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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the special meeting on 5 December 2011**

**Results of Study of Matters Raised in the Annual Report
to the Chief Executive by the Commissioner
on Interception of Communications and Surveillance**

Purpose

This paper summarizes past discussions by the Panel on Security ("the Panel") on the results of study of matters raised in the annual reports to the Chief Executive ("CE") by the Commissioner on Interception of Communications and Surveillance ("the Commissioner").

Background

2. Under section 49 of the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO"), the Commissioner shall, for each report period, submit a report to CE. The report is to be submitted within six months after the expiry of the report period. CE shall cause to be laid on the table of the Legislative Council ("LegCo") a copy of the report.

3. In the course of examination of the Interception of Communications and Surveillance Bill in 2006, the Administration undertook, inter alia, to report to the Panel the results of the Administration's study of matters raised in the Commissioner's annual report to CE.

Deliberations of the Panel

4. Since the commencement of ICSO on 9 August 2006, the Commissioner has submitted four annual reports to CE. The results of the Administration's

study of matters raised in the four annual reports have been discussed at the Panel meetings on 6 November and 6 December 2007, 16 February and 3 March 2009, 7 December 2009 and 29 November 2010. The deliberations are summarized below.

Attitude problem and compliance with the statutory requirements among officers of the law enforcement agencies

5. Concern was raised about the overall attitude of law enforcement officers towards the Commissioner's oversight and review functions. Information was sought about the measures taken by the Administration and the Independent Commission Against Corruption ("ICAC") to address the attitude problem among law enforcement officers and to ensure their strict compliance with ICSO and full cooperation with the Commissioner.

6. According to the Administration, the Commissioner's comments in his Annual Report 2008 were related to the attitude of a law enforcement officer in a reported case involving an irregularity due to system failure in effecting discontinuance resulting in the facilities covered by five prescribed authorizations being disconnected six to 18 minutes after the expiry of the authorizations. Although the way in which the officer responded to the Commissioner's enquiry appeared to be unsatisfactory, it was an isolated incident due possibly to the fact that the officer had not got used to the Commissioner's oversight authority. With the benefit of more practical experience gained in the implementation of ICSO, law enforcement agencies ("LEAs") were more readily able to offer useful comments from the operational perspective in response to recommendations and suggestions made by the Commissioner for improving the checking mechanism. Regarding recommendations made by the Commissioner to LEAs, the LEAs concerned had accepted them in full or were actively identifying improvement measures to address the Commissioner's concerns. The Security Bureau ("SB") had amended the Code of Practice ("CoP"), as and where appropriate, to resolve common issues that had implications across LEAs.

7. Members were informed that ICAC was committed to ensuring ICAC 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/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.

Protection of information subject to legal professional privilege and privacy of members of the public

8. Concern was raised about how LEAs handled interception products involving information which might be subject to legal professional privilege ("LPP"). Members considered that LEAs should be mindful of the need to protect LPP in carrying out interception or surveillance operations, as failure to observe the requirements of ICSO regarding handling of LPP would have an adverse impact on LEAs' reputation.

9. Members noted that section 59(2)(b) of ICSO and CoP provided safeguards for protected products, including those containing information subject to LPP. ICSO and CoP required that any intercepted product containing information that was subject to LPP should be destroyed as soon as reasonably practicable.

10. Information was sought on 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.

11. Members were advised that officers were always reminded that they should exercise extreme care when making 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.

12. There was a suggestion that the content of the Commissioner's annual report should be expanded to include the numbers of applications received from and authorizations issued or renewed for respective LEAs, as well as more

detailed information on renewal cases.

13. According to the Administration, it was concerned that the provision of too much information in the Commissioner's annual report might reveal the investigation capability of LEAs, and would be prejudicial to the prevention and detection of crime and the protection of public security. Notwithstanding this concern, the Administration would refer members' request to the Commissioner for consideration.

Journalistic material

14. Members noted that in 2009, the Commissioner received two reports, which involved three prescribed authorizations, on inadvertent obtaining of information which contained journalistic material. Information was sought about the measures to protect the source and content of the journalistic material. There was a view that the Administration should have a clear and well defined policy regarding the protection of journalistic material against access by LEAs for the purpose of investigation.

