

(Translation)

Briefing on 'Annual Report 2009'

by Mr Justice Woo

Commissioner on Interception of Communications and Surveillance

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Conference Hall, 1/F, Central Government Offices New Annexe

SPEECH

1. Welcome to this briefing.
2. It has been more than four years since the Interception of Communications and Surveillance Ordinance ('the Ordinance') came into force on 9 August 2006. The Ordinance is to regulate the conduct of interception of communications and the use of surveillance devices in covert surveillance by the four law enforcement agencies ('LEAs'), namely, the Hong Kong Police Force, Independent Commission Against Corruption, Customs and Excise Department and Immigration Department. As the Commissioner on Interception of Communications and Surveillance, my main function is to oversee the compliance of these LEAs and their officers with the requirements of the Ordinance.
3. On 30 June this year, I submitted my fourth annual report 'Annual Report 2009' to the Chief Executive. The Report covers the period from January to December 2009.

Number of authorizations

4. In 2009, a total of 1,989 prescribed authorizations (including fresh and renewed authorizations) were issued, of which 90% (1,781) were judge's authorizations for interception, 6% (130) were judge's authorizations for Type 1 surveillance and 4% (78) were executive authorizations for Type 2 surveillance (issued by designated authorizing officers of the LEAs).
5. A total of 19 applications for authorization were refused (including 15 applications for interception and four applications for Type 2 surveillance). The refusals were mainly due to inadequate or

insufficient materials to support the application, not meeting the conditions of necessity and proportionality, or no useful information having been obtained pursuant to the preceding authorization.

6. In 2009, a total of 366 persons were arrested as a result of or further to the interception or covert surveillance carried out pursuant to prescribed authorizations.

Legal professional privilege

7. Regarding legal professional privilege ('LPP'), in 2009, I received five reports from LEAs of which only LPP Report 2 involved the actual obtaining of LPP information. For details, please refer to Chapter 5 of this Annual Report ('the Report').

8. When I reviewed these five cases, I did not listen to the audio recording of the intercept products. This was because after the submission of my 'Annual Report 2007' in June 2008 to the Chief Executive, doubts were raised on my power to listen to audio recording of intercept products, with reference to the judgment on 17 July 2008 of a Canadian court case and it was considered that the Interception of Communications and Surveillance Ordinance had no express provision empowering me to do so. In view of this and to avoid people feeling or even criticising that I wilfully act above the law, pending resolution by the Legislature, I decided not to listen to the audio recording of intercept products when I reviewed incidents or irregularities.

9. As I did not listen to the intercept products, I could not verify whether the LEAs had truthfully reported the conversations in the calls to the panel judges, and whether there was concealment of any other calls preceding the reported calls which might have contained LPP information but the LEAs did not report them to the panel judges. Hence, in these five cases, no finding could be made on these two aspects. In fact, the conclusion that only one of the five cases did involve the actual obtaining of LPP information was based on the written reports submitted by the departments on the contents of the calls.

10. When reviewing these cases, I have made some suggestions such as (i) a new audit trail report system should be developed to record the duration of listening by the listener and which part of the call the listener had listened to so as to check whether the listener had accessed

the part containing LPP information; (ii) apart from reporting to the panel judge the number of times that the LPP call had been listened to and the date and time and duration of each such listening, the LEA should also report whether before and after the LPP call, there was any communication between the two telephone numbers concerned; (iii) if an authorization is revoked due to the obtaining or heightened likelihood of obtaining LPP information, and if the LEA intends to listen to or re-listen to any intercept products obtained prior to the revocation of the authorization, the LEA should first obtain the approval of the panel judge.

11. However, I must point out that if the Commissioner on Interception of Communications and Surveillance is not empowered to listen to the audio recording of the intercept products, the above recommendations are futile in exposing any non-compliance or concealment.

Journalistic material

12. Schedule 3 to the Ordinance requires an applicant to state, when applying for a prescribed authorization, the likelihood of obtaining information which may be the contents of any journalistic material ('JM'). However, the Ordinance and the Code of Practice are totally silent on how to deal with applications with such likelihood or how to deal with the matter if such material has been obtained. Nor do the Ordinance and the Code require the LEAs to report such cases to me. In paragraph 9.21 of the 'Annual Report 2008', I already flagged up the above issue so that authorities concerned could explore this in the comprehensive review of the Ordinance.

