

立法會
Legislative Council

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by the Administration)

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Panel on Security

**Minutes of special meeting
held on Monday, 29 November 2010, at 2:30 pm
in the Chamber of the Legislative Council Building**

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

Public Officers : Item I
attending

The Administration

Mr Ambrose LEE, GBS, IDSM, JP
Secretary for Security

Ms CHANG King-yiu, JP
Permanent Secretary for Security

Ms Carol YIP Man-kuen, JP
Deputy Secretary for Security

Mrs Millie NG KIANG Mei-nei
Principal Assistant Secretary for Security

Ms Roxana CHENG Pui-lan
Deputy Solicitor General (Constitutional) (Acting)
Department of Justice

Mr Godfrey KAN Ka-fai
Senior Government Counsel
Department of Justice

Independent Commission Against Corruption

Dr 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)
Operations Department

Mr Ricky YAU Shu-chun
Assistant Director 3
Operations Department

Clerk in : Mr Raymond LAM
attendance : Chief Council Secretary (2) 1

Staff in attendance : Ms Connie FUNG
Senior Assistant Legal Adviser 1

Mr Bonny LOO
Assistant Legal Adviser 3

Miss Josephine SO
Senior Council Secretary (2) 1

Ms Kiwi NG
Legislative Assistant (2) 1

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I. Results of study of matters raised in the Annual Report 2009 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance
(LC Paper Nos. CB(2)347/10-11(01) and CB(2)351/10-11(01))

Secretary for Security ("S for S") briefed Members on the results of the Administration's study of matters raised in the Annual Report 2009 to the Chief Executive ("the Annual Report 2009") by the Commissioner on Interception of Communications and Surveillance ("the Commissioner"), as detailed in the Administration's paper.

2. At the invitation of the Chairman, Commissioner, Independent Commission Against Corruption ("C/ICAC") provided information about the use of interception of communications and covert surveillance by ICAC officers in the investigation of corruption complaints. C/ICAC also briefed Members on the improvement measures which had been introduced for ensuring compliance with the statutory requirements under the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO").

3. Members noted the following papers tabled at the meeting -

- (a) Speech delivered by the Commissioner at his briefing held in the morning of 29 November 2010; and
- (b) Summary of the Commissioner's Annual Report 2009, which was distributed at the briefing on 29 November 2010.

(Post-meeting note: The above papers were issued to members vide LC Paper Nos. CB(2)419/10-11(01) and (02) on 30 November 2010.)

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Appointment of panel judges

4. Dr Margaret NG expressed dissatisfaction that the Commissioner declined the invitation of the Panel to attend the meeting on the ground that it was not appropriate for him to attend. She said that she was in strong opposition to the present arrangements of appointing senior judges as panel judges for the purpose of considering applications for prescribed authorizations to conduct interception and covert surveillance operations. Expressing concern about the implications of the appointment arrangements, including the role and independence of the panel judges, she urged the Administration to address the issue in the comprehensive review of ICSO.

5. S for S advised that checks and balances were built into the ICSO regime to ensure that a balance was maintained between protecting the privacy of individuals and allowing law enforcement agencies ("LEAs") to conduct interception and covert surveillance operations for the purpose of 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.

Inadvertent obtaining of information which might be subject to legal professional privilege ("LPP") or contain journalistic material

6. Referring to LPP Report 2 in paragraphs 5.22 to 5.38 of the Annual Report 2009, Dr Margaret NG expressed grave concern as to whether the concerned LEA was aware that section 31(1)(a)(ii) of ICSO prohibited the interception of any telecommunications service used at a lawyer's office, residence and other relevant premises in the circumstances described in that section unless exceptional circumstances existed. Dr NG said that she could not understand why the officers concerned continued at their discretion to intercept the third call made to the subject by a person from a landline telephone number, despite their knowledge that one of the parties involved in the communication was a lawyer and it was probable that the telecommunications interception conducted under the prescribed authorization might cover a telecommunications service used at an office of a lawyer or any telecommunications service known or reasonably expected to be known to be ordinarily used by a lawyer for the purpose of providing legal advice to clients.

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7. Deputy Solicitor General (Constitutional) (Acting) advised that in the context of LPP Report 2, section 31(1)(a)(ii) of ICSO did not apply to the situations since the prescribed authorization was not targeted against a lawyer or a telecommunications service used by a lawyer. The Chairman and Dr Margaret NG expressed disagreement with the Administration's interpretation of this provision in ICSO. The Chairman requested the Administration to explain in writing why section 31(1)(a)(ii) of ICSO was not applicable to LPP Report 2 and, if it was the case, whether the Administration had any plan to introduce legislative amendments to enhance the protection of information subject to LPP.

