

立法會
Legislative Council

LC Paper No. CB(2)844/11-12
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by the Administration)

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Panel on Security

**Minutes of special meeting
held on Monday, 5 December 2011, at 2:30 pm
in Conference Room 1 of the Legislative Council Complex**

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

Public Officers : Item I
attending

The Administration

Mr Ambrose LEE Siu-kwong, 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 1

Mrs Millie NG KIANG Mei-nei
Principal Assistant Secretary (Security) E

Mr Godfrey KAN Ka-fai
Assistant Principal Government Counsel,
Legal Policy Division
Department of Justice

Independent Commission Against Corruption

Mr Steven LAM Kin-ming
Assistant Director / 3
Operations Department

Mr KO Dale
Senior Principal Investigator / R Group

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

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

Ms Rita LAI
Senior Council Secretary (2) 1

Miss Lulu YEUNG
Clerical Assistant (2) 1

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I. Results of study of matters raised in the Annual Report 2010 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance

(LC Paper Nos. CB(2)419/11-12(01) and CB(2)423/11-12(01))

Members noted the following papers tabled at the meeting -

- (a) Speech delivered by the Commissioner on Interception of Communications and Surveillance ("the Commissioner") at his briefing held in the morning of 5 December 2011; and
- (b) Summary of the Annual Report, which was distributed at the briefing on 5 December 2011.

(Post-meeting note: The above papers were issued to members vide LC Paper Nos. CB(2)496/11-12(01) and (02) on 6 December 2011.)

2. Secretary for Security ("S for S") briefed Members on the results of the Administration's study of matters raised in the Annual Report 2010 to the Chief Executive ("the Annual Report") by the Commissioner, as detailed in the Administration's paper. He supplemented that the Administration had no objection in principle to the Commissioner's recommendation for empowering him to listen to intercept products. Consultation with the key stakeholders on the review of the Interception of Communications and Surveillance Ordinance ("ICSO") was being conducted. The Administration would report to the Panel on its proposals to amend ICSO after the review.

3. Mr WONG Yuk-man expressed dissatisfaction that the Commissioner was not attending the meeting. He said that it would be difficult to discuss the Annual Report without the attendance of the Commissioner. The Chairman informed Members that the Commissioner had been invited to attend the meeting. As in the past, the Commissioner had declined the invitation on the ground that it was not appropriate for him to attend.

Commissioner's power to listen to intercept products

4. Referring to paragraph 18 of the speech delivered by the Commissioner at his briefing held in the morning of 5 December 2011 at his office, Mr CHEUNG Man-kwong expressed concern that the recommendation of the Commissioner for empowering him and the staff

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designated by him to examine intercept and covert surveillance products, which was made since 2008, had not been adopted by the Security Bureau ("SB"). In his view, the Commissioner should be expressly empowered to listen to the intercept product so as to monitor effectively the compliance of the law enforcement agencies ("LEAs") and their officers with the requirements of ICSO. He considered that the Administration was deliberately delaying the adoption of the proposal.

5. Referring to paragraph 20 of the Commissioner's speech, Mr CHEUNG Man-kwong expressed concern that in the absence of the power to listen to intercept products, it would be difficult for the Commissioner and his staff to discover contravention of ICSO by LEAs. Providing the Commissioner and his staff with such power would provide the necessary deterrence against the malpractice or concealment by LEAs. His view was shared by Mr WONG Yuk-man.

6. Mr WONG Yuk-man referred to paragraph 1.4 of Chapter 1 of the Annual Report and said that while interception of communications and covert surveillance operations provided a useful tool for LEAs in combating serious crimes and protecting public safety, such power of LEAs should not be unrestricted. His view was shared by Dr Margaret NG.

7. Mr Ronny TONG and Mr LEUNG Kwok-hung considered that a sunset clause should have been incorporated in ICSO when it was enacted in 2006.

8. Noting that a relevant report had been submitted to the United Nations Human Rights Committee by the Administration and that a hearing would be held in October 2012, Ms Emily LAU said that relevant non-government organizations would provide views and it was expected that the Administration had to provide explanation for the deficiencies of ICSO accordingly.

9. S for S responded that while the Administration had no objection in principle to the Commissioner's proposal of empowering him to listen to intercept products, such power was not granted to similar supervisory authorities in other common law jurisdictions; therefore, the Administration considered it necessary to study the proposal and conduct consultation. He added that a proper balance had to be struck between protection of privacy and facilitating the performance of the oversight function by the Commissioner. S for S said that the Administration was undertaking a comprehensive review of ICSO and the recommendation

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would be considered in the context of the review. The key stakeholders including the panel judges, legal professional bodies, human rights organizations, media and the Privacy Commissioner for Personal Data, had been consulted in the past few months in the Administration's comprehensive review of ICSO. Given the stringent requirements on LEAs in listening to interception communications, there were concerns about whether requirements and safeguards similar to those applicable to LEAs should also be made applicable to the staff designated by the Commissioner for listening to intercept products.

