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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the special meeting on 7 December 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 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 in 2006, 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.

Past discussions of the Panel

4. Since the commencement of ICSO on 9 August 2006, the Commissioner has submitted two annual reports to CE. The first one covered the period from 9 August 2006 to 31 December 2006, and the second for the whole year of 2007. The Security Bureau (SB), in consultation with the law enforcement agencies (LEAs) concerned,

had studied the matters raised therein and briefed the Panel at four meetings on the results of the Administration's study of matters raised in the two annual reports.

5. The following paragraphs set out the major areas of concern raised by members.

Protection of information subject to legal professional privilege and privacy of members of the public

6. Members expressed deep concern about how LEAs handled interception products involving information which might be subject to legal professional privilege (LPP). Members considered that LEAs should be mindful of the need to protect LPP in carrying out interception or surveillance operations, as failure to observe the requirements of ICSO regarding handling of LPP would have an adverse impact on LEAs' reputation.

7. The Administration responded that section 59(2)(b) of ICSO and paragraphs 124 and 169 of the Code of Practice (CoP) provided adequate safeguards for protected products, including those containing information subject to LPP. ICSO and CoP required that any intercepted product containing information that was subject to LPP should be destroyed as soon as reasonably practicable.

8. Members were also concerned whether LEAs carried out interception in a responsible manner and complied closely with the requirements and spirit of ICSO to ensure that the intrusion into privacy of the subject of the prescribed authorization, albeit a suspected offender, would not be continued unless it was necessary and reasonable.

9. The Administration advised 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. Whenever an application was made to the relevant authority (panel judge or authorizing officer) for a prescribed authorization, the relevant authority would assess whether the conditions for issue of the prescribed authorization as set out in section 3 of ICSO were met. Applications for renewal of prescribed authorizations were also subject to stringent requirements. 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 individuals concerned.

10. Some members requested expanding the content of the Commissioner's annual report to include the numbers of applications received from and authorizations issued or renewed for respective LEAs, as well as more detailed information on renewal cases.

11. The Administration responded that it was concerned that the provision of too much information in the Commissioner's annual report might reveal the investigation capability of LEAs, and would be prejudicial to the prevention and detection of crime and the protection of public security. Notwithstanding this concern, the Administration undertook to refer members' request to the Commissioner for consideration.

12. Hon James TO suggested that consideration should be given to engaging officers or organizations independent from any LEAs, such as the Office of the Commissioner on Interception of Communications and Surveillance, to be responsible for listening to interception products. In his view, this measure would serve as a safeguard against LEAs since staff members of the Commissioner's Office would screen out any suspected LPP information before passing it to the investigators for their retention. The Administration responded that it would consider the suggestion when conducting the comprehensive review of ICSO.

13. Some members noted from the Commissioner's Annual Report 2007 that some conversations containing LPP information or possible LPP information might touch on matters not directly related to legal advice but useful for crime prevention or detection purposes relating to the offence for which the prescribed authorization was granted or to other offences. They also noted that the Commissioner had raised a query on whether LPP information obtained in this manner could be used for criminal investigation purposes. These members sought clarification on whether information subject to LPP, if obtained, could be used for crime prevention or detection purposes.

14. The Administration responded that it had already made its stance clear to LEAs that any information subject to LPP was to remain privileged notwithstanding that it had been obtained pursuant to a prescribed authorization. As a matter of fact, ICSO required that any telecommunications interception product should not be admissible as evidence in any proceedings before any court and should not be made available to any party to these proceedings. LEAs must fully observe the requirements of ICSO in their handling of LPP matters.

15. Hon LEUNG Kwok-hung was of the view that penalty should be introduced for non-compliance with the provisions in ICSO or CoP. He suggested that the Administration should consider making the use of LPP information obtained through interception of telecommunications for any purposes a criminal offence.

Law enforcement officers' compliance with the statutory requirements

16. Some members were concerned that the cases of irregularities as reported in the Commissioner's Annual Report 2007 which involved inadvertent obtaining of LPP information had aroused grave concern in the community, including the legal sector, over law enforcement officers' understanding of and compliance with the relevant requirements under ICSO.

17. The Administration advised that 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 ICSO. While the Commissioner had identified some inadequacies of individual law enforcement 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. The Commissioner had also stated in his Annual Report 2007 that he was satisfied that LEAs were on the 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.

Differences in the interpretation of provisions in the legislation

18. Members were concerned that LEAs and panel judges held different interpretations on a number of provisions in ICSO, such as the power of panel judge to revoke an authorization that had been granted, to impose additional conditions when confirming an emergency authorization and to revoke a device retrieval warrant. Some members queried whether LEAs were challenging the rule of law, the power of panel judges and the views of the Commissioner. They took the view that if LEAs questioned the power of the panel judge to revoke the prescribed authorization, LEAs 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 to seek for a declaration of a proper interpretation of the statutory provision.

19. The Administration responded that although the annual reports had revealed that there was occasional disagreement between LEAs and the Commissioner on the interpretation of certain provisions of ICSO, there was no question of LEAs being disrespectful to panel judges or the Commissioner. In the LPP case referred to in the Commissioner's Annual Report 2007, the LEA concerned had accepted the panel judge's view and discontinued the covert operation as soon as reasonably practicable.

20. The Administration further advised that LEAs had adopted pragmatic measures to address the Commissioner's concerns and resolve the differences in views between them regarding the power of panel judge to revoke an authorization. SB had amended CoP where appropriate to address the issues identified in the annual reports. 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 Commissioner's second full-year report for the year ending 31 December 2008 was available. The review would provide an opportunity for the Administration to identify further legislative improvements to ICSO.

21. The Administration stressed that notwithstanding the possible need to refine ICSO when the Administration next reviewed the legislation, the issues raised by the Commissioner in his annual reports 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.

Political monitoring

22. Some members were concerned whether law enforcement officers would carry out interception of communications for political monitoring under the name of crime investigation. They suggested that the Commissioner should consider disclosing in his annual report any political monitoring identified.

23. 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 covert operations under ICSO being conducted for political monitoring. The Administration reiterated 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.

Latest development

24. The Commissioner has submitted his Annual Report 2008, covering the period from 1 January 2008 to 31 December 2008, to CE in June 2009. CE has caused a copy of the Annual Report 2008 of the Commissioner to be laid on the table of LegCo at its meeting on 2 December 2009. The Administration will brief the Panel on its responses to matters raised in the Annual Report 2008 on 7 December 2009.

Relevant papers

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

Minutes

- (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) minutes of the meeting of the Panel on Security on 16 February 2009 (LC Paper No. CB(2)1208/08-09);
- (d) minutes of the meeting of the Panel on Security on 3 March 2009 (LC Paper No. CB(2)1420/08-09);

Papers

- (e) 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));
- (f) Administration's responses to issues raised at the Panel meeting held on 6 November 2007 (LC Paper No. CB(2)462/07-08(01)).
- (g) Administration's paper entitled "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 No. CB(2)808/08-09(01));
- (h) Information paper provided by Independent Commission Against Corruption in response to issues raised in Chapter 5 of the Annual Report 2007 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance for the special meeting on 16 February 2009 (LC Paper No. CB(2)889/08-09(01)); and
- (i) Information paper provided by Independent Commission Against Corruption in response to issues raised by members at the special meeting on 16 February 2009 (LC Paper No. CB(2)990/08-09(01)).

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