

立法會
Legislative Council

Ref : CB2/PL/SE/1

LC Paper No. CB(2)639/05-06
(These minutes have been seen
by the Administration)

Panel on Security

**Minutes of special meeting held on Tuesday, 4 October 2005
at 4:30 pm in the Chamber of the Legislative Council Building**

- Members present** : Hon James TO Kun-sun (Chairman)
Hon Albert HO Chun-yan
Hon Margaret NG
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, JP
Hon Howard YOUNG, SBS, JP
Hon LAU Kong-wah, JP
Hon CHOY So-yuk, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung
Hon CHIM Pui-chung
- Members attending** : Hon Martin LEE Chu-ming, SC, JP
Hon Alan LEONG Kah-kit, SC
Hon Ronny TONG Ka-wah, SC
- Members absent** : Hon Daniel LAM Wai-keung, BBS, JP (Deputy Chairman)
Dr Hon LUI Ming-wah, SBS, JP
Hon CHEUNG Man-kwong
- Public Officers attending** : Mr Ambrose S K LEE
Secretary for Security
- Mr Stanley YING
Permanent Secretary for Security

Miss CHEUNG Siu-hing
Deputy Secretary for Security

Mr Ian WINGFIELD
Law Officer (International Law)
Department of Justice

Clerk in attendance : Mrs Sharon TONG
Chief Council Secretary (2)1

Staff in attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Raymond LAM
Senior Council Secretary (2) 5

Ms Alice CHEUNG
Legislative Assistant (2) 1

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I. The Law Enforcement (Covert Surveillance Procedures) Order
(LC Paper Nos. CB(2)2632/04-05(01) to (05) and CB(2)2639/04-05(01))

The Chairman informed Members that a judicial review had been sought by Mr LEUNG Kwok-hung and Mr KOO Sze-yiu on the constitutionality of the Law Enforcement (Covert Surveillance Procedures) Order (the Order) and other matters. The Administration had advised that it would be constrained by the ongoing legal proceedings from commenting on any of the issues covered by the judicial review. This included the constitutionality of the Order and section 33 of the Telecommunications Ordinance, the reasons for not commencing the Interception of Communications Ordinance and related issues.

2. Secretary for Security (S for S) briefed Members on the Administration's response to issues raised at the special meeting on 15 August 2005 and the questions subsequently raised by Mr LAU Kong-wah and Ms Audrey EU. He stressed that the Administration would consult the Legislative Council (LegCo) on its legislative proposals on covert surveillance as soon as possible within the first half of the 2005-06 session.

3. S for S said that the Administration had provided Members with the Police's internal guidelines on covert surveillance that were made under the Order on a confidential basis. He noted that as the internal guidelines were confidential, they were restricted for the reference of Members only.

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4. The Chairman said that many Members had indicated their wish to discuss the internal guidelines. He considered that the latter part of the meeting could be changed into a closed session, if necessary, for discussion of the internal guidelines. He expressed doubt whether the guidelines were the only guidelines on covert surveillance for Police officers, especially given that reference was made in the guidelines to another document. He said that after studying the guidelines, he could not identify anything in them which should particularly be graded confidential. The Order did not require the internal guidelines to be classified confidential. He asked whether S for S would consider de-classifying the internal guidelines.

5. Mr Ronny TONG said that the internal guidelines only set out the procedures to be followed by Police officers. He queried why such guidelines had to be classified confidential.

6. Ms Audrey EU said that she could not identify anything particularly confidential in the internal guidelines. She considered that members of the public would not be able to know whether Police officers undertaking covert surveillance were acting in compliance with the internal guidelines, if the guidelines were not disclosed. She questioned why the internal guidelines, which were drawn up under the Order, were confidential.

7. Mr LEUNG Kwok-hung asked whether the Administration had established a mechanism for classifying confidential documents. He considered that the Commissioner of Police should be invited to attend the Panel's discussion on the internal guidelines and explain why the guidelines were confidential.

8. Ms Margaret NG asked whether the Panel was in breach of the Rules of Procedure of LegCo, if it discussed at an open meeting a paper provided by the Administration on a confidential basis. The Chairman said that a Panel so doing would not be in breach of the Rules of Procedure of LegCo. However, this would have a negative impact on the spirit of cooperation between LegCo and the Administration. If the Panel did not accept the condition that a document provided by the Administration be classified confidential, there were a number of ways to deal with the issue. For example, the Panel could condemn the Administration. LegCo would also pass a resolution to summon the Administration to disclose the document.

