ON SECURITY

8. We have relayed the Panel's request as set out in para. 2(b) above to the Commissioner. Members may wish to note the Commissioner's views at **Annex B**.

Security Bureau
November 2007

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Annex A

Response of the Administration
to comments and recommendations made in Chapter 13 of the Annual Report 2006
of the Commissioner on Interception of Communications and Surveillance (the Commissioner)

	Comments and recommendations made by the Commissioner	**The Administration's response**
1.	***"Partial revocation" of an authorization for the interception of more than one communication service (paragraphs 13.5 - 13.7)***	
	Panel judges adopted the stance that where they had granted a prescribed authorization for the interception of more than one communication service, but the interception of any of these services had subsequently been dropped, the prescribed authorization should be revoked partially in respect of that service. Panel judges took the view that the power conferred by the Interception of Communications and Surveillance Ordinance (the Ordinance) on them to grant an authorization must include the power to revoke it and to revoke it partially. The Administration holds a different view. (Paragraph 13.5)	● Our legal advice is that the Ordinance does not provide for partial revocation of a prescribed authorization. A prescribed authorization may only be revoked in its entirety. The law does not provide for any procedure for "partial revocation". Please also see the comments under item 1 overleaf.

	Comments and recommendations made by the Commissioner	The Administration's response
	Law enforcement agencies (LEAs) should inform the Panel Judges' Office in case the interception of any service under a prescribed authorization granted by a panel judge had been dropped. (Paragraph 13.6)	• Paragraph 159 of the code of practice [1] (CoP) requires, where interception of a facility authorized by a panel judge should cease but interception of the other facilities under the same prescribed authorization should nevertheless continue, the cancellation of that facility to be reported to the panel judges. • It is the established practice of LEAs that after the cancellation of a facility has been reported to the panel judges, if they subsequently see a need to intercept the same facility again, they will make a fresh application to a panel judge for an authorization to intercept that facility.
2.	***Interception: telecommunications service that the subject is reasonably expected to use (paragraphs 13.8 - 13.11)***	
	There is no express provision for "addition" of facilities or the approving officer or his ranking in the Ordinance, nor is there any definition of the scope or extent of facilities that can be so added. It is not clear whether the departmental approving officer could approve the addition of a facility that has previously been refused or revoked by a panel judge. (Paragraph 13.8)	• Our legal advice is that a prescribed authorization may authorize the interception of communications made to or from any service that the subject is using "or is reasonably expected to use". The legal basis for these subject-based authorizations is set out in section 29(1)(b)(ii) of the Ordinance. • The detailed procedures for the addition of facilities

[1] The Secretary for Security revised the code of practice issued pursuant to section 63 of the Ordinance in the light of the Commissioner's various suggestions and recommendations in the Annual Report 2006 and the operational experience of LEAs, and issued the revised version to the LEAs on 29 October 2007.

	Comments and recommendations made by the Commissioner	The Administration's response
		pursuant to a subject-based authorization are set out in paragraph 109 of the CoP, which requires such additions to be approved by a very senior officer of the LEA concerned[2]. ● On the scope of approval, paragraph 109 of the CoP provides that it is inappropriate to include a facility that the subject may only use incidentally, and an officer should not apply to an approving officer for the inclusion of any facility which had been refused authorization by a panel judge before. He should make a fresh application to the panel judges instead.
	The fact that the original authorization contained the "reasonably expected to use" clause does not necessarily mean that the same clause is included in the renewed authorization. (Paragraph 13.9)	● This is now made clear in the CoP. Paragraph 110 of the CoP states that the fact that an authorization for interception containing the "reasonably expected to use" clause has been granted does not mean that subsequent renewals granted by a panel judge automatically embrace such a clause, unless the panel judge has expressly stated so in the renewed authorization.
	Initially, the LEAs did not report to the panel judges as to the facilities which they had added by virtue of the "reasonably expected to use" clause. (Paragraph 13.10)	● Paragraph 110 of the CoP requires the LEAs to report to a panel judge the determination of an application for the addition of a facility pursuant to a

[2] The approving officer must be at the rank equivalent to that of a senior assistant commissioner of police or above.

