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立法會

Legislative Council

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Panel on Security

**Minutes of special meeting
held on Monday, 16 February 2009, at 5:30 pm
in Conference Room A of the Legislative Council Building**

- Members present** : Hon LAU Kong-wah, JP (Chairman)
Hon James TO Kun-sun (Deputy Chairman)
Hon Albert HO Chun-yan
Dr Hon Margaret NG
Hon CHEUNG Man-kwong
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung
Hon CHIM Pui-chung
Hon CHAN Hak-kan
Hon WONG Kwok-kin, BBS
Hon WONG Yuk-man
- Members attending** : Hon Ronny TONG Ka-wah, SC
Hon Cyd Ho Sau-lan
Hon Paul TSE Wai-chun
- Members absent** : Hon LAU Wong-fat, GBM, GBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon IP Kwok-him, GBS, JP

Public Officers attending : Item I

The Administration

Mr Ambrose LEE, IDSM, JP
Secretary for Security

Ms CHANG King-yiu, JP
Permanent Secretary for Security

Mrs Jessie TING, JP
Deputy Secretary for Security

Mrs Apollonia LIU
Principal Assistant Secretary for Security

Mr Ian WINGFIELD
Solicitor General
Department of Justice

Mr Godfrey KAN
Senior Government Counsel
Department of Justice

Independent Commission Against Corruption

Mr Timothy TONG Hin-ming
Commissioner

Mr Daniel LI Ming-chak, IDS
Deputy Commissioner and Head of Operations

Mr Ryan WONG Sai-chiu, IDS
Director of Investigation (Government Sector)

Mr NG Ping-kwok, IMS
Acting Assistant Director/3, Operations Department

Clerk in attendance : Ms Betty FONG
Chief Council Secretary (2) 2

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser 1

Miss Josephine SO
Senior Council Secretary (2) 1

Miss Helen DIN
Legislative Assistant (2) 1

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- I. Results of study of matters raised in the Annual Report 2007 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance**
(LC Paper Nos. CB(2)808/08-09(01), CB(2)861/08-09(01), CB(2)889/08-09(01))

Secretary for Security (S for S) briefed Members on the results of the Administration's study of matters raised in the Annual Report 2007 to the Chief Executive (the Report) by the Commissioner on Interception of Communications and Surveillance (the Commissioner).

(Post-meeting note: The speaking note of S for S was issued to members vide LC Paper No. CB(2)903/08-09(01) on 18 February 2008.)

2. At the invitation of the Chairman, Commissioner, Independent Commission Against Corruption (C/ICAC) and Head of Operations, ICAC (HO/ICAC) gave responses to issues raised in Chapter 5 of the Report which dealt with legal professional privilege (LPP) and journalistic material.

(Post-meeting note: The speaking notes of C/ICAC and HO/ICAC were issued to members vide LC Paper No. CB(2)907/08-09 on 18 February 2008.)

3. Members noted the following papers tabled at the meeting -
- (a) Speech delivered by the Commissioner at his briefing held in the morning of 16 February 2009; and
 - (b) Summary of the Commissioner's Annual Report 2007, which was distributed at the briefing on 16 February 2009.

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(Post-meeting note: The above papers tabled at the meeting were issued to members vide LC Paper Nos. CB(2)903/08-09(02) & (03) on 18 February 2008.)

4. The Deputy Chairman recalled that at the briefing held in the morning of 16 February 2009 by the Commissioner on his Annual Report 2007, the Commissioner said that he had doubt about the integrity of individual officers of the law enforcement agencies (LEAs). Regarding those four cases reported by ICAC involving inadvertent obtaining of information which might be subject to LPP, the Commissioner had made some negative comments on officers concerned in their handling of LPP matters. Although there was no or insufficient evidence of any wilful or deliberate flouting of the requirements of the Interception of Communications and Surveillance Ordinance (ICSO) or deliberate destruction of records and evidence to avoid his inspection, the Commissioner had suspicion that something untoward might have occurred. The Deputy Chairman said that the four LPP cases mentioned in Chapter 5 of the Report had aroused grave concern in the community, including the legal sector, over ICAC officers' understanding of and compliance with the relevant requirements under ICSO. He considered that the incidents had, directly or indirectly, undermined public confidence in ICAC. He enquired whether measures would be taken to restore public trust and confidence in ICAC.