9. S for S said that that he had indicated at the special meeting held on 15 August 2005 that he would consider providing the internal guidelines on a confidential basis. The internal guidelines, which had been provided in response to members' request at the meeting, were confidential and intended for the information of Members only. In this connection, S for S pointed out that the Police were very concerned that some of the information contained in the internal guidelines were reported in some newspapers two days after the internal guidelines had been provided to the Panel on a confidential basis.

10. On the classification of the internal guidelines, S for S said that by their nature,

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departmental guidelines on internal procedures and practices usually had restricted circulation. Nevertheless, the classification of all documents was subject to review in order to take into account changing circumstances. In addition, the Administration appreciated the need to increase transparency in this area, and would take this into account in drawing up the legislative proposals on covert surveillance. Against this background, he undertook to consider, in consultation with the Commissioner of Police, whether the Police's guidelines on covert surveillance should continue to be graded confidential and provide a reply.

(Post-meeting note : The Administration replied on 17 October 2005 that it fully recognised the need to increase transparency of procedures and accountability when working out the legislative proposals on covert surveillance. In line with this thinking, the Police's internal guidelines on covert surveillance might be declassified, and that the guidelines no longer had to be graded confidential. Members were informed of the Administration's reply vide LC Paper No. CB(2)51/05-06 dated 17 October 2005.)

11. Mr Howard YOUNG said that the Liberal Party supported the issuance of the Order to clarify the legal basis for covert surveillance conducted by law enforcement officers. Referring to the statistics provided in paragraph 2 of the Administration's paper, he asked about the total number of Police officers at or above the rank of senior superintendent of Police. He also asked whether there was a sufficient number of authorising officers in the Immigration Department (ImmD).

12. S for S responded that although he did not have the relevant statistics on hand, the number of authorising officers in the Police was much less than the total number of Police officers at or above the rank of senior superintendent of Police. Police officers not involved in covert surveillance were not designated as authorising officers. Although there were less than five authorising officers in ImmD, such a number was adequate. It struck a balance between operational needs and the objective of keeping the number of authorising officers to a minimum.

13. Ms Margaret NG asked whether law enforcement agencies had discontinued all covert surveillance after the judgment delivered by the District Court in Criminal Case No. DCCC689 of 2004. Referring to paragraph 67 of the judgment delivered by the court in the case, she pointed out that the judge had stated that "Now that a Hong Kong court has made a ruling that the installation of covert surveillance devices is in breach of the Basic Law without proper legal procedures in place, and unless and until this ruling is overturned, it may well be held in future criminal trials that the ICAC are acting mala fide if they continue this practice without some legislative basis." She considered that law enforcement agencies would be in contravention of the rule of law, if they continued conducting covert surveillance despite the judgment.

14. Law Officer (International Law) (LO(IL)) responded that although the judge held that evidence gathered through covert surveillance in the case concerned had

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been unlawfully obtained, the evidence had been admitted. There was thus no opportunity for the prosecution to appeal against the ruling regarding whether the evidence concerned had been unlawfully obtained. As an appeal had been lodged by two of the defendants against their conviction by the District Court, it was likely that the issue might be addressed in the hearing. He said that the Chief Executive (CE) had issued the Order, which created legal procedures for the purposes of Article 30 of the Basic Law (BL30), to address the concerns of the judge.

15. Ms Margaret NG queried why covert surveillance was still being conducted before the appeal was concluded.

16. LO(IL) responded that the appeal was lodged in relation to the conviction of the defendants and the question of whether the evidence concerned should have been admitted. Although the ruling was made by the judge during the delivery of judgment, it did not determine the outcome of the case. He said that the ruling was not binding on other courts or the Government. The Chairman however considered that although the ruling was not binding on other courts, it was binding on the Government.

17. Ms Margaret NG queried why the Order could create legal procedures for the purposes of BL30. She considered that what was unconstitutional and unlawful would not become constitutional and lawful after the issuance of the Order. Her view was shared by Mr Martin LEE.