	Comments and recommendations made by the Commissioner	The Administration's response
		subject-based authorization.
	The Commissioner recommends that the Ordinance should have an express provision on the ambit of facilities that can be added by LEAs and the corresponding reporting requirements, to avoid any ambiguity in the legality of facilities added by LEAs. (Paragraph 13.11)	● Our legal advice is that there is sufficient legal basis under the Ordinance for the issue and execution of subject-based authorizations for interception. Section 29(1)(b)(ii) provides that such an authorization authorizes the interception of communications made to or from any telecommunications service that any person specified in the prescribed authorization is using, "or is reasonably expected to use". That being the case, we have incorporated the Commissioner's various suggestions and relevant procedural requirements into the CoP.
3.	***Whether panel judge may impose conditions when confirming emergency authorization (paragraphs 13.12 - 13.14)***	
	Panel judges do not agree with the Administration's view that they cannot impose any additional conditions when confirming an emergency authorization. They refer to section 32 of the Ordinance which provides that a prescribed authorization (defined as including an emergency authorization) may be "issued or renewed" subject to any conditions specified. (Paragraphs 13.12-13.13)	● Under section 21 of the Ordinance, an emergency authorization is issued by the head of a department only. The authority of a panel judge under section 24 of the Ordinance in respect of an emergency authorization is to "confirm" or "refuse to confirm" the authorization. Our legal advice confirms that there is no statutory provision that empowers a panel judge to impose additional conditions when "confirming" such an authorization.

	Comments and recommendations made by the Commissioner	The Administration's response
		● Under the statutory regime, in processing an application for confirmation of an emergency authorization, a panel judge may first refuse to confirm the authorization and then make an order under section 24(3)(a) that the emergency authorization will only have effect, subject to the variation specified by him, from the time of his determination. Such procedure would achieve the same effect as imposing conditions on the emergency authorizations. ● Paragraph 80 of the CoP requires the heads of the LEAs, when issuing emergency authorizations, to impose a "standard" condition[3] in the first instance, as would have been imposed by panel judges issuing judge's authorizations. We also require them to be proactive to have regard to special considerations, such as protection of legal professional privilege, in approving emergency authorizations and to impose additional conditions where appropriate.

[3] The "standard" condition in respect of emergency authorizations requires the LEA concerned to bring to the attention of the head of department as well as panel judges as soon as practicable and within the validity of the authorization (i) any initial material inaccuracies, or (ii) any material change of circumstances upon which the emergency authorization was granted, which the applicant of the authorization becomes aware of during its period of validity.

	Comments and recommendations made by the Commissioner	The Administration's response
4.	***"Revocation" of device retrieval warrants (paragraphs 13.15 - 13.20)***	
	There is no provision in the Ordinance for panel judges to revoke a device retrieval warrant. The Commissioner considers that there is a need to report the "discontinuance" of a device retrieval warrant to a panel judge for him to revoke the warrant, in case the warrant has been "discontinued", say, because the relevant purpose has been achieved or it has become unable to retrieve the device. Panel judges share his view, and reckon that there is a need to revoke the warrant in cases, for example, where the address is found to be incorrect after the issuing of the warrant. The Commissioner recommends that there should be an express provision requiring LEAs to report to panel judges the "discontinuance" of device retrieval warrants and for panel judges to revoke the warrants where necessary. (Paragraphs 13.16, 13.19 and 13.20)	● Our legal advice is that as with search warrants, once a device retrieval warrant is executed and the device retrieved, it will no longer have any legal effect. In other words, the device retrieval warrant will be "spent". In case an incorrect address has been entered in the device retrieval warrant by mistake and the error is not a minor defect within the meaning of section 64 of the Ordinance, the device retrieval warrant will have no legal effect even though it has not been revoked. ● Notwithstanding the legal position set out above, the LEAs are required to report to the panel judges as and when a device retrieval warrant is "spent" or no longer has effect.
5.	***Commissioner's power under section 53 (paragraphs 13.21 - 13.29)***	
	Section 53 of the Ordinance empowers the Commissioner to access, for the purpose of performing his functions, any documents or records kept under section 3 of Schedule 2 to the Ordinance by the panel judges. On the other hand, panel judges, supported by legal advice from the	● The Administration will consider the matter in the course of the comprehensive review of the Ordinance, taking into account the concerns expressed by the Commissioner and panel judges and the need to protect the integrity of the LEAs'

