

For information

Legislative Council Panel on Security

**Annual Report 2007 to the Chief Executive by the Commissioner on
Interception of Communications and Surveillance**

**Supplementary Information on
Destruction of Material in LPP Cases 2 and 3
and Revised Procedures Dealing with Suspected LPP Information**

Purpose

This paper provides supplementary information requested by Members of the Panel on Security (**the Panel**) on the destruction of intercept-related material in LPP Cases 2 and 3, and the revised procedures for handling information which might be subject to legal professional privilege (**LPP**) obtained inadvertently through telecommunications interception.

Background

2. In response to issues raised in Chapter 5 of the Annual Report 2007 to the Chief Executive (**the Report**) by the Commissioner on Interception of Communications and Surveillance (**C/ICS**), the ICAC presented an information paper [LC Paper No. CB(2)889/08-09(01)] to the Panel at its special meeting on 16 February 2009. The paper set out the ICAC's views on three major issues arising from the four LPP Cases mentioned in Chapter 5 of the Report, including C/ICS's concern over the destruction of interception products and relevant records in LPP Cases 2 and 3.

3. During the special meeting, Members of the Panel requested the ICAC to provide further information on disciplinary actions taken against

those officers found to have acted inappropriately or breached the relevant requirements under the Interception of Communications and Surveillance Ordinance (**ICSO**) or the Code of Practice as revealed in the four LPP Cases. As a result, the ICAC presented a further information paper [LC Paper No. CB(2) 990/08-09(01)] to the Panel at its meeting on 3 March 2009. Apart from giving a detailed account of the incidents which led to the management or disciplinary actions being taken against the officers involved in handling LPP Cases 2 and 3, the paper reported that a new set of procedures was adopted in January 2008 governing the handling of information which might be subject to LPP, obtained inadvertently through telecommunications interception.

4. At the meeting on 3 March 2009, Members of the Panel requested the ICAC to provide -

- (a) a chronology of events setting out all relevant facts and dates relating to the destruction of interception products and written summaries required by C/ICS in LPP Cases 2 and 3; and
- (b) details of the new procedures for handling information which might be subject to LPP, obtained inadvertently through telecommunications interception.

For ease of reference, two flow charts one each for LPP Cases 2 and 3 are respectively given in **Annexes A and B**. Details of the new procedures are set out in **Annex C**.

Chronology of Events

5. The flow charts set out the sequence of events relating to the destruction of intercept-related material in LPP Cases 2 and 3 in accordance with established practice. They also help to explain why the destruction process was not stopped despite the express requirements by C/ICS for their preservation. In the view of the ICAC, the problem stemmed from two wrongful thoughts that the Responsible Officer (**RO**), then Assistant Director responsible for ICSO matters, had of the requirements of C/ICS.

6. The RO's wrongful thoughts first arose from the inspection visit by C/ICS on 23 November 2007, during which the RO mistakenly formed the impression that C/ICS was satisfied with the way LPP Case 2 was handled, so much so that the intercept-related material of this case, including the recording of the intercepted call, need not be preserved, and that the preservation requirement would only apply to future LPP cases.

7. Furthermore, the RO wrongly thought that the requirements for preservation would apply only to the extent that records containing information which might be subject to LPP (i.e. the recording of the relevant call itself) would need to be preserved, but that the written summaries made of the other calls which were not suspected to contain LPP information would not need to be preserved. His belief stemmed from the ICAC long-standing practice that written summaries would not be made of any intercepted calls that are suspected to contain LPP information. In his subjective mind, because the written summaries would not in any event contain LPP information, they would not be of interest to C/ICS and as such they need not be preserved. The Principal Investigator and the Chief Investigator (CI) who were responsible for the supervision of ICSO operations and were present during the inspection visit were of the same frame of mind.

8. It is relevant to note that three types of interception products may come out of an intercepted call. First, there is the recording of the intercepted call itself which exists in electronic format. Such recording is made in respect of all intercepted calls irrespective of whether or not they contain suspected LPP information. Second, there are the soft and hard copies of the written summaries of the call, the former in electronic format stored in the computer (therefore its destruction time can be traced on the computer) and the latter in paper format (the destruction time of which cannot be traced on the computer). Written summaries will only be made of a non-LPP call, and not of a suspected LPP call so as not to prejudice its confidentiality. Third, where it is necessary for operational purpose, an abridged version of the summaries will be made which is more concise than the soft and hard copies of the written summaries. With reference to the two LPP cases in question, soft and hard copies of the written summaries were made of the non-LPP calls intercepted in both cases. Abridged version of the summaries was made only in respect of LPP Case 2, and not LPP Case 3.