5. Director of Investigation (Government Sector), ICAC stressed that ICAC had long recognized the importance of protecting LPP, and that even before the enactment of ICSO, ICAC had established practice for handling LPP matters. He added that any alleged infringement of LPP was very serious in nature. It could be dealt with not only as a disciplinary matter but also a matter subject to the court's scrutiny. He cited a recent District Court case as an example of a challenge by the defence on alleged infringement by ICAC on LPP resulting in an application for a stay of proceedings. The legal challenge

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had aroused public concern in view of the granting of the stay by the trial judge. Following the advice of the Department of Justice (DoJ), an application for a judicial review was sought and as a result, the Court of Appeal ruled that the case be reverted to the District Court for a retrial. The case was concluded with a finding that ICAC had not infringed LPP.

6. Mr Albert HO said that the Report revealed that there existed an attitude problem amongst LEA officers. He was surprised to note from the Report that in a written statement explaining the propriety of a case upon the Commissioner's request, an LEA officer seemed to consider that the course of action taken by the Commissioner amounted to a situation where little trust was placed on him and his subordinates in handling ICSO matters, that their professionalism was slighted and their precious time in performing their duties had been wasted for providing statements and information as required by the Commissioner. Expressing concern that LEAs and panel judges held different interpretations on a number of provisions in ICSO, Mr HO further quoted the case referred to in paragraph 5.22 of the Report and queried why C/ICAC disagreed with the Commissioner's views regarding the power of panel judge to revoke an authorization that had been granted. Mr HO agreed with the Commissioner's view that if C/ICAC questioned the power of the panel judge to revoke the prescribed authorization in the circumstances of the case concerned, C/ICAC should seek remedy from the court, such as to quash the panel judge's decision of revocation or his refusal to allow the continuance of the prescribed authorization or for a declaration of a proper interpretation of the statutory provision. His view was echoed by Dr Margaret NG.

7. Solicitor General (SG) responded that although the Report indicated that there was occasional disagreement between LEAs and the Commissioner on the proper interpretation of certain provisions of ICSO, such as whether the panel judge had the power to revoke a prescribed authorization upon receipt from the LEA concerned of a report (in the form of an REP-11 report) to him

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on material change of circumstances, there was no question of LEAs being disrespectful to the rule of law. In the LPP case cited by Mr Albert HO, the LEA concerned had accepted the panel judge's view and discontinued the operation as soon as reasonably practicable.

8. S for S supplemented that notwithstanding the difference in views between the Administration and the Commissioner, LEAs had adopted pragmatic measures to address the Commissioner's concerns. As a matter of fact, for the recommendations made by the Commissioner to LEAs, the LEAs concerned had accepted them in full or proposed alternative improvement measures. The Security Bureau (SB) had also amended the Code of Practice (CoP) where appropriate. S for S further said that the Commissioner had stated in his Report that he was satisfied that LEAs were as a whole compliant with the ICSO requirements, and that they had been cooperative in assisting the Commissioner in the performance of his oversight and other functions under ICSO.

9. Noting that all the four LPP cases mentioned in Chapter 5 of the Commissioner's Report were associated with ICAC, Mr CHEUNG Man-kwong was concerned whether the incidents were caused by technical errors or inadvertent oversight of the officers concerned. Apart from taking disciplinary actions against those officers found to have acted inappropriately or breached the relevant requirements under ICSO, Mr CHEUNG queried whether the senior management of ICAC should be held responsible for the wrongdoings of individual officers.

10. Mr Ronny TONG expressed concern about how ICAC handled LPP matters. He said that the cases mentioned in Chapter 5 of the Commissioner's Report had given him an impression that ICAC was actually challenging the rule of law, the power of panel judges and the views of the Commissioner. Mr TONG shared the concern of Mr CHEUNG Man-kwong as to whether

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C/ICAC should bear the ultimate responsibility for the failure to observe the principle of protecting LPP. He enquired whether disciplinary actions had been taken against those staff for non-compliance with the relevant requirements under ICSO.

