

(Translation)

Commissioner on Interception of Communications and Surveillance

Briefing on Annual Report 2007

(16 February 2009 at 11 am)

Speech

1. Welcome to this briefing.

2. The Interception of Communications and Surveillance Ordinance ('ICSO' or 'the Ordinance') came into force on 9 August 2006. I submitted my second annual report, ie Annual Report 2007, to the Chief Executive on 30 June 2008. The Report covers the period from 1 January 2007 to 31 December 2007. In this briefing, I shall explain the contents of the Report and, without prejudice to the prevention or detection of crime or the protection of public security, answer any questions that you may have.

3. My main function is to oversee the compliance by four law enforcement agencies ('LEAs'), as specified in the Ordinance, with the statutory requirements in relation to interception of communications and covert surveillance; and to conduct reviews to ensure full compliance by these LEAs and their officers with the requirements of the Ordinance, the Code of Practice issued by the Secretary for Security and the conditions in the prescribed authorizations. The four LEAs are Customs and Excise

Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption ('ICAC').

Number of authorizations

4. During the report period, a total of 1,785 prescribed authorizations (including fresh and renewed authorizations) were issued. Among them, 1,525 were judge's authorizations for interception, 134 were judge's authorizations for Type 1 surveillance, and 126 were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs. These authorizations included 23 that had been renewed more than five times.

5. During the report period, a total of 33 applications were refused (including 31 applications for interception and two applications for Type 1 surveillance). For reasons for refusal, please see paragraph 2.6 of Chapter 2 and paragraph 3.3 of Chapter 3 of the Report.

6. There was no application for emergency authorization during the report period.

7. A total of 661 persons were arrested in 2007 as a result of or further to the interception or covert surveillance carried out pursuant to prescribed authorizations.

Legal professional privilege

8. The Ordinance makes specific reference to legal professional privilege ('LPP') and journalistic material for particular caution when interception and covert surveillance are to be authorized and carried out. At the beginning of Chapter 5, I set out in detail how the Ordinance operates to protect and deal with communications which are subject to LPP. The Code of Practice also requires LEAs to notify me of operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. On the basis of the department's notification, I may review the information passed on by the dedicated units to the investigators to check that it does not contain any information subject to LPP that should have been screened out.

9. During the report period, I received four reported cases of inadvertent obtaining of information which might be subject to LPP, all from the ICAC.

10. Case 1 is a sure case that information subject to LPP had been obtained. It happened in February 2007. The department considered that there was material change of circumstances and reported the matter to the panel judge using form REP-11. The panel judge revoked the authorization concerned. But the Security Bureau and the department were of the view that the panel judge had no power to revoke the authorization in such circumstances. Hence they did not consider that the interception carried out during the period between the revocation of the

authorization at 1115 hours and the disconnection of the facility at 1300 hours was unauthorized. The department therefore considered it inappropriate to submit a non-compliance report to me under section 54 of the Ordinance. Although eventually on 10 January 2008, the department submitted a detailed incident report to me under section 53 of the Ordinance, as the records had already been destroyed, I was unable to verify whether listening did cease at 1125 hours on the day of revocation as reported and whether the LPP information obtained had been screened out and was not disseminated to investigators.

11. In Case 2, the panel judge allowed the authorization to continue after considering the REP-11 report on material change of circumstances submitted by the department. Despite my request to the department to preserve all relevant records, the records were still destroyed by the department. Hence, I was unable to verify whether the department had truthfully reflected the content of the conversation concerned in the REP-11 report. I therefore cannot determine the nature of this case, ie whether information subject to LPP had been obtained.

12. Regarding Case 3 and Case 4, they did not show that information subject to LPP had in fact been obtained.

13. For details of the review of these four cases, please refer to Chapter 5 of the Report.

14. I have also observed that the Ordinance and the Code of Practice are silent on the details of some practical aspects of dealing with situations where LPP information might possibly be obtained. The handling of the above LPP cases has also highlighted some issues which are worthy of consideration such as the extent of listening; whether supervising officers should be allowed to listen so as to confirm or rebut the listener's belief or understanding; whether a panel judge is entitled to listen before deciding how to deal with the authorization; whether the Commissioner should listen for carrying out his review functions; whether the Commissioner is entitled to require the preservation of the recorded product with possible LPP information and other related materials, and if so, what is the maximum period of retention he may require; and last but not least, can information subject to LPP be used for criminal investigation purposes? Please refer to paragraphs 5.82 to 5.100 of Chapter 5 of the report for details of these issues. The Security Bureau has been apprised of and will take them into account when conducting a comprehensive review of the Ordinance in 2009.

Journalistic material

15. During the report period, I did not receive any reported case of journalistic material having been obtained.

Applications for examination under section 43 of the Ordinance

16. In 2007, a total of 27 applications for examination were received, among which one was subsequently not pursued by the applicant

and another one was not within my purview. Of the remaining 25 applications, eight concerned suspected cases of interception and five alleged surveillance. The other 12 related to a combination of both. I carried out examination on these 25 applications and found 24 of these cases not in the applicant's favour and notified each of them in writing accordingly. Under the Ordinance, I am not allowed to provide reasons for my determination. The handling of the remaining case still continued at the time of the writing of the Report.

Notification to relevant person under section 48 of the Ordinance

17. In 2007, I gave a notice to a relevant person pursuant to section 48 of the Ordinance for interception conducted without the authority of a prescribed authorization. The unauthorized interception was caused by an error in the execution of interception resulting in a facility being intercepted in addition to the facility authorized by a prescribed authorization. Up to the time when the report was prepared, the case had still not finalized. Please refer to Chapter 6 and paragraphs 7.63 to 7.81 of Chapter 7 of the report for details.

