

香港特別行政區政府
保安局



LC Paper No. CB(2)1879/14-15(01)

The Government of the
Hong Kong Special Administrative Region
Security Bureau

香港添馬添美道 2 號

2 Tim Mei Avenue, Tamar, Hong Kong

本函檔號 Our Ref.: SBCR 14/2/3231/94 Pt. 21

來函檔號 Your Ref.:

電話號碼 TEL. NO.: 2810 2632

傳真號碼 FAX. NO.: 2877 0636

13 July 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 29 June 2015. Government's response is at Annex.

Yours sincerely,

A handwritten signature in black ink, appearing to be "Me" or a stylized version of the name.

(Mrs Millie Ng)
for Secretary for Security

Encl (5 pages)

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**

**Response to issues raised
at the Bills Committee's meeting held on 29 June 2015**

Checking of Protected Products by the Commissioner

- *To advise whether the intercept products of all cases involving legal professional privilege (LPP), journalistic material (JM), non-compliance and irregularity referred to in all the published annual reports of the Commissioner were retained by law enforcement agencies (LEAs) and whether the intercept products of other interception cases had been destroyed.*

Over the years the Commissioner has requested LEAs to preserve intercept products of specific cases, such as cases involving LPP, JM, non-compliance and irregularity, for his inspection pending the completion of the amendment to the Ordinance. LEAs have complied with the Commissioner's requests in preserving the protected products concerned. Upon enactment of the Interception of Communications and Surveillance (Amendment) Bill 2015 (the Bill), the Commissioner may require an LEA to provide these intercept products to him for checking. For intercept products of which the Commissioner had not made any request for preservation, they were destroyed in accordance with the requirements of section 59 of the Ordinance.

- *To explain the operation and interactions of section 53 and section 59 of the Ordinance in relation to the time limit for destruction of intercept products.*

2. According to the existing section 53(1)(a) of the Ordinance, the Commissioner may, for the purpose of performing any of his functions under the Ordinance, require any public officer or any other person to answer any question and to provide any information, document or other matter in his possession or control to the Commissioner, within the time and in the manner specified by the Commissioner when making the requirement. Under the existing section 59(1)(c) of the Ordinance, the head of an LEA shall ensure that protected products are destroyed as soon as their retention is not necessary for the relevant purposes of the prescribed authorizations. The Commissioner

may require any LEA officer to provide any protected product in his possession or control to the Commissioner pursuant to section 53(1)(a) any time before the protected product is destroyed under section 59(1)(c).

3. To facilitate the checking of protected products by the Commissioner for the purpose of performing his functions, we propose that the requirement to destroy a protected product once its 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, where the Commissioner imposes a requirement under section 53(1)(a) that a particular protected product should be provided to him for the purpose of performing his functions, the protected product should not be destroyed even though its retention is no longer necessary for the relevant purpose of the prescribed authorization. But once the protected product provided to the Commissioner is not 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.

- ***To advise whether the Commissioner was empowered under the Bill to require an LEA to retain all or certain categories of intercept products for a certain period of time for his checking.***

4. The proposal to expressly empower the Commissioner to require the provision of protected products is not qualified in any way. The Commissioner must, however, only exercise such power for the purpose of performing his functions. Under section 53, the Commissioner may require the provision of any protected product "within the time and in the manner specified by the Commissioner when making the requirement". He may require the provision of any protected product for his random checking even though it is not a case of non-compliance or irregularity and does not involve LPP or JM. When the protected product provided to the Commissioner is no longer required by the Commissioner, it should be destroyed only if its retention is not necessary for the purpose of the prescribed authorization and for compliance with any further requirements imposed by the Commissioner.

