

(Translation)

Briefing on 'Annual Report 2008'
by Mr Justice Woo
Commissioner on Interception of Communications and Surveillance
(7 December 2009 at 11 am)
Conference Hall, 1/F, Central Government Offices New Annexe

SPEECH

1. Welcome to this briefing.
2. It has been more than three years since the Interception of Communications and Surveillance Ordinance ('ICSO' or 'the Ordinance') came into force on 9 August 2006. As the Commissioner on Interception of Communications and Surveillance, my main function is to oversee the compliance by the four law enforcement agencies ('LEAs'), namely, the Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption ('ICAC') and their officers with the requirements of the Ordinance, including complying with the requirements of the Code of Practice issued by the Secretary for Security pursuant to the Ordinance and the conditions in the prescribed authorizations.
3. The 'Annual Report 2008' is my third annual report, which was submitted to the Chief Executive on 30 June 2009. The Report covers the period from 1 January to 31 December 2008.

Number of authorizations

4. In 2008, a total of 1,924 prescribed authorizations (including fresh and renewed authorizations) were issued, of which 89% (1,719) were judge's authorizations for interception, 5% (98) were judge's authorizations for Type 1 surveillance and 6% (107) were executive authorizations for Type 2 surveillance (issued by designated authorizing officers of the LEAs). These authorizations included seven authorizations (about 0.4 %) issued upon oral application (all for Type 2 surveillance) and 51 authorizations (about 3%) that had been renewed for more than five times.

5. During the report period, a total of 28 applications were refused (including 26 applications for interception and two applications for Type 2 surveillance). For reasons for refusal, please see paragraph 2.6 of Chapter 2 and paragraph 4.3 of Chapter 4 of this Annual Report ('the Report').

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

7. During the report period, a total of 603 persons were arrested as a result of or further to the interception or covert surveillance carried out pursuant to prescribed authorizations.

Legal professional privilege

8. Paragraph 120 of the Code of Practice requires LEAs to notify me of cases where information subject to or might be subject to legal professional privilege ('LPP') 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. In 2008, I received one report on inadvertent obtaining of information subject to LPP. The report was from ICAC.

10. The case happened in late January 2008. As the call intercepted contained LPP information, the department considered that there was material change of circumstances and reported this to the panel judge using form REP-11. The panel judge revoked the authorization subsequently and the facility was disconnected 12 minutes after the revocation of the authorization. The department reported this case to me in accordance with the Code of Practice and preserved the relevant records for my review. I went to the ICAC in March 2008 and listened to the recording of the LPP call. I found that the REP-11 report had truthfully reported the gist of the conversation and there was no material non-disclosure. I also inspected the written summaries. They did not contain any information about the LPP call. For details of the review and an issue arising from it, please refer to paragraphs 5.5 to 5.19 of Chapter 5 of the Report.

11. In the light of my experience in handling the four LPP cases in 2007 and the fifth one in 2008 mentioned above, in paragraph 5.90 of my 'Annual Report 2007' submitted to the Chief Executive in June 2008, I proposed to adopt a practice of checking the intercept product only when an authorization is allowed to continue despite the obtaining or likely obtaining of LPP information or when it is necessary to do so in the hope of resolving doubts.

12. After I submitted my 'Annual Report 2007', I was apprised of doubts regarding the legitimacy or propriety of my listening to products derived from interception of telecommunications facilities. Those who expressed the doubts referred me to a decision of the Supreme Court of Canada, *Privacy Commissioner of Canada v Blood Tribe Department of Health & Ors*, 2008 SCC 44 (17 July 2008) and considered that I had no authority to listen to the recording of intercept products. They considered that I did not have a duty to verify the statements made by the LEAs in their REP-11 reports which were submitted to the panel judges in compliance with the conditions of the prescribed authorizations. They considered that my listening to intercept products was not to meet the needs of public security or of investigation into serious criminal offences (ie not meeting the conditions in section 3 of the Ordinance) and that under section 59(1)(a) of the ICSO, LEAs had a general duty to ensure that the extent to which, and the number of persons to whom, intercept products were disclosed be limited to the minimum that was necessary for the purpose of prevention or detection of serious crime or protection of public security. They also considered that there was absence of express unambiguous words in the Ordinance empowering me to listen to intercept products.

13. I consider that my case was different from the Canadian case. Based on my experience in dealing with LPP Case 2 in 2007, I consider that there is a need for me to listen to the recording of the intercept product to verify if the REP-11 report has made a full and frank disclosure to the panel judge without withholding any information or misleading the panel judge so that the authorization would not be revoked. Regarding LPP Case 3 in 2007, the time of decision made by the department to discontinue the interception operation and the ground for discontinuance were dubious. If I could listen to the recording of the calls intercepted before and after the alleged LPP call, I could have found out if there was

anything behind.

