

香港特別行政區政府  
保安局



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The Government of the  
Hong Kong Special Administrative Region  
Security Bureau

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26 June 2015

Mr KAU Kin-wah  
Senior Assistant Legal Adviser  
Legal Service Division  
Legislative Council Secretariat  
1 Legislative Council Road  
Hong Kong

Dear Mr Kau,

**Interception of Communications and Surveillance  
(Amendment) Bill 2015**

Thank you for your letter dated 9 June 2015, sharing with us your suggestions on the drafting of the Interception of Communications and Surveillance (Amendment) Bill 2015. Our responses are set out in the note attached for your reference, please.

Yours sincerely,

A handwritten signature in black ink, appearing to be "Millie Ng".

(Mrs Millie Ng)  
for Secretary for Security

Encl (4 pages)

c.c.

DoJ (Attn : Mr Godfrey Kan, Sr Asst Solicitor General  
Ms Monica Law, Sr Asst Law Draftsman)

**Interception of Communications and Surveillance  
(Amendment) Bill 2015**

**Further authorization or requirement under a prescribed authorization or a device retrieval warrant (clauses 6(2), 8(2), 9, 16(10), 17(5) and 18)**

The background of the reference to “*any further authorization or requirement*” contained in the captioned provisions was set out in ICS(A)2015-01 (LC Paper No. CB(2)1172/14-15(02)). Having regard to section 32 of the Interception of Communications and Surveillance Ordinance (Cap. 589) (the Ordinance), which provides that a prescribed authorization (i.e. a judge’s authorization, an executive authorization or an emergency authorization) may be issued or renewed subject to any conditions specified in it that apply to the prescribed authorization itself or to any *further* authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance)” (emphasis added), we consider it reasonable to retain the word “further” in the captioned proposed amendments to ensure consistency in the construction of the Ordinance.

**Clause 19 – proposed section 59(1)(c)**

*The Commissioner’s review function and the requirement to destroy protected products*

2. Under the existing section 59(1)(c) of the Ordinance, 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.

3. The design of the ICSO regime is that the Commissioner on Interception of Communications and Surveillance (the Commissioner) is an independent body having an oversight function to perform under the Ordinance. The Commissioner is empowered to conduct reviews on compliance by departments and their officers with the relevant requirements but does not play any role in the actual operations of the departments. The Commissioner may determine the procedure to be adopted in performing his functions and require a department to provide protected products to him at any time under section 53(1) of the Ordinance. The department must comply with such a requirement pursuant to section 53(3). The Commissioner's reviews and the use and destruction of protected products by the departments are related but separate procedures.

4. Apart from the proposal to expressly empower the Commissioner to check protected products for the purpose of performing his functions under the Ordinance, we also propose that the requirement to destroy protected products once their retention is no longer 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 as soon as its retention is not 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. In addition, individual privacy is better protected in this way as the Commissioner may not necessarily review each and every case investigated by the departments and may not

necessarily require access to each and every protected product obtained pursuant to a prescribed authorization in a case reviewed by him. Even if protected products are required for his review in a particular case, they may not be required to be retained by the Commissioner for the entire period of the review. Therefore the current proposal strikes a fair balance between the right to privacy of the subjects and affected persons on the one hand and the need to facilitate the performance of the Commissioner's oversight function on the other. It is preferable to requiring the departments to preserve all protected products until the Commissioner has completed his review of the cases falling within a specified period of time.

5. On practical arrangements, section 53(5) of the Ordinance provides that the Commissioner may determine the procedure to be adopted in performing any of his functions under the Ordinance. In performing his functions to review different categories of cases at present, the Commissioner has put in place arrangements whereby the four departments preserve protected products of specific cases for the Commissioner's review. Under these arrangements, the Commissioner is able to require a department to preserve the protected products of a particular case before they may be destroyed pursuant to the destruction requirement. We understand that the arrangements are operating smoothly. The departments comply with the Commissioner's requirements and the Commissioner has not encountered any difficulties in this regard.

*Emergency authorizations and prescribed authorizations issued upon oral applications*

6. Section 23(3)(a) provides that if an application for confirmation of an emergency authorization is not made, the head of department shall cause the immediate destruction of any information obtained by carrying out the interception or Type 1 surveillance concerned which includes any product so obtained. There is also a similar provision in section 26(3)(b)(i) in respect of a failure to apply for confirmation of a prescribed authorization issued upon an oral application. The purpose of the requirement to cause the immediate destruction of information is to deter the departments from not complying with the requirement to apply to the relevant authority for confirmation of the authorization within 48 hours of its issuance. Failure to make an application for confirmation pursuant to section 23(1) or 26(1) is a serious matter and the

department must submit to the Commissioner a report with details of the case pursuant to section 23(3)(b) or 26(3)(b)(ii). As it is a clear case of very serious non-compliance, any information obtained by the department should not be made available to its officers and must be destroyed immediately to safeguard the privacy of the subject and affected persons.

7. Where a department has made an application for confirmation in compliance with section 23(1) or 26(1) but the relevant authority refuses to confirm the authorization in question, the relevant authority has a discretionary power to make an order under section 24(3)(b) or 27(3)(b) (as the case may be) for the immediate destruction of any information obtained by carrying out the operation concerned. The relevant authority will take into account all the circumstances of the case in determining whether such an order should be made and to what extent information so obtained should be destroyed, including whether the conditions in section 3 have been met. Conferring a power on the relevant authority to order the immediate destruction of information enables the relevant authority to better protect the privacy of the subject and affected persons if the relevant authority considers that the authorization should be revoked or subject to variations and the circumstances of the case warrant the making of such an order.

8. The destruction arrangements set out in paragraphs 6 and 7 above are related to the handling of information obtained by carrying out operations the authorization of which is no longer available or is not confirmed. The situations involve either serious non-compliance or a failure to meet the stringent threshold for the issue of a prescribed authorization. Immediate destruction of the information obtained is an appropriate remedy for the department not complying with the requirement to apply for confirmation within 48 hours and may be necessary if the operation does not meet the requirements for the issue of the prescribed authorization. This measure is without prejudice to the power of the Commissioner to report the non-compliance or matter in his annual report and to make recommendations under sections 49 to 52. The considerations underlying the above arrangements are different from those underlying the destruction of protected products obtained pursuant to valid prescribed authorizations (other than emergency authorizations) issued upon written applications.