

For information

Legislative Council Panel on Security

**Annual Report 2008 to the Chief Executive by
the Commissioner on Interception of Communications and Surveillance**

**Information Paper by the ICAC
in response to issues raised in the Report**

Purpose

This paper provides information in response to issues raised in the Annual Report 2008 to the Chief Executive (**the Report**) by the Commissioner on Interception of Communications and Surveillance (**C/ICS**).

Background

2. ICAC fully recognizes the importance of striking a right balance between effective law enforcement and protection of individual's privacy. Since the inception of the Interception of Communications and Surveillance Ordinance (**ICSO**), ICAC officers have strived to conduct interception and covert surveillance in strict accordance with legal requirements.

3. ICAC notes that while C/ICS is generally satisfied with the overall performance of the law enforcement agencies and their officers in their compliance with the requirements of the ICSO, he has pointed out in Chapter 7 of the Report two cases of more serious non-compliance (i.e. Report 1 and Report 2) involving ICAC officers. He has also identified a number of issues of concern. ICAC fully accepts the comments and criticisms of C/ICS regarding the performance of individual ICAC officers in the way they carried out their duties relating to ICSO. ICAC regrets the inconvenience and frustration that this has caused C/ICS in his review of the cases. C/ICS's comments and recommendations have been taken fully on board, and internal procedures and guidelines have been strengthened aiming at preventing occurrence of similar incidents.

Issues of Concern

Disparate disciplinary actions

4. This issue relates to an irregularity concerning the inclusion of a wrong facility number in the application for and the obtaining of a prescribed authorization for interception resulting in the interception for a few days of a facility of a person who was not the subject under investigation (i.e. Report 1). Upon discovery, ICAC duly reported the incident to C/ICS. A full investigation was then conducted by the Compliance Assurance Group¹ to determine, among other things, the appropriate disciplinary actions to be taken. Taking into account a number of matters including the duties and responsibilities of the officers concerned, the nature and extent of contravention and mitigating circumstances, the four officers concerned were variously awarded with either a disciplinary warning or a disciplinary advice.

5. In reviewing the case, C/ICS considered that the disciplinary treatments of the officers were unequal and disparate. ICAC noted C/ICS's comments and analyses and appreciated his concerns. In the light of his observations, the ICAC management has reviewed the disciplinary actions taken and considered that they were not inappropriate or unfair. This notwithstanding, ICAC has also assured C/ICS that his comments would be taken into consideration in the performance review of each and every officer concerned together with other aspects of their performance.

6. As mentioned in paragraph 7.27 of the Report, C/ICS accepts that disciplinary matters are squarely within the autonomy of the department concerned and the Administration, and in order to avoid any semblance of his interfering in these matters by dwelling on his reasoning in the Report, C/ICS

¹ The Compliance Assurance Group, which was set up in April 2008, is headed by a Principal Investigator. The Group is tasked exclusively with the duty to carry out investigations into circumstances leading to cases of irregularity or non-compliance under the ICSO regime and reports directly to Director of Investigations (Government Sector) on such investigations.

has separately written to the Chief Executive to provide him with details of the facts of the case and of his reasoning pursuant to section 50 of the ICSO².

7. In view of the seriousness of the matter, an independent review was conducted and conclusion was reached that ICAC had acted within a reasonable range.

Competency of Chief Investigator (B)

8. Also in relation to Report 1, C/ICS doubted the competence and suitability of the Chief Investigator in charge of the investigation (i.e. CI(B)) in performing functions under the ICSO. ICAC took a serious view of the concern of C/ICS and had reviewed CI(B)'s applications for prescribed authorizations since the occurrence of this case and found no irregularity. CI(B) has received continuous training on ICSO applications and implementation through attending regular in-house briefings and workshops, with a view to ensuring his proper performance in ICSO-related matters. ICAC will continue to closely monitor the officer's performance in discharging ICSO-related functions. Appropriate management measures will apply if deficiency is detected.

Non-preservation of intercept products and related records

9. This issue relates to LPP Case 2 the first part of which was dealt with by C/ICS in the 2007 Annual Report. The 2008 Annual Report dealt with the latest development of the case (as Report 2) that took place in the latter half of 2008.