14. The greatest obstacle to my listening to intercept products seems to be posed by the holding of the Canadian Supreme Court on provisions conferring general power. It may be argued that the powers conferred on me by section 53 of the ICSO to require production of documents or information by any person and to determine the procedure to be adopted in performing any of my functions under the Ordinance are not wide enough to entitle me to listen to the recording of calls involving LPP information. This matter of legality should be seriously considered and resolved by the Legislature in its review of the provisions of the Ordinance. Arguments for and against the matter in dispute are set out in paragraphs 5.20 to 5.35 of Chapter 5 of the Report.

Journalistic material

15. There is no provision in the Ordinance and the Code of Practice requiring LEAs to report to me incidents where information which may be the contents of journalistic material has been obtained. The Code of Practice is also silent on how to deal with the matter if such material has been obtained. I suggest that these doubts should be clarified when the Ordinance or the Code of Practice is reviewed.

16. During the report period, I did not receive any report that journalistic material had been obtained.

Applications for examination under section 43 of the Ordinance

17. Any person who suspects that his communications have been intercepted by any of the LEAs or he is the subject of covert surveillance by the LEA, he may apply to me for examination under section 43 of the Ordinance. In 2008, I received a total of 16 applications for examination of which five were subsequently not pursued by the applicants. Of the remaining 11 applications, two are covered by section 45(2) which means that criminal proceedings are pending and until the criminal proceedings have been finally determined, I cannot carry out or proceed with the examination.

18. Regarding the 11 applications for examination, I found eight of these cases not in the applicants' favour and I have notified them in writing. The Ordinance does not allow me to provide reasons for my

determination. Processing of the remaining three cases had not yet been completed at the time of writing this Report. For details, please refer to paragraphs 6.3 to 6.5 of Chapter 6 of the Report.

Notification to relevant person under section 48 of the Ordinance

19. If I find that any of the LEAs have conducted interception or covert surveillance without the authority of a prescribed authorization, I may issue a notice to the relevant person pursuant to section 48(1) stating whether the case is one of interception or covert surveillance and the duration of the covert operation. The Ordinance does not allow me to give details further to those mentioned above. However, section 49(2)(e) of the Ordinance requires me to provide an assessment on LEAs' overall compliance with the relevant requirements. If I were not allowed to disclose the facts of the irregularities in the annual report, the public would not be able to know whether my criticism of a particular LEA or an LEA officer is justified, or whether the disciplinary action taken by the department against any officer is fair and appropriate. In view of the conflict between section 48 and section 49(2)(e) when carried into practice, I hope that the authorities concerned could tackle this when reviewing the Ordinance. At the very least, I should be given the discretion to disclose relevant facts of the irregularities without any fear of criticism that I do not comply with the spirit and intent of section 48. The arguments are given in paragraphs 7.4 to 7.8 of the Report.

20. In 2008, I gave notice to a relevant person under section 48 of the Ordinance for interception conducted without the authority of an authorization. Having considered the written submission of the relevant person and other factors, I made an order under section 44(3) of the Ordinance for the payment of compensation in the sum of \$10,000 by the Government to the relevant person. Please see paragraphs 6.6 to 6.10 of the Report.

Cases of non-compliance and irregularities

21. Where the head of an LEA considers that there may have been non-compliance by the department or any of its officers with any relevant requirement, he shall submit a report to me under section 54 of the Ordinance. In the report period, I received four reports submitted under section 54 of the Ordinance. These are Reports 1 to 4 referred to

in Chapter 7 of the Report.

