

**Legislative Council Panel on Security**

**Supplementary information related to matters raised in the  
Annual Report 2010 to the Chief Executive by the  
Commissioner on Interception of Communications and Surveillance**

**PURPOSE**

This information note provides supplementary information requested by Members during the discussion of the Annual Report 2010 of the Commissioner on Interception of Communications and Surveillance (the Commissioner) at the Panel meeting held on 5 December 2011.

**THE COMMISSIONER'S PROPOSAL ON CHECKING OF INTERCEPT PRODUCTS**

2. As stated in Chapter 9 of the Commissioner's Annual Report 2008, the Commissioner's proposal is to amend The Interception of Communication and Surveillance Ordinance (the ICSO) to require the preservation of intercept products and related records by the law enforcement agencies (LEAs) and to empower the Commissioner and his staff (five to ten staff) to check and listen to any intercept products, including special cases and cases involving the obtaining of information subject to legal professional privilege (LPP) or journalistic material (JM) (or a likelihood of obtaining such information or material) as well as other cases chosen by the Commissioner at random. The materials which would have to be preserved for checking under the Commissioner's proposal include -

- (a) the intercept products of each and every interception operation, and the associated data;
- (b) the audit trail report recording the identity of each officer who has listened to an intercept product and the time of access to it; and
- (c) the written notes or summary of each intercept product and other records of it in any other format for verifying the

content of a REP-11 report<sup>1</sup> submitted to a panel judge or a report submitted by an LEA to the Commissioner in accordance with paragraph 120 of the Code of Practice<sup>2</sup> (CoP).

3. The Commissioner has reiterated in his Annual Reports that his proposal may operate as deterrence against the LEA officers from committing any malpractice or concealment, whilst noting that there has been no evidence that such kind of concealment has been committed by any of the LEAs or any of their officers so far.

## **PRINCIPLES UNDERLYING THE INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE ORDINANCE AND EXISTING SAFEGUARDS**

### ***General***

4. The ICSO provides for a statutory framework for the conduct of telecommunications interception that aims to strike a balance between the need for prevention and detection of serious crimes and the protection of public security on the one hand and safeguarding the privacy and other rights of individuals (including the right to confidential legal advice) on the other. It provides for a stringent regime with checks and balance to ensure that the LEAs' interception operations comply with the requirements of the Ordinance and its CoP. For example -

- (a) an LEA must apply to a panel judge for an authorization for interception and the application must be supported by an affirmation/affidavit which complies with the requirements of Schedule 3 to the ICSO;
- (b) only designated officers in the LEAs may listen to intercept products. Even the supervisors of these listeners are not allowed to listen to the intercept products unless there are operational needs, for example, when the supervisors find it

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<sup>1</sup> One of the standard conditions imposed by panel judges on prescribed authorizations is that all material changes in circumstances must be reported to the panel judges. LEAs report such material changes in circumstances to the panel judges through REP-11 reports.

<sup>2</sup> Paragraph 120 of the CoP requires that dedicated units separate from the investigation team must screen out any information protected by LPP, and to withhold such information from the investigators. It also requires the LEAs to notify the Commissioner of any covert operation that is likely to involve LPP information as well as other cases where LPP information has been obtained, albeit inadvertently

necessary to listen to the intercept products themselves to verify the contents of certain specific calls;

- (c) there is a firewall established between the listeners and the investigation team. The listening team (i.e. the dedicated unit) will screen out any information obtained from interception that is not relevant to the investigation, as well as any LPP or JM obtained, before forwarding the screened information to the investigation team. The listening team is not involved in any crime investigation.
- (d) Heads of the LEAs are required to ensure that their officers comply with requirements of the ICSO. They are under a statutory obligation to report to the Commissioner any cases of non-compliance with the relevant requirements. LEAs have put in place internal procedures and requirements regarding supervisory control and compliance checks; and
- (e) LEAs are subject to stringent oversight by the Commissioner. Apart from his power to conduct examinations (under Part 4 Division 3 of the ICSO), the Commissioner has put in place a very comprehensive compliance checks for the purpose of conducting reviews (under Part 4 Division 2 of the Ordinance), including checking the weekly returns and required reports from LEAs, weekly returns from panel judges and communication services providers' four-weekly returns to counter-check LEAs' returns and reports, and conducting inspection visits to view any files and records kept by the LEAs. Under section 53(1) the Commissioner may require the LEAs to provide him with any information, document or other matter in their possession or control for the Commissioner's inspection.