LPP Case 2

9. The relevant call was discovered on 13 November 2007, and was reported to the Panel Judge and C/ICS on 14 and 15 November 2007 respectively. In accordance with established practice, the responsible CI issued a written Notification of destruction on 5 December 2007 requiring that the written summaries of the relevant facility in the investigation to which LPP Case 2 was related be passed to the team of Central Registry on or before 12 December 2007 for destruction.

10. In his letter dated **10 December 2007** concerning LPP Case 2, C/ICS required, among other things, that all relevant records should be preserved to facilitate his examination of the case. ICAC records show that the letter, which was delivered by C/ICS's messenger, reached the reception counter of the ICAC Building at **1220 hours** on **11 December 2007**. It subsequently reached the RO at about **1800 hours** on the same day, having gone through the Commissioner of ICAC (**C, ICAC**) and two senior directorate officers. ICAC computer records show that, in the interim, the soft copy of the written summaries regarding LPP Case 2 was destroyed by **1723 hours** on **11 December 2007**, i.e. the same day. The exact time of the destruction of the hard copy is not known but it is believed that the hard copy was destroyed at approximately the same time as the soft copy was destroyed. These events are shown on the flow chart in Annex A. All indications are that the RO had no knowledge of the contents of C/ICS's letter before the letter reached him, and, by the time the letter reached him, the soft and hard copies of the written summaries were already destroyed.

LPP Case 3

11. The relevant call was discovered on 26 November 2007, and was reported to the Panel Judge and C/ICS respectively on 27 and 28 November 2007. Operating from his wrongful belief that only the recorded call itself that might contain LPP information was required to be preserved, and that the related soft and hard copies of the written summaries which would not contain LPP information need not be preserved, the RO wrote to C/ICS on 28 November 2007. In his letter, the RO stated that the recording of the call had already been preserved to await C/ICS's examination.

12. In accordance with established practice, the responsible CI issued a written Notification of destruction on 5 December 2007 requiring that the written summaries of the relevant facility in the investigation to which LPP Case 3 was related be passed to the team of Central Registry on or before 12 December 2007 for destruction.

13. In his letter dated **11 December 2007** in respect of LPP Case 3, C/ICS required the ICAC, among other things, to preserve the recorded intercept product and other records relevant to the case for his examination. ICAC records show that the letter, which was delivered by C/ICS's messenger, reached the reception counter of the ICAC Building at **1030 hours** on **12 December 2007**. It subsequently reached the office of C, ICAC at **1105 hours** the same morning.

14. ICAC computer records show that the soft copy of the written summaries regarding LPP Case 3 was destroyed by **1059 hours** on **12 December 2007**. That was approximately half an hour after C/ICS's letter reached the ICAC Building, but before the letter reached the office of C, ICAC, and that was before the envelope was opened by the Personal Assistant to C, ICAC.

15. C, ICAC was engaged at a meeting in the morning of **12 December 2007** and he was away on leave in the afternoon. The letter left his office on **13 December 2007** and, after routing through two senior directorate officers, was passed to the RO in the evening of **13 December 2007**. The relevant movements and events are shown on the flow chart in Annex B.

Immediate Response from ICAC Management

16. C/ICS's letter on LPP Case 2 reached the RO late in the day of 11 December 2007 and C/ICS's letter on LPP Case 3 reached the RO in the evening of 13 December 2007. The RO consulted his immediate supervisor, the Director of Investigation (Government Sector) (**D/GS**), in the evening of 13 December 2007. Upon discovery that the RO had misunderstood the requirements of C/ICS, D/GS immediately instructed the RO to preserve, with immediate effect, all forms of records relevant to LPP information for

C/ICS's examination in future. Such instruction was duly followed in LPP Case 4.

ICAC's Assessment

17. The ICAC regretted that the intercept-related material including soft and hard copies of the written summaries regarding LPP Cases 2 and 3 were destroyed despite C/ICS's express requirements for their preservation. As mentioned in paragraphs 6 and 7 above, the problem first arose from the RO's misunderstanding of C/ICS's requirements. There is also clear indication of a lack of vigilance on the part of the RO. There is, however, no indication of bad faith.

