

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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26 June 2015

Miss Betty MA
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Miss MA,

Members of the Bills Committee on Interception of Communications and Surveillance (Amendment) Bill 2015 enquired about the checking of protected products by the Commissioner and some other matters at the meeting on 22 June 2015. Government's response is at Annex.

Yours sincerely,

(Mrs Millie Ng)
for Secretary for Security

Encl

c.c.

Department of Justice

(Attn: Mr Godfrey KAN, Senior Assistant Solicitor General
Ms Monica LAW, Senior Assistant Law Draftsman)

Interception of Communications and Surveillance
(Amendment) Bill 2015

Checking of Protected Products by the Commissioner

Current checking procedures

For the purpose of performing the Commissioner's oversight functions under the Interception of Communications and Surveillance Ordinance (ICSO), the Commissioner may require any public officer or any other person to provide any information, document or other matter in his or her possession or control to the Commissioner and require any officer of a specified department to prepare any report on any case of interception or covert surveillance handled by the department, or on any class of such cases, within the time and in the manner specified by the Commissioner when making the requirement. The Commissioner may determine the procedure to be adopted in performing any of his functions under this Ordinance. These powers are set out in section 53 of the ICSO.

2. The Commissioner has explained in his Annual Reports the stringent procedures adopted by him for overseeing the interceptions and covert surveillance conducted by the departments to check the compliance by the departments with the requirements of the Ordinance. In addition to examining the reports submitted by the departments to the Commissioner under various requirements of the Ordinance and Code of Practice, such as reports on cases of non-compliance and cases involving information subject to legal professional privilege (LPP) or journalistic material (JM) (or a likelihood of obtaining such information or material), the Commissioner would check the weekly reports submitted by the departments and the Panel Judges' Office (PJO) which cover general information relating to cases of the related week such as whether the application was successful or rejected, the duration of authorization, the offences involved, the assessment on the likelihood of obtaining LPP information and JM from the proposed operation, etc.

3. The Commissioner may seek clarification and explanation on the weekly reports from the departments and/or the PJO as and when necessary or during the inspection visits. In the visits, the Commissioner would also select, on a random basis, some other cases for examination apart from those requiring clarification. Documents to be scrutinized by the Commissioner would

include the original of the applications, reports on discontinuance, reports on material change of circumstances, reports on initial material inaccuracies, case files and internal review documents, etc. If the questions or doubts still could not be resolved after the examination of such documents, the Commissioner would require the department to answer the queries or to explain the cases in greater detail. The Commissioner also checks the inventory lists and device registers of surveillance devices managed by the departments and makes inspection visits to the device stores of the departments to ensure that surveillance devices are not used for covert surveillance without the authority of a prescribed authorization.

Current record keeping by specified departments

4. Under the existing section 59(1)(c) of the ICSO, the head of a specified department shall ensure that protected products are destroyed as soon as their retention is not necessary for the relevant purpose of the prescribed authorization. This requirement, together with the other provisions of section 59, reflects the Government's policy to protect individual privacy by limiting the disclosure of protected products to the minimum that is necessary for the relevant purpose of the prescribed authorization and to destroy protected products as soon as their retention is not necessary for the relevant purpose. It is in line with Data Protection Principle 2(2) in Schedule 1 to the Personal Data (Privacy) Ordinance (Cap. 486) that all practicable steps must be taken to ensure that personal data is not kept longer than is necessary for the fulfilment of the purpose (including any directly related purpose) for which the data is or is to be used. Where the protected products contain any information that is subject to LPP, the head of a specified department shall ensure that any part of the products containing the information, in the case of a prescribed authorization for a postal interception or covert surveillance, is destroyed not later than one year after its retention ceases to be necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted; or in the case of a prescribed authorization for a telecommunications interception, is as soon as reasonably practicable destroyed.

5. At present, the originals of intercept products are normally destroyed within one month from interception. Any summaries and extracts of the originals are destroyed as soon as possible but in any case not later than one month after the completion of the operation. Surveillance products are also destroyed as soon as their retention is not necessary for the relevant purpose of the prescribed authorization; and something is necessary for the relevant purpose of a prescribed authorization for covert surveillance when it continues to be, or is likely to become, necessary for the relevant purpose, or at any time before the expiration of one year after it ceases to be necessary for the purposes

of any civil or criminal proceedings before any court that are pending or are likely to be instituted. For specific cases, the departments have been preserving, at the Commissioner's request, protected products for his inspection if necessary.

6. As regards other documents and records in relation to prescribed authorizations under ICSO, such as applications for the issue or renewal of prescribed authorizations, the determinations of such applications, and relevant case files and review reports, the departments are keeping them in accordance with the provisions of section 60 of the ICSO, i.e., for a period of at least two years after the prescribed authorizations have ceased to have effect, or for a period of at least one year after any relevant court proceedings, review or application for examination has been finally determined or disposed of, as the case may be.

Proposal to check protected products

7. In his Annual Report 2008 and Annual Report 2010, the former Commissioner proposed to amend the ICSO to provide the Commissioner and his or her staff with express power to examine, inspect and listen to protected products, including those which concern cases of non-compliance or irregularity and cases involving information subject to LPP or JM (or a likelihood of obtaining such information or material) as well as other cases chosen by the Commissioner at random. In his Annual Report 2011, the former Commissioner noted that while the checking of the products by the Commissioner and his or her staff would cause added intrusion to the subject's rights, the purpose is to ensure that the officers have done nothing wrong in the conduct of interception or covert surveillance against the subject. He considered that this is for protecting the subject's and the public's rights rather than undermining them. The former Commissioner also pointed out that the security risk could be reduced to the minimum by having the intercept and surveillance products kept and preserved in the LEA's premises. Examination of the products will be made upon the request of the Commissioner, which will be carried out at the LEA's premises. When the review is completed, the Commissioner will allow the material to be destroyed by the LEA. The incumbent Commissioner also considers the proposal a very important initiative, and is a necessary deterrence for those who would be minded to breach the requirements under the ICSO regime.

