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Interception of Communications
and Surveillance)

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Panel on Security

**Notes of briefing held by the
Commissioner on Interception of Communications and Surveillance
on Friday, 18 January 2008, at 11:00 am
in the Press Conference Room, 7/F, Murray Building**

- Members present** : Hon LAU Kong-wah, JP (Chairman)
Hon James TO Kun-sun (Deputy Chairman)
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
- Office of the Commissioner on Interception of Communications and Surveillance** : Hon Mr Justice WOO Kwok-hing, GBS
Commissioner on Interception of Communications and Surveillance
Miss CHENG Wai-fung
Secretary
Secretariat, Commissioner on Interception of Communications and Surveillance
- Public Officers in attendance** : Mrs Jessie TING, JP
Deputy Secretary for Security
Mrs Apollonia LIU
Principal Assistant Secretary for Security
Miss Linda LEUNG
Assistant Secretary for Security

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

Commissioner on Interception of Communications and Surveillance (the Commissioner) briefed members on his Annual Report 2006 to the Chief Executive (the Report), as detailed in the speaking notes in the **Appendix**.

2. The Chairman thanked the Commissioner for holding the briefing for the Panel on Security and commended the Commissioner for his hard work in monitoring interception of communications and surveillance. He said that Panel members had discussed issues raised in the Report at the Panel meetings on 6 November and 6 December 2007 and expressed particular concern over -

- (a) how differences between law enforcement agencies (LEAs) and panel judges in the interpretation of certain provisions in the Interception of Communications and Surveillance Ordinance (Cap. 589)(ICSO) were to be tackled; and
- (b) why the interception of a wrong telephone line referred to in paragraph 10.13 of the Report was not discovered immediately and why the telephone line as well as its user could not be identified.

3. The Commissioner said that under the existing regime, it was the panel judges who finally determined whether an application for interception of communications or surveillance would be authorised. He informed members that besides differences between LEAs and panel judges in the interpretation of some provisions in ICSO, there were also differences in the interpretation of section 53 of ICSO between him and panel judges. Although he was empowered under ICSO to request panel judges to give him access to documents compiled by and made available to panel judges, the panel judges had doubts about whether they were permitted under ICSO to provide any photocopy of the documents to the Commissioner. As a result, it would be necessary for him to go to the Panel Judges' Office (PJO) to read the documents and manually copy any document of which he wished to keep a record.

4. Regarding the case of interception of a wrong telephone line referred to in the Report, the Commissioner said that when the head of the LEA concerned

informed him of the case and suggested not identifying the affected persons as to do so would expose the operation concerned, he had requested the LEA to try its best to investigate the matter and submit a detailed report. When the LEA subsequently advised that it could not identify the telephone line and user, he had conducted an investigation into the case in person, which included inspecting the process of interception of communications and interviewing the relevant law enforcement officers and the non-LEA staff responsible for effecting the interception. After investigation, he became aware of the reasons for the wrong interception and why the wrongly intercepted line and user could not be ascertained. However, he was not in a position to disclose such reasons, as to do so might expose the operational methods of LEAs. He added that further investigation was not pursued, as it might expose the operation concerned while the chance of successfully identifying the wrongly intercepted telephone line and its user was slim, say, less than 20%.

5. The Chairman asked how the privacy of members of the public could be protected, if persons who were not law enforcement officers and thus not subject to the Commissioner's monitoring were engaged in interception and no record was maintained on such interception. He queried why the wrongly intercepted telephone line and its user could not be identified.

6. The Commissioner responded that the wrong interception, which was reported by the LEA concerned in accordance with the requirements under ICSO, was caused by an inadvertent human error on the part of the person responsible for effecting the interception, who was not a law enforcement officer. The Commissioner said that he was aware of the identity of the person effecting the interception. He also knew how the interception had been effected. However, he was not in a position to disclose further details.

7. The Commissioner further said that he had, in view of the case, made the recommendations set out in paragraph 10.19(c) of the Report. He considered that interception of communications was a necessary tool for the investigation and detection of serious crime and protection of public security. However, there should be a proper balance between interception work and the protection of privacy and thus all interception of communications had to be carried out in accordance with the requirements in ICSO and with the authorisation of a panel judge.

8. The Commissioner said that he was most concerned about whether any law enforcement officer had performed interception of communications without authorisation. He considered that unauthorised interception of communications was unlikely, as any law enforcement officer who did so would be in breach of the law and might face disciplinary actions or dismissal. He added that panel judges and the Commissioner were empowered under ICSO to regulate and monitor the interception of communications by law enforcement officers. Besides counter-checking the weekly returns from LEAs

against those from PJO, he also conducted periodical checks on the relevant files and documents at the offices of LEAs, since the information contained in such files and documents was secret and taking them outside the office or copying them (unless sanitised properly) would pose security risks.