13. During the report period, I received two reports on obtaining information which contained JM. Before carrying out a review on the first case, I asked the Security Bureau about its position on the legitimacy or propriety of my listening to the audio recording of intercept products. The Security Bureau replied that the matter would be looked into in the comprehensive review of the Ordinance. Hence, when I reviewed these two JM cases, I did not listen to the recordings. As a result, no finding could be made as to the veracity of the gist of the conversation reported by the LEA, and whether there were previous calls which might have contained JM that should have been reported to the panel judge but were not reported.

Applications for examination made under section 43 of the Ordinance

14. Any person who suspects that his communications have been intercepted by an LEA or he is the subject of covert surveillance by an LEA, he may apply to me for examination. During the report period, I received a total of 23 applications for examination. Of these, one was outside the ambit of my functions, five were subsequently not pursued by the applicants, and five had pending criminal proceedings which section 45(2) of the Ordinance mandates me not to carry out an examination in the meantime (one of which is being handled now). For the remaining 12 applications, I had carried out examination on each of them and found these cases not in the applicants' favour.

15. In order not to prejudice the prevention or detection of crime or the protection of public security, the Ordinance does not allow me to give reasons for my determination or indicate whether or not the interception or covert surveillance suspected by the applicant has taken place. Because of this, some applicants might doubt whether I dealt with their applications in good faith. Some complainants may not understand that my purview is confined to the four LEAs. Or they may not understand the definition of covert surveillance under the Ordinance, for example, a complaint of being surreptitiously or openly followed or stalked but without the use of any surveillance device does not fall within the definition of covert surveillance under the Ordinance. In order to let applicants understand the basis on which the Ordinance empowers me to carry out an examination, I have included the above explanations in the website of my secretariat for reference.

16. In the course of my handling applications for examination, I encountered a case where a person submitted an application for examination through his solicitors but died before I carry out an examination. The Ordinance does not make express provision regarding application for examination in respect of a deceased person. I therefore proposed that the Ordinance should address this issue so that I could follow accordingly. For details, please refer to paragraphs 9.9 to 9.15 of Chapter 9 of the Report.

Notification to relevant person under section 48

17. If I find that any of the LEAs has carried out 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) of the Ordinance. In 2009, no such notice was issued by me.

Cases of non-compliance and irregularities

18. In 2009, I received 12 reports of non-compliance or irregularities.

Report 1: The department had a need to carry out a Type 2 surveillance operation and thus applied for an executive authorization. But the department's authorizing officer issued an executive authorization with mistakes. It wrongly authorized the participating agent to use optical surveillance device when in fact such device was not required to be used by him in the operation. The authorization did not restrict the place at which such device could be used so much so that even if the optical surveillance device was used by the participating agent at private place where privacy was expected, it would still be authorized. On the other hand, the authorization omitted to authorize LEA officers to use listening devices and optical surveillance devices required to be used in the operation as a result of which part of the covert surveillance conducted by the LEA officers became unauthorized. This case reflected very badly on the applicant, the applicant's supervisor and the authorizing officer. The department had taken disciplinary actions against the officers concerned in September and October 2010. My review of this case was completed.

Report 2: There was non-observance of the requirement of the Ordinance in that there was no mention of whether in the preceding two years, there had been any application for prescribed authorization to intercept the telecommunications service now sought to be intercepted. The review of this case was completed.

Report 3: Four discontinued interceptions were reactivated for interception for 2 1/2 hours. I had completed the review of this case and was satisfied that the reactivation was not due to the fault of any LEA.

Report 4: The officer-in-charge of the investigation withdrew two sets of surveillance device despite the fact that the executive authorization only authorized him to withdraw one set. Upon discovery of the mistake, he immediately returned the extra set. The department took disciplinary action against this officer in early 2010. The review of this case was completed.

Reports 5 and 6: The original authorizations were revoked immediately upon their renewal being refused. But the interceptions could not be immediately stopped, resulting in a period of unauthorized interception of 19 minutes and 50 minutes respectively. I had completed the review of these two cases and was satisfied that the officers concerned did not wilfully commit this non-compliance.

Report 7: The audio products of telecommunications interception were distributed by mistake to another section of the department. This other section was not responsible for investigation of the crimes concerned. The department submitted a full investigation report to me in March 2010. I have not yet completed the review of this case.

Reports 8 and 9: The persons on whom covert surveillance was conducted exceeded those authorized by the executive authorizations concerned. The departmental full investigation reports were submitted to me in April 2010 and May 2010 respectively. I have yet to complete the reviews.

Reports 10 and 11: The quantity of surveillance devices used in the Type 1 covert surveillance operations might have exceeded the quantity authorized in the prescribed authorizations. The reviews of these two cases have not yet been completed.

Report 12: A call was wrongly intercepted. The department submitted a full investigation report to me in July 2010. My review has not yet been completed.