8. In the Annual Report 2008, the former Commissioner specifically pointed out that the Commissioner would only use the intercept products for verifying or challenging the contents of the reports prepared by the departments concerned and for other legitimate purposes of checking. The intercept

products accessed by the Commissioner would not be used for investigation of crimes or matters outside the scope of his/her oversight and review functions under the ICSO. The Commissioner suggested that the following could be achieved through the checking of intercept products :

- (a) to check the intercept product against the relevant department's REP-11 report¹ to see if the content of the report truly represents the intercept product as allegedly heard by the listener, such as in a case where the REP-11 report notifies the panel judge of the obtaining of LPP information or JM (or a likelihood of obtaining such information or material);
- (b) to check the intercept product which contains earlier and later conversations than the reported conversation referred to in the REP-11 report;
- (c) to check intercept products by selecting cases at random so as to prevent or expose cases where LPP or JM is involved but no REP-11 report to the panel judge and CoP 121 report to the Commissioner have been made;
- (d) to check intercept products by selecting cases at random to ensure that the person using the telecommunications service under interception as authorized by a prescribed authorization is actually the subject of the prescribed authorization;
- (e) to check intercept products by selecting cases of discontinuance under section 57 of the ICSO at random to ensure that there is no unauthorized interception; and
- (f) the proposal will reinforce the protection of LPP and JM and pose as a deterrence and warning to the specified departments from engaging in unauthorized or unlawful acts or practices in wrongfully breaching these rights or abusing interception as authorized by the ICSO.

9. As part of the proposal, the former Commissioner recommended that the requirement to destroy protected products under section 59 should be made subject to the Commissioner's requirement to examine the products. In this regard, we propose that the requirement to destroy protected products after their

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

retention is not necessary for the relevant purpose of the prescribed authorization under section 59(1)(c) be subject to any requirement that the Commissioner may impose under section 53(1)(a) in relation to protected products. In other words, a protected product should be destroyed once its retention is no longer necessary for the relevant purpose of the prescribed authorization unless the Commissioner imposes a requirement under section 53(1)(a) as amended by clause 19 that the protected product should be provided to him for the purpose of performing his functions. Once the protected product provided to the Commissioner is no longer required by the Commissioner, it should be destroyed as soon as its retention is not necessary for the purpose of the prescribed authorization and for compliance with any further requirements imposed by the Commissioner. The object of the above proposal is to protect the privacy of the subjects and other affected persons without undermining the Commissioner's oversight function. In this way, any requirement that any protected product should be provided to the Commissioner would *override* the requirement to destroy the protected product when it is no longer necessary for the relevant purpose of the prescribed authorization.

Other Matters

- ***To provide the number of officers in the various LEAs responsible for the listening duty for the interception operations.***

10. The manpower for carrying out interception operations is of a confidential nature as the disclosure of which may reveal the operational arrangements of the law enforcement agencies and their law enforcement capabilities to criminals, who may be able to elude justice. Therefore, we are unable to provide the requested information.

11. During interception operations, the actual monitoring is done by dedicated units of the LEAs, which are separated from the investigation teams. The identity of each designated listener and the time of his/her access to an intercept product is fully captured by audit trail records which are subject to the Commissioner's inspection.

- ***To provide the total duration of the communications intercepted under the ICSO and the quantity of documents preserved in relation to such operations.***

12. We do not maintain the requested figures. That said, the Commissioner provides in his Annual Reports the average duration of the prescribed authorizations granted each year. According to the Commissioner's

Annual Report 2013, the panel judges approved a total of 1,365 written applications for interception by the LEAs and the duration of the prescribed authorizations for over 70% of the cases was for a period of one month or less. While the longest approved duration was 43 days, the shortest one was for several days only. Overall, the average duration of all the authorizations was about 30 days.

- ***To advise whether the ICSO permits the various LEAs to record or make copies of the communications intercepted.***

13. A prescribed authorization for interception authorizes the interception of communications which is defined in the ICSO as meaning the carrying out of any intercepting act in respect of any communication. According to section 2(1) of the ICSO, “intercepting act”, in relation to any communication, means the inspection of some or all of the contents of the communication, in the course of its transmission by a postal service or by a telecommunications system, by a person other than its sender or intended recipient, and “inspect” includes listen to, monitor and record.

14. Also, “interception product” means any contents of a communication that have been obtained pursuant to a prescribed authorization for interception, and includes a copy of such contents. The word “copy”, in relation to any contents of a communication that have been obtained pursuant to a prescribed authorization for interception, means any of the following (whether or not in documentary form)—

- (i) any copy, extract or summary of such contents;
 - (ii) any record referring to the interception which is a record showing, directly or indirectly, the identity of any person who is the sender or intended recipient of the communication.
- ***To advise whether persons other than officers of the various LEAs are permitted to listen to the communications intercepted and to explain how listeners will handle the communications intercepted which are of a language that they are not proficient in.***

15. The specified departments have put in place mechanism to make special arrangements for handling different operational scenarios. The departments’ operations under ICSO are subject to the oversight of the Commissioner. We are not able to provide further information, as the operational details for carrying out interception operations are confidential. The disclosure of such details may reveal the operational arrangements of the

law enforcement agencies and their law enforcement capabilities to criminals, who may be able to elude justice.

Security Bureau
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