9. The Deputy Chairman commended the Commissioner for his hard work in monitoring interception of communications and surveillance by LEAs. Referring to the case of interception of a wrong telephone line, he asked how the LEA concerned had tried its best to identify the subscriber of the wrongly intercepted line and its user. He asked whether the wrongly intercepted line belonged to a stored value phonecard that the identities of its subscriber and user could not be ascertained.

10. The Commissioner responded that he had not thought along such a direction. When he was informed by the LEA concerned that such identities could not be ascertained, he had conducted an investigation into the matter in person, which included an excursion at night (to avoid being noticed) to inspect the process of interception of communications and interview the relevant law enforcement officers as well as the person responsible for effecting the interception, until further investigation might prejudice the prevention or detection of crime or the protection of public security by exposing the operational methods of LEAs.

11. Ms Emily LAU commended the Commissioner for his hard work in monitoring interception of communications and surveillance. She expressed support for the view in paragraph 1.5 of the Report that the Commissioner should be renamed as the Commissioner on Protection against Unlawful Interception of Communications or Surveillance. She hoped that members of the public could be allowed, as was the case with the media, to observe similar briefings in the future. She also hoped that the Commissioner would consider attending meetings of the Panel, as there were precedents where judges attended committee meetings of the Legislative Council (LegCo) in other capacities.

12. The Commissioner responded that he had not attended any committee meeting of LegCo since appointment as a judge and in his former position as the chairman of the Electoral Affairs Commission for about 13 years. Even after appointment as the Commissioner, he was still a judge. In view of the image of the independence of the Judiciary, he considered it not appropriate to attend committee meetings of LegCo. He said that the media but not members of the public had been arranged to observe the briefing merely because of the physical constraint of the venue concerned. If his office had more resources, the briefing would have been held at a larger venue and members of the public would have been admitted to observe the briefing.

13. Referring to paragraph 4.9 of the Report, Ms Emily LAU asked about the work of the dedicated team, how the interception work of communications service providers (CSPs) was monitored by the Commissioner and why CSPs were not required to submit returns to the Commissioner at an interval shorter than four weeks.

14. The Commissioner responded that after authorisation was issued by a panel judge to an LEA, the relevant interception of communications would be made through the dedicated team. However, he was not in a position to disclose further information about the team. He said that the submission of returns to him at four-week intervals had already generated much additional work for CSPs. He was thankful for the goodwill, readiness to help and efforts on the part of CSPs. Shortening the report period to one week would overburden CSPs. In addition to the four-weekly returns submitted by CSPs, a computer system had recently been installed in a secured strong room in his office. Information supplied by CSPs was downloaded to the system but could be viewed by him only in the presence of the relevant staff of the dedicated team with the entry of passwords. Where information downloaded to the system was printed for perusal by him and his staff, the printed information would be destroyed at the scene by the team staff immediately after perusal.

15. Ms Emily LAU asked whether the provisions in ICSO had adequately empowered him to require CSPs to provide necessary assistance.

16. The Commissioner responded that section 53 of ICSO had provided him with adequate power to require, among others, any public officer or any other person to answer any question, and to provide any information, document or other matter in that person's possession or control.

17. Ms Emily LAU asked why further information on the dedicated team could not be provided.

18. The Deputy Chairman said that information on the Technical Services Division of the Police had been provided in the replies to written questions raised at special meetings of the Finance Committee.

19. In reply to Ms Emily LAU's question, the Commissioner said that it was not prudent for security reasons to disclose the operations of the dedicated team.

20. Ms Emily LAU asked whether there was a large number of interception of communications. She also asked about the number of authorisations where CSPs were involved in effecting an interception, the number of CSPs involved in such work and whether a breakdown of the number of authorisations among different CSPs could be provided in the future.

21. The Commissioner responded that the number of authorisations issued had been set out in Chapter 12 of the Report. He said that disclosing the number of CSPs involved in effecting interception of communications or providing a breakdown of authorisations among different CSPs might expose the operations of LEAs.

22. Ms Audrey EU asked whether the returns submitted by PJO, LEAs and CSPs covered all interception of communications and surveillance by LEAs and whether such returns indicated that all interception of communications and surveillance conducted by LEAs had been authorised. She also asked whether it was possible to detect from the returns submitted by CSPs any interception of communications conducted by non-LEAs.