5. The Commissioner is fully aware that intercept products contain highly sensitive personal information. The longer and the more intercept products are retained by the LEAs, the greater the risk of unauthorized or accidental access, disclosure or other use of these products. To protect the privacy of the subjects and affected persons and the confidentiality of the operations, the disclosure or use of intercept products that are no longer necessary for the relevant purpose of the prescribed authorization should be kept to the minimum that is necessary for facilitating the performance of the Commissioner's functions. The Commissioner would only use the intercept products for verifying or checking the contents of the reports prepared by the LEAs, conducting reviews, dealing with applications for examinations, or for other legitimate purposes such as random checking. These purposes do not require the retention of all or the bulk of the intercept products by the LEAs after it is not necessary for the relevant purposes of the prescribed authorizations. The Commissioner would not use the intercept products for the investigation of crimes or matters outside the scope of his oversight and review functions. On such premises, unless there are very exceptional circumstances, it is unlikely that the Commissioner would require an LEA to retain all intercept products indiscriminately for his inspection.

- *To provide information on the range of time for the destruction of intercept products of different LEAs and to explain why different LEAs had different policies regarding the range of time for destruction of intercept products.*

6. At present, the originals of intercept products are normally destroyed within one month from interception. This practice is adopted by the specified LEAs concerned.

- *To explain why the time limit for destruction of originals of intercept products was different from that for the summaries and extracts of the originals.*

7. 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 and in any case not later than one month after the completion of the operation. Summaries and extracts of the originals may contain information that is relevant to the investigation (i.e. the purpose of the prescribed authorization). Hence they are destroyed after the completion of the operation.

- ***To consider setting out in law or in the Commissioner's annual reports the requirement of the retention period specified by the Commissioner for LEAs to preserve the intercept products for his checking.***

8. Under the existing section 59(1)(c) of the Ordinance, the head of a specified LEA shall ensure that protected products are destroyed as soon as their retention is not necessary for the relevant purpose of the prescribed authorization. Under the proposal to check protected products in the Bill, 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. Once the Bill is passed, the LEAs will liaise with the Commissioner on any necessary adjustments required to the current destruction arrangements so as to facilitate the exercise of the Commissioner's power to check intercept products.

9. In addition, 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 LEAs preserve protected products of specific cases for his review. Under these arrangements, the Commissioner is able to require an LEA 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 LEAs comply with the Commissioner's requirements and the Commissioner has not encountered any difficulties in this regard. When the express power to check protected products is introduced upon the passage of the Bill, the Commissioner would determine the appropriate procedure to be adopted to enable the checking of protected products. Individual privacy is better protected in this way as the Commissioner may not necessarily review each and every case investigated by the LEAs and may not necessarily require access to each and every protected product obtained pursuant to a prescribed authorization in a case reviewed by him. 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. We do not suggest setting a minimum or maximum period of retention of protected products in the law, as this would inevitably restrict the flexibility of the Commissioner in determining the most appropriate procedure to be adopted for checking different types of cases under varying scenarios.

Other Matters

- *To advise whether persons other than officers of the specified 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.*

10. During interception operations, the actual monitoring is done by dedicated units of the LEAs. All designated listeners are officers of the LEA concerned. LEAs have put in place mechanism to make special arrangements for handling different operational scenarios.

- *To consider requiring LEAs to maintain statistics for the coming three months on the respective numbers of approved and rejected applications for search warrant to obtain information from Internet service providers and provide such statistics to the Bills Committee.*

11. Applications to the court for search warrants are made under different Ordinances and relate to the investigation of a wide variety of crimes. The court is the authority for approving applications for search warrants. LEAs do not maintain statistical figures on the number of applications for search warrants and the results of these applications. It has not been the practice of LEAs to maintain statistics on the procedures taken during crime investigation, as they have no value for formulating fight crime strategies. LEAs do not have plan to compile such statistics.

12. Besides, the subject of applications to the court for search warrants falls outside the scope of the Interception of Communications and Surveillance (Amendment) Bill 2015.

- *To consider requiring LEAs to maintain statistics on the total duration of communications intercepted under the ICSO and the quantity of documents preserved in relation to such operations.*

13. Please refer to paragraph 12 of the Administration's response to issues raised at the Bills Committee meeting on 22 June (LC Paper No. CB(2)1803/14-15(01)).