11. In response, C/ICAC and Acting Assistant Director/3, ICAC made the following points -

- (a) section 59(2)(b) of ICSO and paragraphs 124 and 169 of CoP required that any intercepted product that contained information that was subject to LPP should be destroyed as soon as reasonably practicable. Since the implementation of ICSO, ICAC had issued internal instructions on interception of telecommunications operations, including a destruction policy in accordance with the relevant requirements under ICSO;
- (b) ICAC attached great importance to full compliance of its staff with the relevant statutory provisions under ICSO. It was noteworthy that ICAC notified the Commissioner on its own volition of those four cases involving materials that might be subject to LPP. This showed that ICAC had no intention to cover up any facts;
- (c) with regard to LPP Case 1, the legal issue and the sequence of events leading to the submission of a section 53 report (providing information to the Commissioner) as opposed to section 54 report (reporting on non-compliance) by ICAC to the Commissioner were given in paragraphs 5.14 to 5.23 of the Report. Seven months elapsed between the time the Commissioner made a request to ICAC for submitting a report under section 54 and the time ICAC submitted the report to the Commissioner under

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section 53. Much of the delay was caused by the inability of the parties concerned to reach an agreement as to whether the panel judge had inherent power to revoke a prescribed authorization after ICAC's submission of a REP-11 report. In the end, a case report under section 53 was submitted to the Commissioner in January 2008. ICAC regretted the inconvenience caused to the Commissioner. However, such delay was not the cause of the destruction of the intercepted product and related records required by the Commissioner. The intercepted product and related records had already been destroyed on 22 March 2007 in accordance with the prevailing destruction policy, just before the Commissioner first raised the issue during his inspection visit to ICAC on 28 March 2007 and long before his subsequent request on 13 June 2007 for ICAC to submit a report of non-compliance under section 54;

- (d) ICAC's destruction policy on intercepted product and related records was formulated based on the relevant requirements under ICISO and the principle of protection of privacy and minimization of intrusion. The circumstances in which the destruction of the relevant records in LPP Cases 2 and 3 took place were commented upon by the Commissioner in Chapter 5 of his Report. ICAC regretted the way certain ICAC officers had conducted themselves in the circumstances which appeared to be unsatisfactory;
- (e) the Commissioner had commented on the performance of individual ICAC officers in their handling of matters relating to information that might be subject to LPP, and how they responded to subsequent enquiries conducted by the Commissioner. ICAC respected these comments and had taken

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appropriate actions to ensure strict compliance with the law and full co-operation with the Commissioner in the performance of his statutory duties. The actions taken included intensified training for the officers and improvement of operation procedures, and, where appropriate, disciplinary and administrative actions against those found to have acted inappropriately or breached the relevant requirements under ICSO and the internal guidelines. The senior management of ICAC would not evade responsibility and would discuss with the officers concerned on ways to improve their performance; and

- (f) the inadequacies identified in LPP Cases 1 to 3 were glitches at the initial stage of the implementation of the ICSO regime. The Commissioner observed that the handling of the fourth or last LPP case in the Report demonstrated that such initial glitches had been rectified.

12. Mr Ronny TONG expressed disappointment with ICAC's response. He stressed that revocation of authorizations was expressly provided for in ICSO. He could not subscribe to ICAC's view that any ongoing operation after the revocation of the prescribed authorization by the panel judge was not unauthorized and did not amount to an irregularity. He said that he was very disappointed with this attitude of ICAC to get round the issue.

13. Responding to Mr Ronny TONG's enquiry about the case mentioned in paragraphs 5.46 to 5.48 of the Report, Acting Assistant Director/3, ICAC said that ICAC admitted that the relevant Summaries should be preserved for inspection by the Commissioner. It regretted that the destruction of the Summaries and the recorded intercept product had rendered the Commissioner unable to perform his oversight function. C/ICAC held the view that the responsible officer had misunderstood the Commissioner's requirement that all

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records including the recorded intercept product should be preserved. C/ICAC considered that where in doubt, the officer concerned should take the initiative to verify what the Commissioner's requirements entailed. The officer was unprofessional in handling the case. He was subsequently given appropriate advice by C/ICAC and another senior officer.

14. Noting that all cases of inadvertent obtaining of information which was or might have been subject to LPP were reported by ICAC of its own accord, Ms Audrey EU asked whether other LEAs had cases of irregularities and incidents.

15. S for S responded that he noted from the Report that in 2007, the Commissioner had received four reports of inadvertent obtaining of information which was or might have been subject to LPP. S for S pointed out that the checks and balances built into the ICSO regime had struck a balance between protecting privacy and LPP, while allowing LEAs to carry out covert operations for the prevention and detection of serious crimes and protection of public security in warranted circumstances. SB would continue to play the co-ordinating role, facilitating the sharing of experience among LEAs concerned in implementing the requirements of ICSO and the resolution of issues that had implications across LEAs.