### ***Legal Professional Privilege***

5. The right to confidential legal advice is guaranteed by Article 35 of the Basic Law. LPP protects client-lawyer communications from disclosure to a client's prejudice. There is a possibility that the LEAs may inadvertently obtain information subject to LPP during an authorized interception operation which is carried out for the purpose of preventing or detecting serious crime or protecting public security. Whilst the ICSO does not preclude the obtaining of LPP information nor require the termination of the interception as and when

LPP information has been obtained, the Ordinance and its CoP have introduced stringent measures to protect LPP so that any LPP information (obtained by LEAs inadvertently by authorized covert operations) will not be passed to the investigators of the LEAs and will not be used for investigations and in any legal proceedings. The relevant safeguards are as follows –

- (a) section 62 makes it clear that any information that is subject to LPP is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization;
- (b) section 59(1) requires that the disclosure of intercept products must be limited to the minimum that is necessary for the relevant purpose of the authorization;
- (c) section 59(1)(c) read with section 59(2)(b) requires that telecommunications intercept products containing any information that is subject to LPP must be destroyed as soon as reasonably practicable;
- (d) part 3 of the ICSO requires that an application for a prescribed authorization for interception must be supported by an affidavit setting out the likelihood of the operation obtaining information which may be subject to LPP or may be the contents of any JM so that a panel judge could take that into account in considering the application;
- (e) it is a standard condition imposed by the panel judges on prescribed authorizations that the LEAs should report any material change of circumstances that occur during the validity of the prescribed authorizations, including inadvertent obtaining of information which might be subject to LPP or JM;
- (f) to minimize the risk of inadvertently obtaining information that may be subject to LPP during an interception operation, section 31 prohibits the carrying out of interception by reference to a telecommunications service used at an office, a residence or other relevant premises of a lawyer (or a telecommunications service known to be used by a lawyer for the purpose of providing legal advice to clients) except in exceptional circumstances;

- (g) paragraph 120 of the CoP requires that dedicated units (i.e. listening team) separate from the investigation team must screen out any information protected by LPP, and to withhold such information from the investigators;
- (h) paragraph 120 of the CoP also requires the LEAs to notify the Commissioner of any interception operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently; and
- (i) the Commissioner may review the information passed on by the dedicated units to the investigators to check that it does not contain any LPP information that should have been screened out.

6. Since the enactment of the ICSO in 2006, the LEAs have acted in a responsible manner and complied strictly with the requirements and spirit of the ICSO. The Commissioner has checked the written summaries of the LPP-related cases (involving cases with LPP likelihood or LPP information obtained) and stated in his Annual Reports that he has not found any case in which LPP information has been passed to the investigators. The Commissioner also did not find anything that indicated wilful or deliberate flouting of the statutory provisions or the law by the LEAs, nor did he find any officer committing a mistake or irregularity for ulterior motive or with ill will. There has been no evidence that any kind of concealment has been committed by any of the LEAs or their officers.

#### **LISTENING OF INTERCEPT PRODUCTS BY THE COMMISSIONER**

7. As stated in his Annual Report 2007 which was published in 2008, the Commissioner had listened to intercept products in two of the four reported LPP cases in 2007. In one case, the Commissioner listened to the recording of a telephone call containing information which might be subject to LPP. In another case, the Commissioner reported that he had listened to the intercept product of the facility that took place since the LPP calls up to the disconnection on the second day. The Commissioner also proposes in the Annual Report to adopt a practice of only checking the intercept product 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. (The Commissioner made further proposals afterwards. Please refer to paragraphs 9 and 11 below for details.)

8. In Hong Kong, the right to confidential legal advice is guaranteed by Article 35 of the Basic Law. In August 2008, we were aware of the case of *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574, and noted that the ICSO has not expressly provided for the arrangements for the Commissioner to listen to intercept products, including those that contain LPP information. We therefore provided the relevant materials for the Commissioner's reference and consideration.

9. The Commissioner set out in detail his proposed system of checking of intercept products and related records in his Annual Report 2008 which was published in 2009. The proposal is to amend the ICSO to require the preservation of intercept products and related records by the LEAs and to empower the Commissioner and his staff (five to ten staff) to check and listen to any intercept products, including special cases and cases involving the obtaining of information subject to legal professional privilege (LPP) or journalistic material (JM) (or a likelihood of obtaining such information or material) as well as other cases chosen by the Commissioner at random.