15. According to the Administration, 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 legal professional privilege, 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 ICSO. For those cases which were assessed by a panel judge to have journalistic material implications, additional conditions were imposed to better protect the freedom of the media.

Commissioner's power and authority to listen to interception product and the need for legislative amendments

16. There was a suggestion that consideration should be given to engaging officers or organizations independent from any LEAs, such as the Office of the Commissioner on Interception of Communications and Surveillance, to be responsible for listening to interception products. This measure would serve as a safeguard against LEAs since staff members of the Commissioner's Office would screen out any suspected LPP information before passing it to the investigators for their retention. According to the Administration, it would consider the suggestion when conducting the comprehensive review of ICSO.

17. Concern was also raised about the queries regarding the legitimacy or propriety of the Commissioner's listening to interception products including those that contained, or might contain, LPP information, which had been lawfully obtained by LEAs, for the purposes of performing his functions under ICSO. Noting that the Commissioner had made a recommendation to the Administration for amending ICSO to give express power and authority to the Commissioner to listen to interception products held by LEAs, members sought information on whether the Administration was prepared to do so.

18. Members noted the Administration's view that there was an absence of express and unambiguous provisions in ICSO empowering the Commissioner to listen to interception products. It was also doubtful whether section 53(1)(a) regarding the power of the Commissioner to require any person to provide information for the purpose of performing his functions under ICSO could be construed as having the effect of empowering the Commissioner to listen to interception products. With the existence of legal uncertainty, the Commissioner considered that the safest way was to amend ICSO to allow the Commissioner and the staff designated by him to conduct the checking. The Administration would carefully consider the recommendations raised in the Commissioner's annual reports, including the one in connection with the Commissioner's authority to listen to interception products which required legislative amendments for implementation, during the comprehensive review of ICSO. The Administration noted that the Commissioner would cease listening to the recordings before it took any final decision on the matter. Nevertheless, LEAs would continue to preserve the recorded products containing LPP information or possible LPP information and other related materials for the purposes of the Commissioner's inquiry or performance of his oversight functions under ICSO.

Differences in the interpretation of provisions in the legislation

19. Concern was raised over LEAs and panel judges having different interpretations on a number of provisions in ICSO, such as the power of panel judge to revoke an authorization that had been granted, to impose additional conditions when confirming an emergency authorization and to revoke a device retrieval warrant. Concern was also raised over whether LEAs were challenging the rule of law, the power of panel judges and the views of the Commissioner. There was a view that if LEAs questioned the power of the panel judge to revoke the prescribed authorization, LEAs should seek remedy from the court, such as to quash the panel judge's decision of revocation or his refusal to allow the continuance of the prescribed authorization or to seek for a declaration of a proper interpretation of the statutory provision.

20. According to the Administration, the annual reports had revealed that there was occasional disagreement between LEAs and the Commissioner on the interpretation of certain provisions of ICSO. However, there was no question of LEAs being disrespectful to panel judges or the Commissioner. LEAs had adopted pragmatic measures to address the Commissioner's concerns and resolve the differences in views between them regarding the power of panel judge to revoke an authorization. SB had amended CoP where appropriate to address the issues identified in the annual reports.

Political monitoring

21. Concern was raised over whether law enforcement officers would carry out interception of communications for political monitoring under the name of crime investigation. They suggested that the Commissioner should consider disclosing in his annual report any political monitoring identified.

22. Members were advised that law enforcement officers had always conducted interception and covert surveillance operations strictly in accordance with the law and only for the purpose of prevention or detection of crime or protection of public security. There was no question of covert operations under ICSO being conducted for political monitoring.

Relevant papers

23. A list of the relevant papers on the Legislative Council website is in the **Appendix**.

**Relevant papers on
Results of Study of Matters Raised in the Annual Report
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on Interception of Communications and Surveillance**

Committee	Date of meeting	Paper
Panel on Security	6.11.2007 (Item V)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	6.12.2007 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	16.2.2009 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	3.3.2009 (Item IV)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	7.12.2009 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	6.7.2010 (Item III)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	29.11.2010 (Item I)	<u>Agenda</u> <u>Minutes</u>