23. The Commissioner responded that the returns submitted by CSPs and information downloaded to the computer system referred to in paragraph 14 above covered only interception of communications, as CSPs did not have any role in covert surveillance. On the other hand, the returns submitted by LEAs contained information on interception of communications and covert surveillance. LEAs were also required to submit information on the withdrawal and return of surveillance devices so as to enable him to detect any unauthorised use of such devices. He was not aware of any interception of communications by non-LEAs and the issue was outside his purview.

24. The Commissioner said that since assuming the duties of the Commissioner, he had been monitoring whether there was any unauthorised interception of communications or surveillance by LEAs. It was found that unauthorised covert surveillance by LEAs was very difficult to detect, as substantial resources would be needed for such an exercise. However, unauthorised interception of communications could be identified through counter-checking the weekly returns from LEAs against those from PJO. He informed members that no unauthorised interception of communications had so far been identified. He welcomed members' suggestions on monitoring interception of communications and surveillance by LEAs.

25. Ms Audrey EU questioned whether unauthorised interception of communications could be detected by merely counter-checking the total number of lines intercepted by CSPs against the total number of lines indicated in the returns submitted by LEAs. She asked whether CSPs were required to submit a full list of intercepted telephone lines to the Commissioner and whether such a list included interception by non-LEAs.

26. The Commissioner explained that some tests conducted by CSPs for technical reasons would produce the effect of interception of a telephone line and such lines were not included in the lists submitted by CSPs. He said that CSPs had to submit the lists of all telephone lines intercepted at the requests of the dedicated team. Any unauthorised interception of communications by

LEAs could be effectively detected through counter-checking the returns from LEAs against those from CSPs, although he could not disclose further details about such counter-checking, as this might prejudice the operations of LEAs. The Chairman requested the Commissioner to examine whether there were possible loopholes in such a counter-checking mechanism and provide a further response, if necessary.

27. Ms Audrey EU asked whether there was a pressing need to introduce the legislative amendments proposed in paragraph 14.4 of the Report.

28. The Commissioner responded that for paragraph 14.4(a) of the Report, theoretically there would be problem arising from the difference in view between the panel judges and the LEAs as to whether a panel judge could revoke an authorisation partially, but such problem had not yet occurred. Similarly, the issues raised in paragraph 14.4(c), (d) and (f) of the Report had not occurred so far. In this connection, the Deputy Chairman said that the Administration had advised in a recent paper that it had revised the Code of Practice to address the issue raised in paragraph 14.4(c) of the Report.

29. Regarding paragraph 14.4(b) of the Report, the Commissioner said that LEAs had agreed to implement his recommendation referred to in paragraph 13.10 of the Report. Regarding paragraph 14.4(e) of the Report, the Commissioner said that it had caused him certain inconvenience but this could be resolved through other means such as requesting the panel judges to answer a hundred questions instead of requesting the copy documents. Regarding paragraph 14.4(g), he informed members that there was a recent case falling within a similar situation as that described in paragraph 13.37 of the Report where he considered that there was unauthorised activity and the LEA concerned should submit a report to him. However, the LEA concerned considered that there was no unauthorised activity and hence there was no need to submit a report to him. He had finally exercised his power under section 53 of ICSO to ask the LEA to submit a report on the irregularity.

30. The Deputy Chairman asked whether LEAs were cooperative and whether the relationship between the Commissioner and LEAs was tense.

31. The Commissioner responded that LEAs were cooperative and the relationship between him and LEAs was not tense. However, there were differences in view between him and LEAs in respect of the interpretation of section 58 of ICSO. To his knowledge, LEAs had sought the advice of the Department of Justice before adopting their interpretation on the provision. He said that LEAs had to cooperate with him, as he was empowered under section 53 of ICSO to require any public officer or any other person to provide information.

32. Regarding paragraph 14.4(h), the Commissioner said that statistics in the Report had been and would continue to be set out in accordance with the requirements in section 49(2) of ICSO until the provisions were amended. However, he considered it unnecessary to provide separate figures in relation to interception and covert surveillance for statistics provided under section 49(2)(b), (c), (d) and (e) of ICSO.

33. The Deputy Chairman explained the background for the requirement in ICSO for separate statistics in relation to interception and covert surveillance and said that he had suggested requiring statistics on public security and crime to be set out separately in the Commissioner's annual report so that any political monitoring could be readily noticed. As the Administration had refused to incorporate such a requirement in the relevant Bill, some members of the relevant Bills Committee had requested setting out the type of offences in the annual report.