10. S for S said that the Administration would also carefully consider the latest recommendations of the Commissioner as set out in the 2010 Annual Report, consolidate comments received during the consultation exercise and report to the Panel on its proposals to amend ICSO in the first half of 2012 after the review. He added that the Commissioner was an independent regulatory body under ICSO. He was responsible for overseeing the compliance by LEAs and their officers with the relevant requirements. He could request LEAs to submit reports regularly and conduct inspection visits and review of any non-compliance cases. The Commissioner had advised in his report that the review of reports on non-compliance cases and the inspection visits had been a strong deterrent and he was satisfied with the overall performance of LEAs. There were stringent control at different levels of the mechanism established under ICSO for application and issue of prescribed authorizations which targeted at detection of serious crimes and protecting public security. The conditions of proportionality and necessity should be met and it was believed that there was a good balance.

11. Mr Ronny TONG and Dr Margaret NG enquired whether the Administration would introduce a bill to amend ICSO in the first half of 2012. S for S advised that the Administration would brief the Panel on its proposals to amend ICSO. However, it was too early to advise whether an amendment bill would be introduced within the first half of 2012.

Cases of non-compliance and irregularities

Report 3

12. Mr WONG Yuk-man commented that the disciplinary actions in non-compliance cases had been too lenient and queried whether LEAs had covered up the mistakes of their personnel.

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13. Referring to the listening to the 51 outstanding calls intercepted before the lifting of the additional conditions by the junior supervisor after the lifting of the additional conditions, Mr Ronny TONG expressed concern that the Commissioner had no way to verify the claim and could only accept their claim as proffered as stated in paragraph 19(b) of the Commissioner's speech in respect of Report 3 in Chapter 7 of Annual Report 2010. He considered that the Commissioner found the incident hard to believe and the system for monitoring abuse had collapsed.

14. The Deputy Chairman enquired whether the LEA concerned was satisfied with the explanation given by the junior supervisor that the non-compliance was due to misunderstanding and queried whether advising the officer was an appropriate disciplinary action.

15. S for S said that there was a likelihood that the intercept product might involve information subject to LPP and one of the additional conditions imposed by panel judges at the grant of the authorization was that listening should be undertaken by officers not below a certain rank ("the Specified Rank"). The junior supervisor, who was below the Specified Rank, claimed that he misunderstood the effective period of the additional conditions. He thought that he could, after the lifting of the additional conditions, listened to those 51 calls intercepted before the lifting. The department later discovered the mistake committed by the junior supervisor and reported it to the Commissioner.

16. S for S referred to paragraphs 7.99 to 7.135 of the Annual Report and said that the Commissioner was satisfied with the remedial actions taken by the LEA concerned in respect of the setting up of time limit in the system that the junior supervisor of specified rank could only listen to the intercept products after the lifting of the additional conditions imposed and that the Code of Practice had been amended to provide clear guidelines to listening officers concerned. The Commissioner considered that the disciplinary awards by LEA to the officers concerned were appropriate and that to the junior supervisor's fault of an advice was too lenient. Yet, additional disciplinary action against the officer could not be administered because of "double jeopardy" consideration. The Administration had accepted the recommendation of the Commissioner and amended the Code of Practice to the effect that LEA should take into account any views that the Commissioner might have on the appropriate disciplinary action before taking any disciplinary action against an offending officer.

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17. Referring to paragraph 7.130(b) of the Annual Report, Ms Audrey EU said that the Commissioner was unconvinced of the explanations given by the officers concerned.

18. Ms Cyd HO expressed concern about the increasing number of cases where LEAs covered up the non-compliance of their personnel. She considered that ICSO should be amended to enable the Commissioner and his designated staff to listen to intercept products.

Report 4

19. Referring to the non-compliance case in which three officers involved did not remember the exact date of discovering the mistake, Ms Cyd HO queried the absence of any written record of the internal communications among different ranks regarding the case and the absence of disciplinary action taken against the officers concerned. She considered that the enactment of archive law was important to internal monitoring within government departments. She asked whether there was any requirement within LEAs on the keeping of records in departments to facilitate internal monitoring and checking by the Commissioner. She expressed concern that since the Commissioner was unable to listen to the intercept products, he could not collect the evidence to verify the non-compliance cases.