18. S for S disagreed that covert surveillance was unconstitutional and unlawful. He said that what the court had said recently had aroused public concerns. CE had thus issued the Order to address such concerns.

19. LO(IL) said that BL30 provided that the relevant authorities might inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences. However, it did not require such procedures to be prescribed by law. The Order provided for legal procedures for the purposes of BL30.

20. Ms Margaret NG queried why the Administration would issue a consultation document instead of introducing a bill on covert surveillance within the first half of the 2005-06 session.

21. S for S responded that the Administration would introduce legislative proposals on covert surveillance and interception of communications as soon as possible within the 2005-06 session. The Administration had already started consulting LegCo Members and other relevant parties on the issues involved. There were different views regarding whether the legislation to be introduced should regulate covert surveillance by the private sector, besides that by the Government.

22. Mr Martin LEE said that he had no objection to law enforcement officers

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conducting covert surveillance in the investigation of serious crime. However, the court had ruled that covert surveillance conducted by the Independent Commission Against Corruption (ICAC) was unconstitutional. Before such a ruling was overturned or legislation was enacted on covert surveillance, law enforcement officers should not conduct what had been ruled unconstitutional. He considered that legislation on covert surveillance should be enacted as soon as possible. In view of the time constraint, a minimalist approach should be adopted and LegCo Members could be invited to enact such legislation expeditiously. Alternatively, the Interception of Communications Ordinance could be brought into force.

23. S for S responded that covert surveillance, which had long been one of the effective investigation techniques adopted by law enforcement agencies, was constitutional and lawful, especially after the issuance of the Order. As a judicial review had been sought on the Order, he was not in a position to comment further on the issue. LO(IL) added that what the judge referred to was the situation before the issuance of the Order.

24. Mr Martin LEE queried why there was a need to issue the Order and enact legislation on covert surveillance, if covert surveillance was already constitutional and lawful. He queried why the Administration did not simply issue another executive order on interception of communications.

25. LO(IL) responded that the legislation to be enacted would cover both covert surveillance and interception of communications. He reiterated that the Order provided for legal procedures for the purposes of BL30. The Order was introduced merely as an interim measure and the Administration intended to introduce legislation governing covert surveillance.

26. Mr Martin LEE asked whether any article in BL provided CE with the power to introduce interim measures pending enactment of legislation. He said that the Order would create legal procedure only if LegCo had delegated CE with the power to prescribe covert surveillance procedures by an executive order.

27. LO(IL) responded that the Order, which did not have to be prescribed by law but had been promulgated, provided for legal procedures for the purposes of BL30. He said that existing legislation provided that the commissioner or director concerned could direct and control the respective disciplined services, subject to the orders and control of CE. The Chairman requested the Administration to provide a paper setting out such legislation and its relationship with BL30.

28. Mr Ronny TONG asked whether CE could, through the issuance of an executive order, direct law enforcement officers to perform unlawful acts. LO(IL) responded that law enforcement officers could not be directed to act in breach of the law.

29. Mr CHIM Pui-chung said that, to his knowledge, ICAC had lodged an appeal

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against the judgment in the case where the court ruled that covert surveillance conducted by ICAC was unconstitutional and unlawful. In view of this, he queried whether CE should issue the Order before the appeal was concluded. He said that if ICAC considered its covert surveillance work constitutional and lawful, there should not be a need for it to lodge an appeal. He said that the two recent judgments delivered by the District Court were related to covert surveillance conducted by ICAC, which reported directly to CE. He queried why S for S, instead of CE, was attending the meeting for ICAC.

30. S for S responded that he was not attending on behalf of Commissioner, ICAC, who reported to CE. He said that the Order had been issued in view of public concerns arising from the judgments in the two court cases. Legal advice indicated that the requirement regarding the legal procedures under BL30 could be met through the issuance of the Order by CE. He stressed that covert surveillance conducted by law enforcement agencies was constitutional and lawful.

31. Referring to paragraph 20 of the updated background brief prepared by the LegCo Secretariat on the regulation of surveillance and the interception of communications, LO(IL) said that in Criminal Case No. DCCC689 of 2004, the judge concluded that the system of covertly intercepting private communications as practised by ICAC was not “in accordance with legal procedures”. The judge held that the recordings were made in breach of BL30 and thus unlawfully made. However, the evidence concerned was admitted and the defendants were convicted. He stressed that it was two of the defendants, but not the prosecution, who had lodged an appeal against the ruling by the District Court.