34. The Commissioner said that he had not so far detected any political monitoring. In his view and for argument's sake, interception of communications for political monitoring, if any, might also be made under the name of investigation of other crime, such as possession of drugs, not necessarily be in the name of protection of public security. He maintained that setting out separate statistics over and above the nature and major categories of offences in the Commissioner's annual report might prejudice the operations of LEAs.

35. The Deputy Chairman said that it would be more difficult to carry out interception of communications for political monitoring under the name of investigation of other crime such as possession of drugs, as a panel judge might not believe that a political figure was in possession of drugs. The Deputy Chairman and Ms Emily LAU hoped that the Commissioner would disclose in his annual report any political monitoring identified.

36. The Commissioner responded that according to the files and records reviewed by him, there was no indication of any political monitoring. He noted that panel judges had applied the requirements in ICSO in a stringent manner in their consideration of applications from LEAs. Stringent requirements had to be met before an authorisation was issued by a panel judge.

37. The briefing ended at 1:05 pm.

截取通訊及監察事務專員
就 2006 年周年報告舉行簡介會

各位議員：

1. 歡迎出席今天的簡介會。
2. 我於 2007 年 6 月向行政長官提交了首份周年報告（即 2006 年周年報告），行政長官亦於 10 月把這份報告提交立法會會議席上省覽。我知道各位議員曾於 2007 年 11 月 6 日及 12 月 6 日的保安事務委員會會議討論了這份報告，並提出了若干問題，我希望藉著今天的簡介會向議員講解報告書的內容，並在不會對防止或偵查罪行或保障公共安全造成損害的大前提下，盡量回答議員對有關事項的查問，澄清大家的疑慮。保安局的副常任秘書長丁葉燕薇女士及首席助理秘書長廖李可期女士亦列席今天的簡介會，作為旁聽。

3. 在 2006 年周年報告的引言，我已明確指出，在我出任“截取通訊及監察事務專員”一職後，即感覺部份傳媒及公眾人士有一種錯覺，以為委任我及小組法官的目的，是協助執法機關進行截取及秘密監察行動，置市民大眾的私隱於不顧。其實，專員一職是獨立的，旨在監察執法機關是否恪守《截取通訊及監察條例》的規定；而小組法官在審批授權的申請時亦從嚴處理，並無罔顧個人私隱，我在報告書的第四章已清楚論述。為了消除誤解，我在報告的第一章已建議更改條例及專員的名稱，使到更能清晰說明條例的目的及專員的職能。

4. 有人會懷疑執法機關人員在沒有訂明授權的情況下進行截取或秘密監察行動，但只要反問一句他們這樣做的理由是什麼便知可能性不大。因為可以想像的動機不外乎貪功，八卦，私怨等，但有關人員若如此胡為，一被發現，便屬觸犯法紀，後果堪虞。因此，在邏輯上，在正常情形下

執法機關人員不會明知故犯。但爲了對這可能性不大的情況也加以防範，確保執法機關人員遵守條例的規定，我已訂立監督機制，包括要求執法機關及小組法官辦事處提交每周報表，由一方呈交的資料，會與另一方提供的資料互相比較，查核是否有不符合規定之處。每有需要，亦會要求獨立於執法機關之外的通訊服務供應商提供截取行動的資料，作爲覆核及比對。我亦要求執法機關制訂全面的監察器材記錄制度，以及就有關器材的收發訂立管理機制，防止非法擅用。此外，我亦定期往執法機關查核檔案及文件，並就有疑問的個案要求解釋。

5. 2006年8月9日至12月31日報告期間，共有四宗違規事件，當中包括一宗勾錯綫的個案，我知道各位議員很關注這個案，我願意在可能情況下盡量解答大家的提問。

6. 這份周年報告除了列出在報告期間我對保

安局及執法機關首長作出的建議外，亦載述了我對條例條文的檢討，主要是條例的條文受到不同的詮釋，條例在執行方面的實際困難等，包括：

- (i) 小組法官就已批予的授權作部份撤銷的權力；
- (ii) 小組法官在確認緊急授權施加額外條件的權力；
- (iii) 小組法官撤銷器材取出手令的權力；
- (iv) 第 53 條有關專員在執行其職能時要求小組法官向他提供文件副本的權力和資格事宜等部份；
- (v) 專員根據第 44, 45 及 48 條進行審查及發出通知的進退維谷；以及
- (vi) 引用第 58 條撤銷授權而可能引致的違規行動。

有關的檢討及建議載於周年報告第十三章。

7. 以上是我對 2006 年周年報告的簡介，歡迎各位就有關事項作出提問，謝謝！