8. Sharing the concern of Dr Margaret NG, the Chairman asked whether the Administration had put in place measures to guard against the risk of contravening section 31(1)(a)(ii) of ICSO for the protection of LPP information.

9. The Deputy Chairman asked whether there were guiding principles for law enforcement officers to decide whether or not to discontinue an interception, when they came to notice that the operation might cover a telecommunications service used at an office of a lawyer or any telecommunications service known or reasonably expected to be known to be ordinarily used by a lawyer for the purpose of providing legal advice to clients.

10. S for S and Assistant Director 3/ICAC responded that officers were always reminded that they should exercise extreme care when approaching possible applications that concerned the premises and telecommunications services used by a lawyer. A risk assessment must be conducted if the interception might acquire information that might be subject to LPP. Officers were also reminded that LPP would apply if a lawyer was giving legal advice to a person who was suspected of having committed a criminal offence. Unless officers were fully satisfied that the exceptional circumstances under section 31 of ICSO existed, they should not make an application for an authorization targeting these premises and telecommunications services. In all such exceptional cases, a panel judge's authorization must be obtained and justification for the proposed interception or covert surveillance should be provided in the affirmation or affidavit supporting the application.

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11. S for S further advised that -

- (a) LPP protected client-lawyer communications from disclosure to a client's prejudice. While LEAs were duty-bound to preserve the confidentiality of information subject to LPP, the ICSO regime had put in place a stringent system with the strict purpose and intent to prevent the passing of any privileged materials to the investigators of LEAs and prohibit any possible reference or use of such materials for investigation or in any legal proceedings. There were specific provisions in ICSO and the Code of Practice issued by the Security Bureau ("SB") to regulate the handling of information subject to LPP;
- (b) as with all other law enforcement actions, LEAs should in no case knowingly seek to obtain information subject to LPP in undertaking interception or surveillance operations authorized under ICSO. Indeed, ICSO sought to minimize the risk of inadvertently obtaining information that might be subject to LPP during such operations. While section 31 prohibited the carrying out of interception or covert surveillance at a lawyer's office, residence and other relevant premises in the circumstances described in that section unless exceptional circumstances existed, section 62 of ICSO provided that any information that was subject to LPP was to remain privileged notwithstanding that it had been obtained pursuant to a prescribed authorization; and
- (c) with regard to LPP Report 2, the Commissioner recommended that in future, apart from considering whether a matter amounted to a material change of circumstances which ought to be reported to the panel judge, the LEA should also put in place appropriate measures to guard against the risk of contravening section 31(1)(a)(ii) of ICSO. The LEA concerned had taken note of the Commissioner's recommendation.

12. S for S pointed out that where LEAs came to the view that circumstances warranted the discontinuation of an operation, it would proactively discontinue the operation and inform the panel judge concerned as soon as practicable.

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13. Referring Members to paragraph 5.37 of the Annual Report 2009, Dr Margaret NG pointed out that the Commissioner had indicated clearly that in LPP Case 2, the obtaining of LPP information on the third occasion could have been avoided had the LEA concerned taken appropriate precautionary measures after listening to the first and second calls. Dr NG considered that the LEA concerned and officers involved had obviously made a grave mistake. She asked whether any disciplinary actions had been taken against those officers found to have acted inappropriately and breached the relevant requirements under ICSO. S for S agreed to provide information on whether and what disciplinary action had been taken in the case.

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14. Mr WONG Yuk-man noted that in 2009, the Commissioner received two reports, which involved three prescribed authorizations, on inadvertent obtaining of information which contained journalistic material. Stressing the importance of protecting press freedom and journalistic material, Mr WONG sought clarification as to whether there were any other cases, since the implementation of ICSO, where journalistic material had been obtained in consequence of interception or surveillance carried out pursuant to a prescribed authorization. He asked about the measures in place to protect the source and content of the journalistic material.