16. Ms Audrey EU said that she saw no reason why ICAC destroyed the Summaries in respect of LPP cases. She asked whether the Summaries were required to be preserved for the Commissioner's review under paragraph 120 of CoP. She further questioned why the Summaries prepared in respect of LPP Cases 2 and 3 were destroyed on 11 and 13 December 2007 and on 12 December 2007 respectively, ahead of their due dates for destruction under ICAC's policy and shortly after receipt of the Commissioner's letters of 10 December 2007 and 11 December 2007 requiring ICAC to retain all relevant records, including Summaries, to facilitate his investigation. As

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regards the officers who had destructed the documents in connection with the cases in question, Ms EU asked whether any disciplinary action had been taken against them.

17. Acting Assistant Director/3, ICAC and Director of Investigation (Government Sector), ICAC responded that -

- (a) section 59 of ICSO provided safeguards for protected products, including those containing information subject to LPP. While the head of department was required to make arrangements for any protected product containing LPP information and obtained from interception of telecommunications be destroyed as soon as reasonably practicable, C/ICAC had issued internal guidelines concerning the destruction of protected product containing LPP information. Records generated from the protected product including the Summaries were subject to the same restriction and protection as the protected product;
- (b) in LPP Cases 2 and 3, the Summaries were destroyed in December 2007 since ICAC's destruction policy required them to be destroyed by late December 2007. Officers processed the destruction before the deadline so as to minimize the chance of failing to cause the destruction in time according to internal instruction. It was a coincidence that the destruction of intercepted products and relevant records took place on the days right after the Commissioner requested that the records should be preserved for his investigation; and
- (c) as stated earlier, ICAC regretted that some ICAC officers had conducted themselves in an unsatisfactory manner. The officer had misunderstood the Commissioner's requirement that all

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records including the recorded product of interception should be preserved. C/ICAC held the view that if the officer was in doubt, he should take the initiative to verify what the Commissioner's requirements entailed. The officer concerned was subsequently given appropriate advice by C/ICAC and Director of Investigation (Government Sector), ICAC. This officer had also been re-deployed to undertake other duties that were not related to interception/covert operations.

18. Dr Margaret NG noted with concern that the Commissioner had made quite a number of negative comments about ICAC's handling of ICSO matters, in particular the protection of LPP information. She said that the Basic Law provided that Hong Kong residents should have the right to confidential legal advice. She also recalled that during the scrutiny of the Interception of Communications and Surveillance Bill, in response to the concern raised by members of the relevant Bills Committee about the protection of LPP, the Administration had undertaken to put in place safeguards for LPP. She was disappointed that ICAC had acted according to its own interpretation of the law and ignored the Commissioner's views regarding the authority of panel judge to revoke a prescribed authorization. She questioned whether the system of checks and balances had collapsed.

19. In response, S for S and SG made the following points -

- (a) the Administration did not subscribe to the view that the system of checks and balances had collapsed;
- (b) the Commissioner had stated in the Report that he was satisfied that LEAs were on the whole compliant with the requirements of ICSO, and that LEAs had been co-operative in assisting him in the performance of his oversight functions;

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- (c) although there were some instances of non-compliance with the requirements of ICSO by individual officers of LEAs, such non-compliance was mainly due to inadvertence, or the lack of thorough understanding of or familiarity with the relevant requirements of the Ordinance. While the Commissioner identified some inadequacies in individual LEA officers in their handling of suspected LPP cases, he considered that such inadequacies were glitches at the initial stage of the implementation of the ICSO regime;
- (d) regarding the power of panel judge to revoke an authorization, although SB and LEAs held a different view, there was no question of the Administration turning a deaf ear to the panel judges' views and the Commissioner's comments and recommendations. While LEAs had already accepted the suggestions made by the Commissioner, the Administration had amended CoP where appropriate to address the issues identified in the Report; and
- (e) as some of the Commissioner's recommendations arose from different interpretations of certain provisions in ICSO, the Administration would consider those recommendations in detail when it conducted the comprehensive review of ICSO after the second full-year report of the Commissioner was available. The review would provide an opportunity for the Administration to identify further legislative improvements to ICSO.

