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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 16 February 2009**

**Results of Study of Matters Raised in the Annual Report
to the Chief Executive by the Commissioner
on Interception of Communications and Surveillance**

Purpose

This paper summarizes past discussions by the Panel on Security (the Panel) on the results of study of matters raised in the Annual Report 2006 to the Chief Executive (CE) by the Commissioner on Interception of Communications and Surveillance (the Commissioner).

Background

2. Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance (Cap. 589) (ICSO), the Commissioner shall, for each report period, submit a report to CE. The report is to be submitted within six months after the expiry of the report period. CE shall cause to be laid on the table of the Legislative Council (LegCo) a copy of the report.
3. In the course of examination of the Interception of Communications and Surveillance Bill, the Administration undertook, inter alia, to report to the Panel the results of the Administration's study of matters raised in the Commissioner's annual report to CE.
4. The Commissioner's first report to CE covered the period from the commencement of ICSO on 9 August 2006 to 31 December 2006. A copy of the Annual Report 2006 was tabled at the Council meeting on 31 October 2007. The Security Bureau, in consultation with the law enforcement agencies (LEAs) concerned, subsequently studied the matters raised in the report.

Discussion by the Panel

5. At its meetings on 6 November 2007 and 6 December 2007, the Panel was briefed on the results of the study undertaken by the Administration of matters raised in the Commissioner's Annual Report 2006. The following paragraphs set out the major areas of concern raised by members.

Differences in the interpretation of provisions in the legislation

6. Members expressed concern that LEAs and panel judges held different interpretations on a number of provisions in ICSO. Members queried why LEAs disagreed with the views of panel judges regarding the powers of a panel judge to partially revoke the authorizations that had been granted, to impose additional conditions when confirming an emergency authorization and to revoke a device retrieval warrant. They also enquired how the Administration would tackle the differences in interpretation between panel judges and law enforcement officers. Noting the recommendations on amendments to ICSO made by the Commissioner in the Annual Report 2006, members asked whether all the issues raised had been dealt with and whether a review on ICSO would be conducted.

7. The Administration responded that so far there had not been any application for the issue of an emergency authorization. ICSO did not provide for panel judges to impose conditions when confirming an emergency authorization. However, a panel judge could refuse to confirm an emergency authorization and order that the emergency authorization was to take effect subject to the variations specified by him or order that the authorization be revoked. The Administration pointed out that differences in the interpretation of provisions in legislation were not uncommon. Nevertheless, the Code of Practice had been revised to include a requirement for an authorizing officer, when issuing an emergency authorization, to impose conditions as would have been imposed by panel judges when issuing judge's authorization.

8. Regarding the Commissioner's recommendations, the Administration advised that they sought to address different interpretations held by the Commissioner, panel judges and the Administration of certain provisions of ICSO and a number of practical issues arising from the operation of the new regulatory regime for covert operations. Notwithstanding the possible need to refine ICSO when the Administration next reviewed the legislation, the issues raised by the Commissioner had either been dealt with by pragmatic solutions, such as revision of the Code of Practice, or did not have any substantial impact on the operation of the existing regime. The Administration would continue to keep under review the operation of the new regulatory regime and conduct a comprehensive review of ICSO in 2009 after the second full-year report of the Commissioner was available.

Political monitoring

9. Members were concerned whether law enforcement officers would carry out interception of communications for political monitoring under the name of crime

investigation. Some members suggested that the Commissioner should consider disclosing in his annual report any political monitoring identified.

10. The Administration stressed that law enforcement officers had always conducted interception and covert surveillance operations strictly in accordance with the law and only for the purpose of prevention or detection of crime or protection of public security. There was no question of conducting covert operations under ICSO for political monitoring. The Administration advised that the scope of information to be included in the annual report was a matter for the Commissioner. Nevertheless, it would convey the views of members to the Commissioner.

Wrongful interception

11. Members expressed concern as to why the wrongful interception of a telephone line referred to in the Annual Report 2006 was not reported to the Commissioner until two weeks later. They also asked whether the Administration had reviewed the case and taken steps to prevent the recurrence of similar incidents. Members were also concerned why the wrongly intercepted line as well as its users could not be identified.

12. The Administration responded that the interception of a wrong telephone line had taken place for seven days before it was discovered by law enforcement officers. There was no delay in reporting the matter to the Commissioner. In the case concerned, law enforcement officers suspected but could not confirm immediately until the seventh day that a wrong telephone line had been intercepted. At the same time, the law enforcement officers had been considering whether interception of the originally approved line was needed as there might be no further value to do so. The Administration advised that it might take some time for law enforcement officers to discover and confirm a wrong interception due to a number of reasons, e.g. the telephone line was not frequently used and the interception product would reach the investigation team only after any information protected by legal professional privilege had been screened out. The preparation of a detailed report on the case to the Commissioner, which was required under section 54 of ICSO, also took time. To improve the procedures, the Code of Practice had been revised to require law enforcement officers to notify the Commissioner of any non-compliance in the first instance, with a full report to follow.

13. According to the Annual Report 2006, the Commissioner had tried to identify the wrongly intercepted line and its subscriber. Despite efforts made by the LEA concerned, the Commissioner was satisfied after investigation into the case in person that the identities of the wrongly intercepted line, its subscriber or user could not be ascertained.

Protection of privacy of members of the public

14. Regarding members' concern about the protection of privacy of members of the public, the Administration responded that it respected the views of panel judges,

who had been working hard to protect privacy while facilitating law enforcement for prevention and detection of crime as well as protecting public security. 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 authorization of a panel judge. As pointed out by the Commissioner in his Annual Report 2006, where the LEA concerned came to the view that circumstances did not warrant the continuation of an operation, it would proactively discontinue the operation and inform the panel judge concerned as soon as practicable. This would help protect the privacy of the individual(s) concerned.

Latest development

15. The Commissioner has submitted his Annual Report 2007, covering the period from 1 January 2007 to 31 December 2007, to CE in June 2008. CE has caused a copy of the Annual Report 2007 of the Commissioner to be laid on the table of LegCo at its meeting on 11 February 2009. The Administration intends to brief the Panel on its responses to matters raised in the Annual Report 2007 on 16 February 2009.

Relevant papers

16. Members may wish to refer to the following minutes of meetings and papers for details of the discussions -

- (a) minutes of the meeting of the Panel on Security on 6 November 2007 (LC Paper No. CB(2)707/07-08);
- (b) minutes of the meeting of the Panel on Security on 6 December 2007 (LC Paper No. CB(2)1496/07-08);
- (c) Administration's paper entitled "Results of study of matters raised in the Annual Report 2006 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance" (LC Paper No. CB(2)181/07-08(03)); and
- (d) Administration's responses to issues raised at the Panel meeting held on 6 November 2007 (LC Paper No. CB(2)462/07-08(01)).

17. The above minutes of meetings and papers are available on the website of LegCo (<http://www.legco.gov.hk>).