15. In response, S for S advised that -

- (a) to the knowledge of the Administration, other than the two cases mentioned in Chapter 5 of the Annual Report 2009, there was no report in the past from LEAs of any case where journalistic material was obtained in consequence of interception or surveillance carried out pursuant to prescribed authorizations;
- (b) regarding the protection for journalistic material, it should be noted that Schedule 3 to ICSO required an applicant seeking authorization for interception or covert surveillance to state in the affidavit or statement in writing in support of the application the likelihood that any information which might be subject to LPP, or might be the contents of any journalistic material, would be obtained by carrying out the interception or covert surveillance. This allowed the relevant authority to take account of these factors when considering whether the issue of a prescribed authorization met the conditions set out in section 3 of ICSO; and

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- (c) according to the Annual Report 2009, there were two cases assessed by the LEA concerned to likely involve journalistic material. For those cases which were also assessed by the panel judge to have journalistic material implications, additional conditions were imposed to better protect the freedom of the media.

16. Mr WONG Yuk-man considered the Administration's response unsatisfactory. In his view, press freedom and privacy of communication of Hong Kong residents should be protected and could not be compromised. The Administration should have a clear and well defined policy regarding the protection of journalistic material against LEAs' access for the purposes of investigation.

17. The Deputy Chairman asked about the definition of journalistic material, and whether material in the possession of journalists but not yet published was regarded as journalistic material.

18. Assistant Director 3/ICAC responded that the meaning of journalistic material was provided in section 82 of Part XII of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO"). ICAC officers generally interpreted journalistic material as any material acquired or created for the purposes of journalism. To facilitate discussion, the Chairman referred Members to the meaning of journalistic material in section 82 of IGCO.

19. Assistant Director 3/ICAC pointed out that ICSO required an applicant seeking authorization for interception or covert surveillance to state in the affidavit or statement in writing in support of the application the likelihood of obtaining LPP information or journalistic material. If it was likely that information which might be the contents of journalistic material would be obtained by carrying out the interception, the panel judge would, when granting the prescribed authorization, impose a set of restrictive conditions, differentiating between obtaining journalistic material relevant to the investigation and journalistic material not relevant to the investigation. One of the conditions was that upon detecting the involvement of any journalistic material, a report should be made to the panel judge indicating the nature of the journalistic material obtained from such interception, whether the same was relevant to the investigation and whether the interception was still being conducted.

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20. Responding to the Deputy Chairman's enquiry on the exact point of time at which officers carrying out interception would discontinue the operation due to the likelihood of obtaining journalistic material, Assistant Director 3/ICAC said that depending on the circumstances of the case, if the content of a particular conversation was clear enough to indicate the likely obtaining of journalistic material, the incident would be reported to the panel judge for determination. In the two cases mentioned by the Commissioner in the Annual Report 2009 where journalistic material had been obtained inadvertently, the officers listening to the calls only realized the contents of the calls were the subject of journalistic material after the details of the incidents had been published in the newspapers.

21. Mr LEUNG Kwok-hung said that LEAs should be mindful of the need to protect LPP and press freedom, which in his view should be enjoyed by members of the public as an absolute right. He considered that LEAs should discontinue the interception, once the targetted subject was reasonably found to be engaged in the relevant occupations/professions. His view was echoed by the Chairman.

22. In response, S for S emphasized that the Administration had all along respected press freedom, and the relevant provisions in ICSO had already struck a balance between protection of press freedom and protection of the public interest. Since interception or covert surveillance might interfere with the privacy of persons other than the subject of the investigation, ICSO required LEAs to carry out a risk assessment of collateral intrusion and consider ways of minimizing such interference, at the time of applying for the issue of prescribed authorization. Officers involved in the application for and determination of prescribed authorizations should pay particular attention to this concern when considering whether the necessity and proportionality tests in section 3 of ICSO would be met.

Effectiveness of interception and covert surveillance

23. Mr WONG Yuk-man noted that although the numbers of persons arrested had been on the decline, standing at 661, 604 and 366 respectively in the past three years from 2007 to 2009, there had been a general trend of increase in the numbers of authorizations for the carrying out of interception of communications or covert surveillance over the years, from 1 785 authorizations in 2007 to 1 924 in 2008 and further to 1 989 in 2009. Mr WONG considered the numbers of persons

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arrested as a result of or further to interception or surveillance operations disproportionate to the numbers of authorizations issued. He queried the effectiveness of interception or surveillance in leading to arrest and prosecution of those charged with serious crimes.

24. S for S and C/ICAC responded that while interception of communications and covert surveillance operations were critical to the capability of LEAs in combating serious crimes and protecting public security, the number of persons arrested might attribute to a number of factors.