Report 1

22. This non-compliance originated from a clerical mistake made by an ICAC officer (ie Senior Investigator (A)) who transposed two of the digits of the facility number of the subject resulting in a wrong facility number being stated. Several other officers also committed mistakes one way or another in the verification process resulting in the use of the wrong facility number to apply to the panel judge for authorization for interception which was duly granted. This led to the interception of the facility of an innocent person, who was not the subject under investigation, for a few days. Four ICAC officers involved in this case were disciplined. But I consider that the disciplinary treatment of Senior Investigator (B) was unfair. In the process, he was the only person who discovered the discrepancy between the correct and wrong facility numbers. He immediately reported the discrepancy to his superior officer Chief Investigator (B) and followed the latter's instructions to verify the facility number. But Chief Investigator (B) ignored the result of his verification and used the wrong facility number in the application to the panel judge for authorization. ICAC gave a warning to Chief Investigator (B). It similarly gave a warning to Senior Investigator (B) who discovered the discrepancy. As for Senior Investigator (A) who stated wrongly the facility number, ICAC only gave him an advice. I consider that when compared with his superior officer and the officer who stated wrongly the subject facility number, Senior Investigator (B) has not been treated fairly. I wrote to the Commissioner, ICAC several times on this matter but the department considered that the disciplinary actions taken against the officers concerned were appropriate and there was no unfairness. I feel strongly that if the department considers that the disciplinary punishment of warning given to the superior officer Chief Investigator (B) was appropriate, then the punishment of warning given to Senior Investigator (B) was too harsh. Conversely, if the department considers that the level of punishment to Senior Investigator (B) was appropriate, then the punishment of his superior officer Chief Investigator (B) was too lenient. I appreciate that I have no right or power to interfere with disciplinary matters of departments. But I consider that I have a duty to record in the annual report matter I consider unfair. As a matter of fact, unfair or

inappropriate disciplinary action gives the impression that the department is magnifying the culpability of the junior while playing down the mistakes committed by the superior. It shows that the one who created the mistake was punished lightly while the one who discovered the mistake was punished more severely. This will make officers who work faithfully lose heart. This will also encourage officers who have been entrusted with responsibility not to be serious with their work. At the time when I submitted this Annual Report to the Chief Executive, I separately submitted to the Chief Executive a further report with details of the case and my reasoning on why the case was unfair, pursuant to section 50 of the Ordinance.

23. When I reviewed this case, I also doubted the competency of the superior officer Chief Investigator (B) in performing functions under the ICSO. But the department responded that it was satisfied with the performance of this officer after this incident.

24. Details of the review of the above case are set out in paragraphs 7.9 to 7.33 of the Report.

Report 2

25. This case relates to LPP Case 2 in my 'Annual Report 2007' with the new development in the latter half of 2008. In this case, the listener committed two mistakes: (i) On the morning of 13 November 2007, the listener listened to a call but did not realize that it contained information which might be subject to LPP until he re-listened to it in the afternoon after listening to some 20 calls in between. (ii) When he reported the case to his supervisor, his supervisor instructed him to put on hold the monitoring exercise but he continued to listen to another call, breaching the instructions given by the supervisor and the further condition of the authorization. For the first mistake, the department gave the listener a strong advice. For the second mistake, the department gave him a warning. Regarding the first mistake, when I reviewed the case in depth, the department reversed its version and stated that the information it provided to me previously was not correct. The department considered that since there was uncertainty over the duration of the listener's listening, it could have been that he did not actually access that part of the call containing LPP information. Hence, the department considered that the disciplinary punishment given to him

might have to be reviewed. I took a different view. I was also disappointed with the way individual ICAC officers handled this LPP case, which had wasted a lot of my time. For details, please refer to paragraphs 7.34 to 7.97 of the Report.

Reports 3 and 4

26. These two reports covered nine authorizations. Because of system failure, discontinuance of the interceptions of the facilities concerned failed to take effect by the time the authorizations expired. The department informed me that it had preserved records for my review. However, the officer who was tasked with preserving the records did not preserve the records to prove that there was no communication between the time the authorizations expired and the time the interceptions were discontinued. He considered that I could obtain the best first-hand independent evidence from other avenues and it was no big deal that he did not preserve the records for my review. I was disappointed with the attitude of this officer. For details, please refer to paragraphs 7.98 to 7.109 of the Report.

27. In addition, during the report period, the LEAs also submitted to my Secretariat seven reports on irregularities (ie Reports 5 to 11 referred to in Chapter 7 of the Annual Report). These reports were not submitted under section 54 of the Ordinance because the LEAs did not consider that these irregularities involved any fault of their officers.

Reports 5 to 8

28. They involved seven authorizations which were revoked under section 58 of the Ordinance. The interception operations were discontinued sometime after the revocation of the authorizations resulting in unauthorized interception ranging from ten odd minutes to an hour.

Report 9

29. Due to oversight, an LEA officer failed to allow sufficient time for processing the discontinuance of an interception resulting in the discontinuance of the interception being completed three minutes after the expiry of the authorizations.

Report 10

30. It was discovered that a facility was intercepted for 21 hours without the authority of a prescribed authorization. I found that this interception was caused by a combination of factors not due to the fault of the LEA.