20. Ms Emily LAU considered that ICAC should be mindful of the need to protect LPP in carrying out interception or surveillance operations, as failure to

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ICAC

observe the requirements of ICSO regarding the handling of LPP would have an adverse impact on ICAC's reputation. Noting that many of the issues raised in the Report were not addressed yet, she enquired about the Administration's plan in implementing the Commissioner's recommendations, in particular measures to tackle the differences in interpretation between panel judges and law enforcement officers. She requested ICAC to provide information on disciplinary actions taken against those officers found to have acted inappropriately or breached the relevant requirements under ICSO, including the number and ranking of the staff involved and the level and form of penalties imposed.

21. S for S responded that differences in the interpretation of provisions in legislation were not uncommon, and he noted that fewer differences had emerged in 2007 compared to the previous year. The Administration would consider the Commissioner's recommendations arising from different interpretations of certain provisions of the legislation when it conducted the comprehensive review of ICSO after the second full-year report of the Commissioner was available. In the interim, LEAs had adopted pragmatic measures to address the Commissioner's concerns and resolve the differences.

22. Mr LEUNG Kwok-hung said that he remained unconvinced that LEAs complied fully with the requirements under ICSO. He could not understand why ICAC destroyed the Summaries ahead of their due dates for destruction, and had reasons to suspect that something untoward might have occurred in respect of the LPP cases reported by ICAC. Given the problems identified in the Commissioner's Report, Mr LEUNG questioned whether the Bills Committee on Interception of Communications and Surveillance Bill had gone through thorough deliberation on relevant issues, including appointment of panel judges, protection of LPP and use and destruction of LPP products.

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23. In response to the question raised by Mr LEUNG Kwok-hung, the Chairman replied in the affirmative and advised that members might refer to the report of the Bills Committee for details of the discussion.

24. S for S pointed out that the proposals to appoint panel judges and a Commissioner were in line with the recommendations made in the Law Reform Commission report on the regulation of the interception of communications published in 1996. The Administration had also made reference to the experience of other common law jurisdictions. S for S said that with the parties concerned gaining more experience, the whole regime under ICSO had operated more smoothly in the report period, i.e. the year of 2007. He stressed that the Administration and LEAs had no intention of being disrespectful to the panel judges or the Commissioner.

25. Mr WONG Yuk-man expressed strong dissatisfaction with the way the senior officers of ICAC responded to questions raised by Members. He said that he was frustrated with their disrespectful attitude. He shared Mr Ronny TONG's concern as to whether ICAC respected the rule of law in discharging its duties.

26. In response, Director of Investigation (Government Sector), ICAC stressed that integrity, professionalism, respect for the rule of law and the rights of citizens were core values upheld by ICAC. He said that ICSO was a new statutory regime governing the conduct of covert operations including telecommunications interception and the scrutiny by the Commissioner over such operations. As already pointed out in the Report by the Commissioner, there were a number of legal issues requiring clarification, possibly through legislative amendment. When in doubt, the ICAC would seek legal advice from DoJ. For ICSO-related issues that had service-wide implication on law enforcement, ICAC would consult SB.

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27. Ms Cyd HO questioned whether the reports of irregularity mentioned in the Commissioner's Report represented only the tip of an iceberg. She considered that the Administration should conduct a comprehensive review on ICSO without further delay. The review should cover the authority for authorizing all interception of communications and Type 1 surveillance operations, which was now vested in one of the three to six judges of the Court of First Instance appointed by the Chief Executive as panel judges.

28. S for S noted the suggestion and replied that the Administration would take into account the views expressed by Members in the comprehensive review of the Ordinance.

29. The Deputy Chairman held the view that without sufficient safeguards against abuse, there could be a temptation for law enforcement officers to listen to LPP communications even though they knew that they could not retain the communications or use them in court. He suggested that consideration should be given to engaging an independent party, such as the Office of the Commissioner on Interception of Communications and Surveillance, to be responsible for listening to interception product. In his opinion, this measure would serve as a safeguard against LEAs since staff members of the Commissioner's Office would screen out any LPP information before passing it to the investigators for their retention. The Deputy Chairman was also concerned whether LEAs might stop reporting cases of irregularities to the Commissioner for fear of attracting criticism.

30. S for S said that he did not accept the Deputy Chairman's remarks as they were mere surmise and were an insult to LEAs.

31. Members agreed that the Panel should continue discussion with the Administration and ICAC at a future meeting.

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(Post-meeting note: The issue would be discussed again at the regular meeting of the Panel scheduled for 3 March 2009.)

32. There being no other business, the meeting ended at 7:45 pm.

Council Business Division 2
Legislative Council Secretariat
___ February 2009