18. The handling of this case has highlighted some problems. For example, how to ascertain who the 'relevant person' is? What does the term 'duration' in section 48(1)(a) mean? Does it mean date specific (say, 1 to 5 January 2007) or only period specific (say, five days)? Section 48 of the Ordinance imposes on me various constraints and restrictions in giving notice to the relevant person. If I were to comply fully with the

Ordinance, I might not be able to find out who the relevant person is. Nor might the relevant person be able to make meaningful written submissions to me for the purpose of seeking an order for the payment of compensation. The problem in executing section 48 should be looked into when the Ordinance is next revised.

Cases of irregularities

19. During the report period, I received reports from heads of LEAs made under section 54 of the Ordinance involving five incidents of irregularities. They related to four Type 2 surveillance and one interception cases.

- (1) Case 1: Failure to report discontinuance of covert surveillance under section 57. In this case, disciplinary action was taken against two LEA officers in the form of verbal advice.
- (2) Case 2: Carrying out of Type 2 surveillance at a place other than that authorized by a prescribed authorization. In this case, disciplinary action was taken against two LEA officers in the form of verbal advice.
- (3) Case 3: Incorrect statement in application for executive authorization.

- (4) Case 4: Incorrect commencement time of the renewed executive authorization.

- (5) Case 5: Error was made in the execution of interception resulting in an additional facility being intercepted on top of the facility authorized by a prescribed authorization. I have, pursuant to section 48 of the Ordinance, notified the 'relevant person' of this unauthorized interception (ie the relevant person mentioned before). But up till now (already beyond the time limit), this person has not asked for compensation. In this case, two LEA officers were disciplined (one receiving verbal warning and the other receiving verbal advice). For this wrong interception, I suggested to the Secretary for Security that the checking and verification process should be enhanced. I am awaiting his reply.

For details of the above five irregularity cases, please see paragraphs 7.1 to 7.81 of Chapter 7 and Table 12 in Chapter 11 of the Report.

20. Upon my request, I also received two reports of irregularities from LEAs not made under section 54 of the Ordinance as the LEAs concerned did not consider them to be irregularities. One report concerned revocation of four interception cases under section 58 of the Ordinance and the other report concerned one- or two-minute time gap in

the renewal of 15 executive authorizations for Type 2 surveillance. Please see paragraphs 7.82 to 7.93 of Chapter 7 of the Report for details.

21. In addition, the LEAs also reported to me two incidents that were not treated as irregularities. The first concerned reactivation of a discontinued interception and the other concerned initial material inaccuracies under a prescribed authorization for interception. Please see paragraphs 7.94 and 7.95 of Chapter 7.

22. During my inspection visits to LEAs, I also identified two Type 2 surveillance authorizations which I considered had not been granted entirely properly. The first case concerned an application with marginally justified grounds. Please refer to paragraphs 4.20(e) and 4.21 to 4.24 of Chapter 4 of the Report. The second case concerned overly long period granted for an authorization. Please refer to paragraphs 4.20(f) and 4.25 to 4.27 of Chapter 4 for details.

Recommendations to the Secretary for Security and heads of LEAs

23. To better carry out the objects of the Ordinance, I made a number of recommendations to the Secretary for Security and the heads of LEAs under sections 51 and 52 of the Ordinance during the report period. Please see Chapters 8 and 9 of the Report for details.

24. In the course of performing my functions in 2007, I discovered certain provisions of the Ordinance that are subject to different

interpretations or difficult to comply with fully. There are also matters that are not expressly covered by the provisions of the Ordinance, which have given rise to different ways of understanding what is to be done. Such issues are set out in Chapter 10 of the Report, some of which have been mentioned just now (for example, whether a panel judge can revoke an authorization immediately after receiving a report on material change of circumstances). The Security Bureau will take these issues into consideration when conducting a comprehensive review of the Ordinance in 2009.

Conclusion

25. In Chapter 12 of the report, I made the following conclusions. I was of the view that the panel judges continued to apply very' stringent standards in the consideration of applications and the granting of authorizations. Although there were some instances of non-compliance with the ICSO requirements by some officers of the LEAs as shown in Chapter 7, such non-compliance was mainly due to inadvertence or lack of thorough understanding or familiarity with the Ordinance. There was no or no sufficient evidence of any wilful or deliberate flouting of such requirements.

26. I found the leadership of the LEAs co-operative and constructive in assisting me in the performance of my oversight functions. The leadership of the LEAs was equally concerned that their officers would not carry out any of the statutory activities without a prescribed

authorization. However, I also found some officers of certain LEAs not frank and not forthcoming, and their attitude also gave rise to concern. This can be seen in LPP Cases 2 and 3 in Chapter 5 and the review of the two Type 2 surveillance cases in paragraphs 4.20(e), 4.20(f) and 4.22 to 4.27 of Chapter 4 of the Report.

27. I express my gratitude to the panel judges, the Security Bureau, the LEAs, the communications services providers and other parties concerned for their co-operation and assistance in the performance of my functions as the Commissioner. I promise that as the Commissioner, whenever any problem arises it will be taken up as a challenge and an opportunity to make improvements with the aim of better protecting the right of Hong Kong people to privacy.

28. The above is my introduction of the Annual Report 2007. Questions relating to the Report are welcome. Thank you!

[Remarks: The Report has been uploaded onto the webpage of the Secretariat, Commissioner on Interception of Communications and Surveillance (<http://www.sciocs.gov.hk>) for access by members of the public.]