Report 11

31. Four discontinued interceptions were reactivated for a few hours due to technical complications at the CSP's end.

32. I consider that Reports 5 to 9 should have been submitted under section 54. My reason was set out in paragraph 7.128 of the Report. Although my view regarding Reports 5 to 9 is different from that of the heads of LEAs concerned, I cannot say that they must be wrong because section 54 specifically imposes the obligation of reporting thereunder where the head of the LEA considers that there may have been a case of non-compliance by it or by its officers, and not where I or anyone else so consider. The present practice of LEAs reporting such cases to my Secretariat as incident reports is merely out of goodwill. If they choose not to report at all, they are not acting contrary to the provisions of the Ordinance. Of course, I can invoke section 53 of the Ordinance to require them to submit a report on a particular case or to provide information on it. But if I do not know the occurrence of a particular case, there is no question of my invoking my power under section 53 to require them to submit a report. Without their reports, it would be difficult for me to discover that these irregularities have ever occurred. Hence, I suggest that appropriate amendments should be made to the Ordinance to include a duty of the LEA heads to report to me promptly whatever irregularity in the operation of the ICSO Scheme instead of leaving such reporting as a matter of goodwill or at most gentlemen's agreement.

New initiative: proposed system of checking of intercept products and related records

33. After the publication of my 'Annual Report 2007', Legislative Council Members and members of the legal profession expressed concern over whether there was any measure to safeguard against non-reporting of LPP cases to the panel judges and me. In this

regard, in April this year, I proposed to the Security Bureau a new initiative, that is, to require LEAs to preserve the intercept product of each and every interception and related records to enable my staff and me to check cases of special interest or chosen at random. All such records should be preserved at the premises of individual LEAs concerned and only I and such staff of mine as designated by me could have access to them. LEA officers and any other persons should not be allowed access to these materials. The benefits that could be achieved through this new system of checking are outlined in paragraph 9.4 of Chapter 9 of the Report. Briefly, this new checking system can prevent or expose cases where LPP information or journalistic material is involved but no report to the panel judge and me has been made. It enables the checking of the intercept product against the REP-11 report so as to thwart or expose any attempt at misrepresentation in the report to mislead the panel judge to allow the authorization to continue. It can ensure that the person using the telecommunications under interception is actually the subject of the prescribed authorization, which will help thwart any attempt or expose any misdeed by an LEA to use a disguised identity as a subject for intercepting the telecommunications of a person without justification. It can also, by random selection of cases discontinued under section 57 of the Ordinance, check the intercept product to ensure that such discontinuance is not used to avoid exposure of mistakes or acts done without authority. Details of this new initiative, its advantages and disadvantages and the resources required can be found in paragraphs 9.2 to 9.11 of Chapter 9 of the Report.

34. Moreover, I also wish to supplement. Section 61(4) of the Ordinance provides that if an LEA obtains from the intercept product any information which might be capable of undermining the case for the prosecution against the defence or of assisting the case for the defence in criminal proceedings, the department **shall** disclose the information to the prosecution, so that the prosecution will inform the trial judge. However, under the existing system, if the department does not so disclose to the prosecution, nobody would know. But with the proposed new method of checking mentioned above, there would be a chance of discovering such non-compliance or it could deter such non-compliance.

35. My proposed new initiative is still under consideration by the Security Bureau. The Bureau has not indicated its position. If my

proposal is accepted for implementation, amendment to the Ordinance is required to put it into effect.

36. Chapters 8 and 9 of the Report also contained my recommendations to the Secretary for Security and heads of LEAs on some practical issues and other matters, such as improving the procedural arrangements and the forms, etc. All these can help improve the performance and effect of the oversight function.

Conclusion

37. In Chapter 11 of the Report, I gave an assessment on LEAs' overall compliance with the relevant requirements. The cases in Report 1 and Report 2 were more serious, and the case in Report 1 also involved unfair treatment in punishment. Report 3 and Report 4 reflected the attitude problem of the officer tasked with preserving records. Apart from these, the performance of LEAs is by and large satisfactory.

38. I wish to take this opportunity to thank the panel judges, the Security Bureau, the LEAs, the communications services providers and other parties concerned for their assistance and co-operation in the performance of my functions. I also hope that the new initiative I proposed in Chapter 9 can be accepted for implementation as early as possible so that compliance with the relevant requirements could be further improved and the number of non-compliance cases reduced.

39. The above is my introduction of the 'Annual Report 2008'. Questions are welcome. Always heeding the principle that prejudice should not be caused to the prevention or detection of crime or the protection of public security, I shall try my best to answer your questions. 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.]