18. In making the assessment, the ICAC considers the following to be relevant:

- (a) In Year 2007, the RO had altogether reported four suspected LPP cases to C/ICS, including LPP Cases 2 and 3. He had exercised prudence in that when it was not clear whether a call really contained LPP information, he would opt to err on the side of caution by reporting the case. In this connection, it is noted that C/ICS considers that in two of the four cases (LPP Cases 3 and 4), no LPP information was in fact involved. This contends that the RO had no intention to withhold any information from C/ICS.
- (b) On as early as 5 December 2007, the responsible CI had already issued written Notifications to require the destruction of the written summaries in respect of LPP Cases 2 and 3. At that time the CI could not have known that C/ICS's letters would be forthcoming. This contends that the decision to destroy the written summaries was a pre-determined decision, which was in line with established practice and unrelated to the two letters from C/ICS.
- (c) In both LPP Cases 2 and 3, the time between the arrival of C/ICS's letter in the ICAC Building and the destruction of the soft and hard copies of the written summaries was very short,

respectively about five hours and less than thirty minutes. In both cases, the letters reached the RO only after the soft and hard copies of the written summaries were destroyed. C, ICAC and two senior directorate officers had seen C/ICS's letters before they reached the RO, but they were not involved in the day-to-day operation of the ICSO system and had no knowledge as to when the intercept-related material, including the written summaries, would be destroyed. This contends that the apparent concurrence of the arrival of C/ICS's letters and the destruction of the written summaries was a simple co-incidence.

19. The above notwithstanding, there is clearly a lack of vigilance on the part of the RO. As mentioned above, C/ICS's letter dated 10 December 2007 (LPP Case 2) reached the RO at approximately 1800 hours on 11 December 2007. Available records show that the RO did not act on C/ICS's letter promptly. He would in any event not be able to stop the destruction of the soft and hard copies of the written summaries in respect of LPP Case 2 because the destruction had already taken place by that time. However, had he been more alert, he might be able to prevent the destruction of the soft and hard copies of the written summaries in respect of LPP Case 3 on 12 December 2007, and the destruction of the abridged version of the summaries in respect of LPP Case 2 which took place on 13 December 2007.

20. In response to the Panel's request in paragraph 4(a) above, the ICAC has shown the sequence of events in the above paragraphs in painstaking details. The ICAC regrets that the incidents have caused the Panel much time and concerns. The ICAC regrets over any hindrance caused to the work of C/ICS.

The Revised Internal Procedures

21. The revised set of procedures was implemented and adopted by the ICAC in January 2008, having taking into account the advice and comments of C/ICS. All interception products and records relating to the obtaining of information which might be subject to LPP, including the written summaries, are now preserved to facilitate C/ICS's examination.

22. It should be noted that in the process of continuous improvement, this current set of procedures will be subject to further deliberation by the Security Bureau and other law enforcement agencies concerned, particularly in the comprehensive review of ICSO to be conducted in due course.