10. In the Annual Report 2009 which was published in 2010, the Commissioner pointed out that he had listened to intercept products of three LPP cases in 2007 and 2008, but decided not to listen to the intercept products afterwards. Rather, he has required the LEAs to keep such intercept products intact pending formal legislative amendments.

11. In the Annual Report 2010 which was published in 2011, the Commissioner further recommended that apart from authorizing the Commissioner and his staff to examine and listen to intercept products, they should also be given express power to inspect and listen to products of covert surveillance as and when necessary, including those with LPP information.

#### **THE CANADIAN COURT CASE**

12. In the case of *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574 that we referred to the Commissioner who subsequently discussed it in his Annual Report 2008, the Supreme Court of Canada dismissed the appeal by the Privacy Commissioner from the decision of the Federal Court of Appeal that the Privacy Commissioner did not have the power to compel the production of documents over which solicitor-client privilege was claimed, for the purpose of ensuring compliance with the data protection legislation.

The Supreme Court pointed out that solicitor-client privilege is fundamental to the proper functioning of the legal system, and to give effect to this fundamental policy of the law, legislative language that may (if broadly construed) allow incursion on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference.

13. In the case concerned, the Privacy Commissioner demanded routine access to documents in any case she investigated where solicitor-client privilege had been invoked. However, the Supreme Court noted that even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue. The Supreme Court further pointed out that the Privacy Commissioner is an administrative investigator, not an adjudicator. As she is not a court and is a stranger to the privilege, the Supreme Court does not accept the argument that because she is independent from the parties, her adjudication of a claim of privilege would not be an infringement of the privilege. In the Supreme Court's opinion, client confidence is the underlying basis for the privilege, and to a client, compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality. The Privacy Commissioner had not made out a case that routine access to solicitor-client confidences was absolutely necessary to achieve the ends sought by the data protection legislation. There were other less intrusive remedies.

14. The Commissioner set out in detail his proposed system of checking of intercept products and related records in his Annual Report 2008, and proposed that the ICSO should be amended to give express power to him to request the preservation of intercept products and related records and allow him and his staff as designated by him to check them. We are conducting a comprehensive review of the ICSO. We note that any proposal to amend the ICSO to require the preservation of all intercept products for a period of time longer than that required for the relevant purpose of the prescribed authorization or for a purpose other than the relevant purpose of the prescribed authorization will need to be balanced against the need to protect the privacy of communications and the right to confidential legal advice. In considering the Commissioner's proposal, we cannot find any overseas reference and we are not aware of such powers being granted to similar supervisory personnel in other common law jurisdictions, so that they are also empowered to listen to intercept products that contain or are likely to

contain LPP information in particular. In this regard, we have put the legislative proposal to the relevant stakeholders to obtain their views.

## **CONSULTATION WITH STAKEHOLDERS**

15. After reporting to the Security Panel in July 2011, we have proceeded to consult key stakeholders, including panel judges, legal professional bodies, law faculties of local universities, journalist associations, the Privacy Commissioner for Personal Data, etc on our legislative proposals, which include the proposal to empower the Commissioner and his designated staff to listen to intercept products of cases of special interest (e.g. cases of non-compliance and LPP or JM cases) or other cases chosen by the Commissioner at random. In relation to the proposal on checking of intercept products, the stakeholders in general welcome the principle to strengthen the Commissioner's oversight functions but also suggest that a mechanism on checks and balance should be considered and put in place at the same time. The views we collected are summarized as below –

- (a) access to intercept products should be available only to a limited number of people. The intercept products should maintain secrecy and the material in question should be destroyed as soon as it is no longer required;
- (b) there is reservation about random checking or vesting the Commissioner with an unfettered discretion in selecting cases for random checking consider that due consideration should be given to introduce a threshold which the Commissioner has to meet before exercising his power to conduct checking so as to deter possible abuse of power;
- (c) the legislative amendment should specify the responsibility of the Commissioner (or his designated staff) and the consequence of non-compliance with the arrangements or internal guidelines should be spelt out clearly. Sufficient measures should be put in place to guard against unauthorized access and to ensure data security. In prescribing the retention period for checking purpose, attention should be paid to the Data Protection Principle 2(2) in Schedule 1 of the Personal Data (Privacy) Ordinance which provides that personal data shall not be kept longer than is necessary for the fulfillment of the purpose (including any directly related purpose) for which the data

are or are to be used;

- (d) a respondent considers that section 53 of the ICSO, by necessary implication, already gives the Commissioner the power to obtain from the LEA the intercept products of possible communications that might be covered by LPP or JM and to listen to them. If the Administration disagrees with this interpretation, then the ICSO should be amended to give the Commissioner this express power; and
- (e) there is also the suggestion that the Commissioner's staff who are empowered to listen to intercept products should have some knowledge of the law (preferably holding a law degree) and have knowledge or training on the concept of LPP.