10. The incident of non-preservation was a subject of much concern and discussions following the release of the 2007 Annual Report. ICAC fully accepts that there was clear inadequacy and a lack of alertness on the part of the Responsible Officer and his team, as they were not alert to the express requirements of preservation of relevant material for C/ICS's examination. The Responsible Officer was personally advised by the

² Section 50 of the ICSO provides that in addition to the submission of Annual Report to the CE, C/ICS may from time to time submit any further report to the CE on any matter relating to the performance of his functions under the ICSO as he thinks fit.

Commissioner, ICAC for his inadequacy and the same advice was relayed to his officers. ICAC has since implemented new preservation procedures which were followed in LPP Case 4 reported in the 2007 Annual Report, and the only LPP Case reported in the 2008 Annual Report. Such preservation requirements are now strictly followed by ICAC officers in reporting any LPP case to C/ICS, who is satisfied with the current arrangements.

Non-compliance of the listener

11. In relation to LPP Case 2, the listener was found not to have been sufficiently vigilant in responding to information which might be subject to LPP, and was given a disciplinary advice. He was also found to have ignored the instruction given by his supervisor and had breached the condition imposed by the panel judge on the authorization which requires that the case would need to be brought back to a panel judge for re-assessment as soon as any LPP information was likely to be obtained. Investigation did not reveal any evidence that he had any ulterior motive. He was subsequently given a disciplinary warning for the non-compliance which C/ICS considered appropriate.

12. Since the incident, listeners have been given regular training and briefings on ICSO implementation, and are regularly reminded to remain vigilant in performing listening duties especially in regard to information that might be subject to LPP.

Inaccurate or confusing information provided by ICAC to C/ICS

13. In following up on LPP Case 2, C/ICS criticised that ICAC provided inaccurate and confusing information concerning whether the preserved record can show the duration of access made by individual listeners to their assigned facilities. When ICAC first presented the information to C/ICS in January 2008, ICAC was unaware that the record had not accurately showed the access made by individual listeners to their assigned facilities. In August 2008, C/ICS sought further clarification of the matter. Only then did ICAC discover that the information in the record did not represent the exact duration of actual listening to the assigned facilities by the listeners. ICAC had no intention to mislead C/ICS in its reply.

Way Forward

14. ICAC remains committed to ensuring full compliance with the ICSO requirements in conducting interception and covert surveillance. We will continue to render full co-operation and support to C/ICS in the performance of his statutory duties, and welcome his comments and suggestions for the improvement of our work. Although investigations into the cases of non-compliance have not revealed any evidence of bad faith on the part of the ICAC officers, we accept that the officers should have been more vigilant in the implementation of the ICSO and in responding to requests by C/ICS to facilitate the performance of his statutory duties.

15. In the light of practical experience gained since the inception of the ICSO regime and having had the benefit of the advice and recommendations given by C/ICS, ICAC has introduced a number of improvement measures with a view to ensuring that the relevant statutory activities are carried out in strict compliance with legal requirements. These include:

- (i) conducting regular briefings and training workshops to ensure that officers concerned with ICSO duties are kept abreast of the latest legal and administrative requirements;
- (ii) strengthening the existing internal guidelines for conducting interception and covert surveillance, such as procedures in handling information which might be subject to LPP and procedures to verify telecommunications facilities; and
- (iii) setting up a dedicated Compliance Assurance Group to ensure full compliance with the law and relevant requirements and to answer any queries raised by C/ICS in the performance of his oversight functions.

16. As part of ICAC's on-going efforts to seek improvements in its performance in implementing the ICSO, ICAC has recently invited C/ICS to conduct an in-house seminar for ICAC officers to share his experience and to seek his advice on best practices. The seminar was held on 3 November 2009 with over 200 officers attending.

17. The ICAC will make continuous efforts to enhance training for the officers involved in ICSO duties, to review internal procedures for improvement and to ensure that cases of irregularity and non-compliance are promptly and properly dealt with.

**Independent Commission Against Corruption
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