25. Director of Investigation (Government Sector), ICAC ("DI(GS)/ICAC") supplemented that the number of persons arrested did not necessarily have a direct correlation with the number of authorizations granted. To illustrate this point, he said that there would be a time lag between the carrying out of an interception or covert surveillance operation under a prescribed authorization and the taking of arrest action. DI(GS)/ICAC stressed that it was the common view of LEAs that interception was a very effective and valuable investigation tool in the prevention and detection of serious crimes and the protection of public security. Information gathered from interception could very often lead to a fruitful and successful conclusion of an investigation.

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26. The Chairman requested the Administration to provide further information, with supporting analyses and statistics, on the effectiveness of interception and surveillance operations in leading to arrest and prosecution.

Change of attitude and compliance with the statutory requirements among law enforcement officers

27. The Deputy Chairman said that he was glad to note from the Annual Report 2009 that the attitude problem among law enforcement officers towards the Commissioner's oversight and review functions, which had been pointed out by the Commissioner in his two previous annual reports, did not seem to persist any longer. Knowing that LEAs had taken steps to address the attitude problem among law enforcement officers and to ensure their strict compliance with ICSO and full cooperation with the Commissioner, the Deputy Chairman stressed that it was necessary for LEAs to ensure the efficiency and effective working of the reporting systems for material change of circumstances or initial material inaccuracies under a prescribed authorization, and for cases of non-compliance, irregularities and incidents.

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28. In response, S for S said that ICSO was intended to provide for a stringent regulatory regime for the interception of communications and the use of surveillance devices by public officers, in particular to ensure that LEAs respected the privacy and other rights of the public while combating crimes and protecting public security. Despite the few isolated cases of non-compliance and irregularities, the Commissioner had stated in the Annual Report 2009 that he was satisfied with the overall performance of LEAs and their officers in their compliance with the requirements of ICSO. The Administration also noted that the Commissioner had not made any finding that any non-compliance or irregularity was due to deliberate flouting or disregard of the statutory provisions or the law, nor did the Commissioner find any of the officers committing mistakes actuated by ulterior motive. The Commissioner also confirmed that apart from the defects caused by technical problems, the incidents, regardless of whether they involved irregularities or more serious non-compliance, were consequences of inadvertent or careless mistakes or unfamiliarity with the relevant requirements of ICSO.

29. S for S further said that ICSO required that there should be suitable control and checking mechanisms in respect of interception and covert surveillance conducted under ICSO to guard against possible abuse. Regarding the recommendations made by the Commissioner to LEAs, the LEAs concerned had accepted them in full and proposed improvement measures. SB had also amended the Code of Practice, as and where appropriate, to resolve common issues that had implications across LEAs.

30. C/ICAC and Assistant Director 3/ICAC assured Members that ICAC was committed to ensuring its officers' full compliance with the ICSO requirements in conducting interception and covert surveillance. In tandem with the introduction of a package of improvement measures, a dedicated Compliance Assurance Group had been set up to deal with ICSO-related matters. Although investigations into the cases of irregularities or non-compliance had not revealed any evidence of bad faith on the part of ICAC officers, the ICAC management agreed that officers should have been more vigilant in the implementation of ICSO and in responding to the Commissioner's enquiries or requests. ICAC would continue to render full cooperation and support to the Commissioner to facilitate his performance of the statutory functions under ICSO.

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Progress of the comprehensive review of ICSO

31. The Chairman expressed concern over the Administration's work progress in reviewing ICSO, in particular the proposal to amend ICSO to enable the panel judges and the Commissioner to access the interception products. He recalled that at the Panel meeting on 6 July 2010, when the Administration briefed Members on the scope of its comprehensive review on ICSO, the Administration had indicated its intention to introduce legislative amendments to ICSO to address those issues raised and recommendations made by the Commissioner which required legislative amendments for implementation. The Chairman asked whether the Administration could introduce the legislative amendments in the current legislative session.

32. In reply, S for S advised that the comprehensive review of ICSO was on-going. The Administration had briefed Members on the proposed scope of the review at the Panel meeting on 6 July 2010. It would take into account the advice and comments of the Commissioner, panel judges and Members in working out the review recommendations and legislative proposals. While the Administration was committed to maintaining the effectiveness of LEAs in combating serious crimes and protecting public security, it should continue to strive for improvement in the operation of ICSO. It was the plan of the Administration to report to the Panel on the findings of the review and the legislative proposals in the early half of 2011, with a view to introducing an amendment bill to the Legislative Council within the same year.

33. The meeting ended at 4:33 pm.

Council Business Division 2
Legislative Council Secretariat
20 May 2011