16. We are considering how best to accommodate these views in taking forward the Commissioner's proposal. At the same time, we are also considering the Commissioner's new recommendations set out in his Annual Report 2010, and are consulting the stakeholders on such recommendations.

#### **VIEWS SOUGHT**

17. With the benefit of the first round of consultation, we have identified the following specific issues on which further and careful thoughts are warranted in terms of finalizing the legislative proposals and implementation details –

- (a) notwithstanding the Canadian case and the fact that no oversight authority in other common law jurisdictions has been vested with the power to listen to intercept products of LPP cases, in taking forward the Commissioner's proposal, how should we strike a balance taking into account the constitutional rights of privacy of communications and confidential legal advice;
- (b) in a similar vein, should there be any limitations on the extent to which the Commissioner and his designated staff may select intercept products for listening, albeit on a random basis;

- (c) should there be a threshold that the Commissioner and his staff must meet before they may exercise the power to listen to intercept products at random or to listen to intercept products that an LEA has reported to contain LPP information or information that might be protected by LPP, such as reasonable suspicion of non-compliance;
- (d) section 59 of the ICSO sets out the safeguards for intercept products to minimize disclosure and requires that they be destroyed as soon as their retention is not necessary for the relevant purposes of the prescribed authorizations, and where the intercept products contain LPP information, they must be destroyed as soon as reasonably practicable. The purpose of these requirements is to minimise risk of disclosure and to protect privacy and LPP in particular. Our courts have consistently upheld the destruction policy adopted by the Administration in this regard. In *Re Li Man-tak*, DCCC 689/2004 (5 May 2005), the Court held that *“it is right and proper that the fruit of the interceptions should be retained only for so long as is necessary to achieve the purpose for which it was authorised. Were it otherwise, it would be disquieting to contemplate a vast land bank of intercepted telecommunications going back over many years in the hands of a single authority.”* In taking forward the Commissioner’s proposal that he and his staff should have the power to listen to any intercept products for random checking and that the LEAs should retain all intercept products for this purpose , how should section 59 of the ICSO be amended so that the existing statutory requirements to destroy intercept products could be relaxed to address the Commissioner’s concerns without unduly undermining the privacy interests and the right to confidential legal advice of the individuals concerned;
- (e) in taking forward the Commissioner’s proposal to empower not only him but also his designated staff to listen to intercept products of LPP cases and other intercept products on a random basis, should the Commissioner and his Office subject to requirements similar to those that the LEAs are required to comply with under the ICSO, and should there be any reporting and/or disciplinary arrangements in the event of non-compliance with these requirements; and

- (f) there is a proposal that the Commissioner could obtain authorizations from panel judges in order to listen to intercept products of cases which involve LPP information or have the likelihood of obtaining LPP information. Any views on this proposal?

18. Member's views on the above questions are welcome to help us finalise the legislative proposals. We are also inviting the stakeholders' views on the Commissioner's latest recommendations as well as the questions above. In the interim, we are also seeking legal advice on whether the existing provisions of the ICSO allow the Commissioner to listen to any intercept products with an authorization from a panel judge or by other possible administrative means.

#### **DOCUMENTATION REQUIREMENT OF NON-COMPLIANCE CASES**

19. At the last Panel meeting on 5 December 2011, a member requested information on LEAs' internal documentation requirements with particular regard to the record of non-compliance cases by the LEAs. The Government Records Service has formulated records management procedures and guidelines to ensure proper management of government records. Bureaux and departments (including LEAs) should create and capture adequate but not excessive records to meet operational, policy, legal and financial purposes.

20. While the code of practice provides a general overview on record management, under the regime of the ICSO, the LEAs are further required to follow the Commissioner's more stringent requirements in reporting on cases of irregularity or non-compliance. All written documents and file records of such cases will need to be preserved for inspection by the Commissioner, in addition to a full investigation report on each of such incidents.

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