19. Please refer to Chapter 7 of the Report for those cases where reviews have been completed. For those cases where reviews are on-going, I shall report the findings of the reviews in the next annual report.

Recommendations

20. Chapters 8 and 9 of the Report contain my recommendations to the Secretary for Security and heads of LEAs, including a recommendation that officers whose substantive rank is below that stipulated in the Ordinance should not be designated as authorizing officers.

21. In addition, I had in April 2009 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 (listening to the audio recording of the intercept products) 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. 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 'Annual Report 2008'.

22. I note that some people are concerned that this new initiative would add intrusion into the privacy of members of the public, infringe their right to confidential legal advice or increase the risk of unauthorized disclosure or unintended leakage of confidential information.

23. In this regard, I wish to make the following points:

- (a) Those persons affected by this new initiative are subjects of prescribed authorizations whom the panel judges have authorized to intercept their communications. They are suspected offenders of serious crimes. Under the Ordinance, if there is no reasonable suspicion of a person's involvement in a serious crime or threat to public security, the panel judge will not issue an authorization to intercept his communications. It follows that ordinary citizens will not be the subject of prescribed authorizations. The new initiative will basically not affect the privacy of these ordinary citizens. On the contrary, if on the face of it an LEA applies to a panel judge to intercept the communications of Person A, but in actual fact it intercepts

the communications of Person B, the new initiative may be able to expose such irregularity, thus better protecting the privacy of citizens.

- (b) For the subjects of the prescribed authorizations, their conversations might have been listened to by LEA officers for more than once and by more than one listener of the LEA. Their privacy has already been infringed by LEA officers. The intrusion into privacy caused by my or my staff's listening to their conversations is doubtless an additional intrusion but this additional intrusion is very limited.
- (c) If LEAs intercept calls involving LPP information or JM but did not report these calls to the panel judges, the new initiative would be able to expose such non-compliance. If the new initiative is established as part of the oversight mechanism, it can deter this kind of non-compliance. Viewed from this perspective, the new initiative can better protect people's right to confidential legal advice and JM.
- (d) As I already mentioned last year, 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 did not so disclose to the prosecution, nobody would know. But if the new initiative is implemented, there would be a chance of exposing such non-compliance or it could act as deterrence.
- (e) As regards the worry of unauthorized disclosure or inadvertent leakage of confidential information, even without the new initiative, the risk already exists regarding LEA officers as they could similarly disclose the confidential information in an unauthorized manner or leak it inadvertently. I wish to point out that I and my staff are subject to the Official Secrets Ordinance and our ranks are

not below those of the LEA listeners. There is no reason for only casting doubt on me or my staff in unauthorized disclosure or inadvertent leakage of confidential information. There is also a suggestion that my staff are general grades officers who would be transferred to other government departments after working in my secretariat for a certain period and hence, this would increase the risk of leakage of confidential information. Similarly, the LEA listeners may also leave their existing posts, for example, through promotion, resignation or retirement.

- (f) At present, through inspection visits to LEAs' offices, I and my officers inspected the documents of application for authorization and other related documents in which information obtained through interception may be mentioned. I cannot see the logic that I and my officers could access such confidential information through inspecting documents but there is worry of our accessing such information through listening to the audio recording of the intercept products.

24. The new initiative is very much for deterrence only as it could expose non-compliance or concealment. If the new initiative is not accepted for implementation, then I have to rely on the voluntary reporting by the LEAs. If an LEA chooses not to report either due to misjudgement or any ulterior motive, then it would be very difficult for me to discover such non-compliance or concealment. I wish to add that section 54 of the Ordinance requires the head of an LEA to report non-compliance to me only when he considers that there may have been any case of failure by the department or any of its officers to comply with the relevant requirement of the Ordinance. If the head of LEA holds the view that the matter is not a non-compliance, then he is not acting contrary to the Ordinance even if he does not report the matter to me. Although there is now a gentlemen's agreement between heads of LEAs and me that they would notify me of any irregularity (regardless of whether it is non-compliance), it is up to the LEAs to do so, not I.

25. The new initiative requires amendment to the Ordinance to put it into effect. A decision from the Security Bureau and the Legislative Council is awaited on whether the new initiative should be

implemented.

Conclusion

26. In Chapter 11 of the Report, I gave an assessment on LEAs' overall compliance with the relevant requirements. The non-compliance or irregularities were mainly due to inadvertent or careless mistakes or unfamiliarity with the Ordinance. I did not discover any wilful flouting of the requirements of the Ordinance.

27. I also 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.

28. The above is my introduction of the 'Annual Report 2009'. 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.]