	Comments and recommendations made by the Commissioner	The Administration's response
	Department of Justice, have doubts on whether the Ordinance permits them to provide to the Commissioner copies of certain types of documents kept by them under section 3 of Schedule 2 to the Ordinance on a routine basis. The Commissioner does not agree with the panel judges' interpretation, considering that under section 53(2) and (5) of the Ordinance copies of these documents could be made available to him by panel judges at his request. (Paragraphs 13.21-13.28)	operations and the privacy of the persons affected.
6.	***Examination and notification by the Commissioner (paragraphs 13.30 - 13.33)***	
	Where the Commissioner, upon an application for examination pursuant to section 43 of the Ordinance, determines that there has been an unauthorized operation but considers that notifying the applicant of this finding would be prejudicial to prevention or detection of crime or protection of public security, giving a notice under section 44(5) would not be appropriate. On the other hand, delaying notification would enable the applicant to appreciate that he was a subject and this would also have a prejudicial effect. The Commissioner recommends that sections 44(6) and 48(3) be amended to provide him with the legal basis for giving a notice in terms of that in section 44(5) in these situations. (Paragraphs 13.30-13.31)	● We are looking into the Commissioner's comments on the examination and notification process under sections 44, 45 and 48 of the Ordinance, and will discuss with the Commissioner practical means to handle the situation should such a case arise.

	Comments and recommendations made by the Commissioner	**The Administration's response**
	Where the Commissioner cannot carry out an examination due to any of the reasons specified in section 45(2), giving a notice that the Commissioner cannot proceed with the examination or the absence of any response from the Commissioner would allow the applicant to appreciate the reason behind and would thus prejudice the prevention or detection of crime or protection of public security. The Commissioner recommends that section 45 be amended to add a provision enabling him to give a notice in terms of that in section 44(5) even where he is not going to proceed with the examination. (Paragraphs 13.32-13.33)	
7.	***Practical difficulty regarding the application of section 58 (paragraphs 13.34 - 13.44)***	
	Where an LEA provides an arrest report to a panel judge under section 58 of the Ordinance and the judge revokes the prescribed authorization (with immediate effect) as a result, the on-going interception or surveillance carried out in the interim period between the time of the revocation and the frontline officers receiving notice thereof would become in theory an unauthorized activity. The same problem also arises in some other scenarios where an authorization is revoked before discontinuance of the operation. (Paragraphs 13.34-13.44)	● We have been working with the Commissioner and the LEAs on a pragmatic solution to address the issue raised about the interim period, although such period is short in duration.

	Comments and recommendations made by the Commissioner	The Administration's response
8.	***Separate listing required by section 49(2) (paragraphs 13.45 - 13.47)***	
	For the Annual Reports, the requirement to set out the various matters separately in relation to interception and covert surveillance "does not make too much sense" when applied to the matters specified in section 49(2)(b) to (e) of the Ordinance. This may also prejudice the prevention or detection of crime or protection of public security (for example, it may help criminals to evaluate what kind of investigation activity is more likely to be employed for a particular kind of offence). The Commissioner recommends that this matter be looked into when the Ordinance is next revised. (Paragraphs 13.45-13.47)	● The requirement in section 49 of the Ordinance was drawn up with a view to balancing the need for a reasonable degree of transparency for the regulatory regime on the one hand, and the need for the prevention or detection of crime or protection of public security on the other. We will take into account the Commissioner's comments when we review the provision in question during the comprehensive review.

Annex B

The Commissioner on Interception of Communications and Surveillance's response to the question raised by Legislative Council Panel on Security

The Commissioner on Interception of Communications and Surveillance ('the Commissioner') is asked to provide his views on one of the questions asked by the Legislative Council Panel on Security ('the Panel') as contained in the Panel's letter to the Secretary for Security on 9 November 2007 which reads:

> '… whether panel judges have the right to seek the court's judicial interpretation when there are differences in the interpretation of a provision in legislation between panel judges and law enforcement agencies.'

2. While the Commissioner feels that he may not be entirely in a position to provide his views on the question raised by the Panel, the brief answer to the question is as follows:

> 'Yes, but in practice panel judges will most unlikely seek judicial interpretation of a provision of the Interception of Communications and Surveillance Ordinance ('ICSO') because they will not be aggrieved by their own decisions made in accordance with their own interpretation of provisions of the ICSO.'

3. The Commissioner's answer above should not be taken as legal advice, nor should this matter be taken as a precedent that the Commissioner will be in a position to answer any query raised by the Legislative Council or the Panel in future.

Secretariat of the Commissioner on Interception of Communications and Surveillance
November 2007