20. S for S stressed that there was no question of LEAs covering up the non-compliance of their personnel. He pointed out that the Commissioner had stated in the Annual Report that he was satisfied with the overall performance of LEAs and their officers in their compliance with the requirements of ICSO. The Commissioner had not found any cases of non-compliance or irregularity due to deliberate flouting or disregard of the statutory provisions or the law, nor could he find any of the officers committing the mistakes being actuated by ulterior motive or ill will. S for S stressed that there were stringent procedures under ICSO and the Code of Practice to be followed by listening officers in LEAs regarding record of internal communications.

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21. The Chairman requested the Administration to advise -

- (a) whether there were requirements on keeping written records of internal communications in the case concerned and whether there was non-compliance with such requirements; and

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- (b) whether there were procedures requiring written records of internal communications among different ranks for reporting non-compliance cases in all LEAs concerned.

22. The Chairman referred to paragraph 19 of the Commissioner's speech about the regrets expressed by the Commissioner over the inability to review the non-compliance cases. He said that different remarks had been used by the Commissioner to point out that he was not convinced of the reports on the cases. The Chairman was of the view that S for S should be held responsible for challenging the Commissioner's legitimacy to listening to the intercept products and the delay in introducing amendments to ICSO. He considered that it was a kind of covering up the subordinates so as to prevent the non-compliance cases from being discovered.

23. S for S disagreed with the comments and said that the Administration had all along been providing support to the Commissioner in the discharge of his oversight function under ICSO and the majority of the recommendations made by the Commissioner had been accepted and the Code of Practice had been amended as when necessary.

24. Mr WONG Yuk-man considered that the non-compliance cases reflected the negligence of the officers concerned and their lack of thorough understanding of the requirements of ICSO. Report 3 was a good example for illustration. He considered it necessary for law enforcement officers to receive further training.

25. S for S replied that training had been provided to officers of LEAs concerned since the implementation of ICSO. The Commissioner had conducted inspection visits and communicated with both the senior management and the frontline staff in LEAs and made recommendations for improvement in various aspects.

LPP information

26. Ms Audrey EU expressed concern over the increasing number of requests for interception of communications by LEAs that were or likely to be subject to legal professional privilege ("LPP") while the Commissioner could not verify the cases.

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27. In response, Permanent Secretary for Security ("PS for S") referred members to Chapter 5 of Annual Report 2010 regarding LPP cases. She pointed out that LEAs were required to notify the Commissioner of operations that were likely to involve LPP information or where LPP information had been obtained inadvertently. Cases in which LPP might be obtained as well as those assessed to have the likelihood of obtaining LPP would have to be reported to the Commissioner. There were procedures to be followed at different stages. An LEA applicant was required to state his assessment of LPP likelihood in his affidavit or statement in support of his application. LEA had to provide the details of all relevant circumstances. At the request of the Commissioner, all intercept products and related records had been preserved to enable him and his designated staff to check cases of special interest or chosen at random and there was an audit trail record for all access to the intercept products. To avoid being criticised for operating above the law, the Commissioner had chosen not to listen to the intercept products for the time being until relevant amendments to ICSO had been enacted.

LPP Case 4

28. Noting a time gap between the revocation of the prescribed authorization and the cessation of the operation in LPP Case 4, the Deputy Chairman asked whether there was an automatic mechanism within LEAs to discontinue interception before the officer concerned received instruction from the panel judge who was informed of the likelihood that LPP information had been intercepted.

29. S for S advised that there was a mechanism within LEAs governing the interception involving LPP information. The inadvertent information if so intercepted would not be provided to the investigators for investigation purposes.

LPP Case 10

30. The Deputy Chairman asked why the panel judge concerned allowed the interception to continue with additional conditions imposed after the LEA concerned reported on the interception of a call which might involve LPP information.

31. Noting that the Administration did not have information on the case concerned, members agreed that the Secretariat of the Commissioner on Interception of Communications and Surveillance be requested to provide the relevant information.

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Ruling of the Supreme Court of Canada in 2008

32. Ms Cyd HO expressed concern that after the Administration had informed the Commissioner of a ruling of the Supreme Court of Canada in 2008 ("the Canadian case"), which concluded that the Canadian law did not entail the privacy commissioner to compel production of documents over which LPP was claimed, even for a limited purpose, the Commissioner had decided not to listen to any of the recordings. Ms HO pointed out that the existing provisions specified that panel judges could authorize LEA officers to listen to intercept products. She considered that ICSO should be amended to expressly empower the Commissioner and his designated staff to listen to intercept products.

33. The Chairman queried why the Administration had informed the Commissioner of the Canadian case. He said that the Commissioner had subsequently refrained from continuing to listen to the recordings of the intercepted communications, pending the legislative amendments. He queried why S for S had challenged the Commissioner's legitimacy to listen to intercept products.