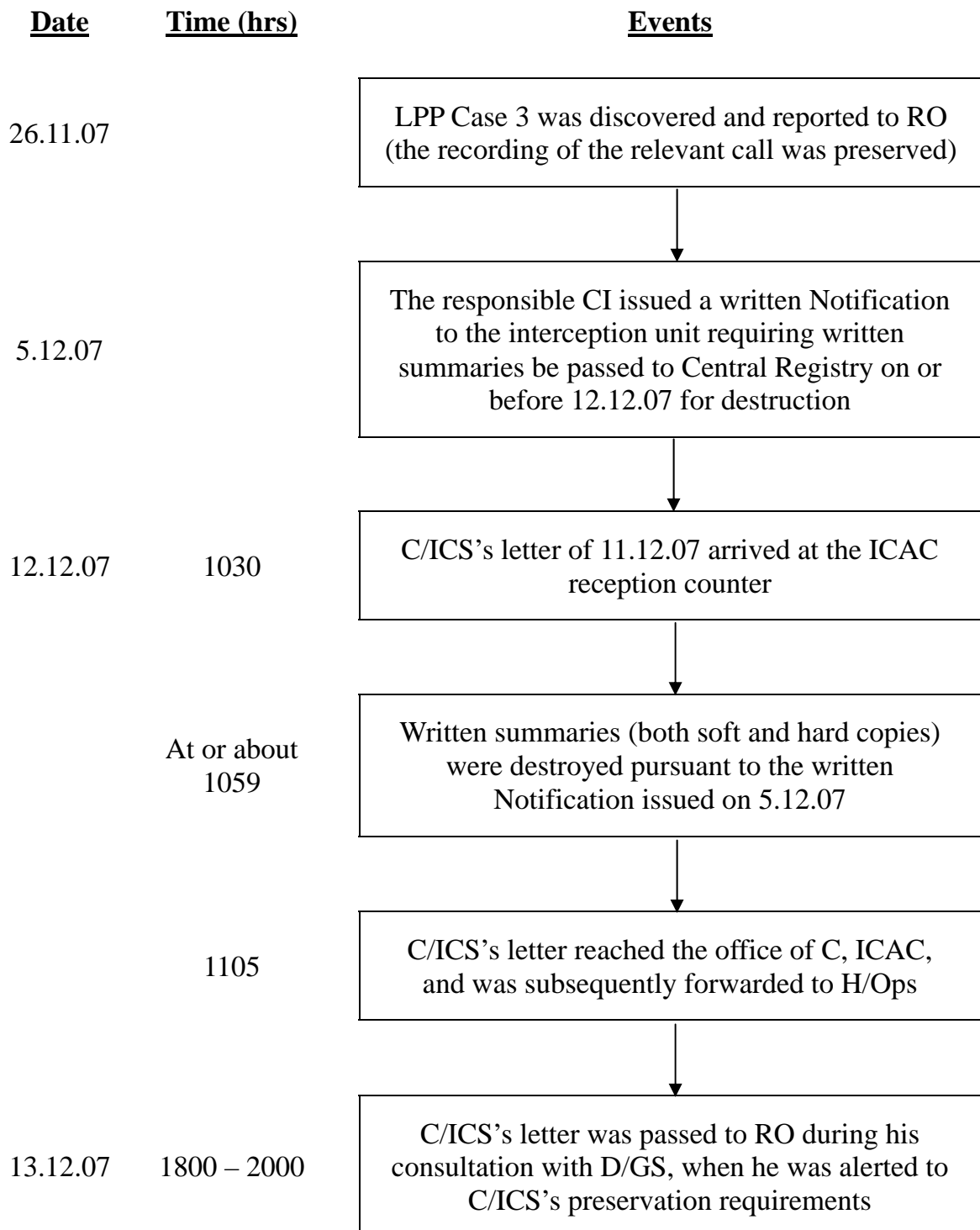
Independent Commission Against Corruption

3 April 2009

Flow Chart Showing Sequence of Events in LPP Case 2

<u>Date</u>	<u>Time (hrs)</u>	<u>Events</u>
13.11.07		LPP Case 2 was discovered and reported to RO
23.11.07		C/ICS's Inspection Visit to ICAC
26.11.07		The recording of the relevant call was destroyed in accordance with established practice due to RO's misunderstanding of C/ICS's preservation requirements
5.12.07		The responsible CI issued a written Notification to the interception unit requiring written summaries be passed to Central Registry on or before 12.12.07 for destruction
11.12.07	1220	C/ICS's letter of 10.12.07 arrived at the ICAC reception counter, and was subsequently dispatched to the office of C, ICAC
	At or about 1723	Written summaries (both soft and hard copies) were destroyed pursuant to the written Notification issued on 5.12.07
	About 1800	C/ICS's letter reached RO, having gone through C, ICAC, Head of Operations (H/Ops) and D/GS
13.12.07		An abridged version of summaries was destroyed in accordance with established practice
	1800 - 2000	C/ICS's letter of 11.12.07 (LPP Case 3) was passed to RO during his consultation with D/GS, when he was alerted to C/ICS's preservation requirements

Flow Chart Showing Sequence of Events in LPP Case 3



The current ICAC procedure governing the handling of information that might be subject to legal professional privilege (LPP) inadvertently obtained through interception

1. During an interception operation, if it appears to a listener that information which might be subject to LPP is inadvertently obtained (“**the Information**”), he will ensure that the Information be screened out from the written summaries to be prepared and not made accessible to the investigating officers.
2. The listener will immediately make a verbal report, through the respective supervisor, to his Chief Investigator (**CI**) of the inadvertent obtaining of the Information and withhold monitoring exercise pending further instruction.
3. The CI will immediately bring the matter to the attention of his Principal Investigator (**PI**) and his Assistant Director (**AD**) for consultation.
4. In determining whether the Information in fact contains material that might be subject to LPP, the AD or in his absence, the PI will examine the Information when necessary.
5. If the Information does contain material that might be subject to LPP, the AD will ensure no access by ICAC officers to such information. He will also ensure that all relevant intercept product and related records be preserved for examination by Commissioner on Interception of Communications and Surveillance (**C/ICS**).
6. The AD will cause a report (REP-11 Report) be submitted to the Panel Judge (**PJ**) as soon as practicable.
7. If the PJ revokes the PA, the interception operation will cease.
8. If the PJ allows the PA to continue, the interception operation will continue accordingly.
9. C/ICS will be notified of the matter.