34. S for S stressed that SB and LEAs concerned had all along been providing support and assistance to the Commissioner in his discharge of duties under ICSO which had been reflected in the Commissioner's annual reports. The Commissioner's request for listening to the intercept products was not provided for in the law and controversial and the Department of Justice ("DoJ") was subsequently consulted on the issue. When the relevant bill was drafted, there was no intent for the Commissioner to listen to intercept products. When DoJ noted the Canadian case, it would only be responsible for the Administration to provide such information to the Commissioner for reference. The Administration had no objection in principle to the Commissioner's listening to the intercept products. It was the Commissioner's decision not to listen to the recordings until the relevant legislative amendments were enacted to expressly empower him to do so.

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35. The Chairman requested the Administration to provide information on the sequence of events regarding the Commissioner's listening to intercept products, the Commissioner's request for legislative amendments, the consultation with DoJ and the provision of information about the Canadian case to the Commissioner for reference.

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Whether interim administrative measures could be introduced to enable the Commissioner to listen to intercept products

36. In anticipation of the time needed for amendment of ICSO, Ms Audrey EU requested the Administration to study the feasibility of introducing interim administrative measures to enable the Commissioner to listen to intercept products before ICSO was amended. Her view was echoed by Ms Emily LAU. Ms EU considered that it might not be appropriate that the Commissioner be empowered to listen to all intercepted communications but it could be confined to certain cases and with reasonable justifications. She considered that such measure was necessary for the Commissioner to review the non-compliance cases and to verify the claims of the LEA officers.

37. S for S advised that the Administration would consult DoJ and make reference to the overseas practice to see whether the Commissioner under the present ICSO could be authorized by panel judges to listen to the intercept products. The Administration would revert to the Panel in a month's time. Ms Emily LAU requested the Administration to provide information on overseas practices in respect of interception of communications and surveillance. Ms LAU also requested the legal adviser to study the matter.

SALAI

38. Ms Audrey EU requested that a study on whether overseas executive authorities with a similar function to the Commissioner were allowed to listen to intercept products be conducted by the Research Division of the Legislative Council Secretariat.

Research
Division

Other issues

39. Dr Margaret NG expressed regret that most probably legislative amendment to ICSO could not be completed within the current term of the Legislative Council. Noting that the Hong Kong Bar Association ("HKBA") had submitted their comments in response to the Administration's comprehensive review of ICSO, Dr NG asked why the comments had not been uploaded to the website of the Administration. She advised that HKBA had commented on the great quantity of interception of communications in view of the absence of terrorist activities in Hong Kong and had identified some areas requiring legislative amendments other than those recommended by the Commissioner. She further enquired whether the Panel needed to listen to the views of stakeholders.

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40. In reply, PS for S advised that relevant stakeholders had already been consulted and some of them might disagree with their views being made public. A simple consultation with the two legal professional bodies and panel judges would be conducted on the two latest legislative amendments as recommended by the Commissioner. The Administration would then consolidate all the views and would submit a proposal to the Panel, including the standpoint of the Administration. The Administration would consult the stakeholders in respect of making their submissions public and the format in so doing .

Admin

41. The Chairman requested the Administration to provide relevant information on the legislative proposal in preparation for a public hearing to be held in January 2012 if deemed appropriate.

42. Members agreed that HKBA be requested to provide a copy of the comments on the review of ICSO submitted to the Administration.

(Post-meeting note: Submission from HKBA to the Administration setting out its comments on ICSO was issued to members vide LC Paper No. CB(2)529/11-12(01) on 8 December 2011.)

43. Ms Emily LAU asked whether there was political monitoring in the interception of communications and covert surveillance.

44. In response, S for S confirmed that no political monitoring had been involved since the implementation of ICSO.

Proposal for moving a motion on the Annual Report at a Council meeting

45. Ms Emily LAU proposed that the Chairman move a motion at a Council meeting to note the Annual Report to the Chief Executive by the Commissioner so as to provide an opportunity for all LegCo Members to express their views on it and for the Administration to provide its response.

46. The Deputy Chairman held the view that a decision on the proposal could be made after the submission of information by the Administration. Dr Margaret NG disagreed and considered that there was an urgency to debate the issue since the issue had been raised for a long time.

47. In view of the difference in views of members and the time constraint, the Chairman advised that about 15 minutes would be allocated at the end of the regular meeting to be held on 6 December 2011 for further discussion of the proposal.

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48. The meeting ended at 4:30 pm.

Council Business Division 2
Legislative Council Secretariat
17 January 2012