32. Referring to paragraph 21 of the background brief, LO(IL) said that in Criminal Case No. DCCC687 of 2004, the District Court considered covert surveillance by ICAC in an application for permanent stay of the proceedings. The judge found that ICAC deliberately and intentionally recorded a conversation knowing that legal advice would almost certainly be given. The judge ordered a permanent stay and ICAC had sought judicial review on the ruling by the District Court. The Chairman requested the Administration to provide the Panel with a copy of ICAC’s application for judicial review.

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(Post-meeting note : A copy of the Administration's application for judicial review in respect of criminal case No. DCCC687 of 2004 was circulated to members vide LC Paper No. CB(2)277/05-06 on 3 November 2005).

33. Referring to paragraph 4 of the Administration paper, Ms Audrey EU queried why statistics on covert surveillance currently undertaken by law enforcement officers could not be provided. She asked about the number of law enforcement agencies engaged in covert surveillance and statistics on covert surveillance authorised by law enforcement agencies.

34. S for S responded that four law enforcement agencies were engaged in covert

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surveillance. Hitherto law enforcement agencies had not adopted a consistent approach to keeping statistics on covert surveillance. There was also the concern that the provision of such information might disclose the capability of law enforcement agencies in undertaking covert surveillance.

35. The Chairman considered that the provision of such information would not disclose the capability of law enforcement agencies in covert surveillance. Ms Audrey EU considered that a person would not be aware of the Police's capability in combating crime merely by studying such historical information.

36. S for S responded that the Administration recognised the need to enhance transparency. However, a balance should be struck between transparency and efficiency in the operations of law enforcement agencies. The Administration would examine, in its formulation of legislative proposals on covert surveillance, how best such statistics could be provided to LegCo in future.

37. Mr LEUNG Kwok-hung said that the issuance of the Order by CE was unconstitutional. He asked whether CE would withdraw the Order and proceed to enact legislation on covert surveillance as soon as possible. He also asked whether the Administration would, in the event that the Order was ruled unconstitutional in the judicial review, seek interpretation of BL.

38. S for S responded that covert surveillance conducted by law enforcement agencies was constitutional, lawful and necessary for the maintenance of law and order. As a judicial review was being sought on the Order, he was not in a position to comment further on the issue.

39. Referring to paragraph 2 of the Administration's paper, Mr LAU Kong-wah suggested that, if covert surveillance was to be authorised by the administrative authorities, the rank of authorising officers should be raised to the level of chief superintendent of Police or above. He considered that although legislation on covert surveillance should be enacted as soon as possible, such legislation should not be enacted in haste, as it was related to human rights. He asked why the Administration would only be consulting Members on its legislative proposals but not introducing a bill in the 2005-06 legislative session. He added that it was not appropriate to bring the Interception of Communications Ordinance into operation, as the Ordinance had not undergone any public consultation or study by a Bills Committee in the process of enactment.

40. S for S noted Mr LAU Kong-wah's suggestion. He said that the Security Bureau had accorded top priority to the enactment of legislation on covert surveillance and interception of communications. The Administration hoped that the relevant legislation could be passed by LegCo within the 2005-06 legislative session.

41. Mr LAU Kong-wah asked whether the Administration would consider

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introducing legislation to regulate covert surveillance by the Government and that by the private sector on a separate basis.

42. S for S responded that there were divergent views on the issue in the community and the Administration had not taken a final view on the matter.

43. Mr Albert HO said that although BL30 provided for a restriction on the freedom and privacy of communication of residents, BL39 provided that the rights and freedoms enjoyed by Hong Kong residents should not be restricted unless as prescribed by law. He questioned why the Administration imposed restriction on the rights of Hong Kong residents through the issuance of an executive order, instead of enacting legislation on covert surveillance. He considered that although legislation on covert surveillance should not be enacted in haste, the enactment process could be expedited. He expressed concern that there would be no legal basis for law enforcement agencies to undertake covert surveillance, if the Order was ruled unconstitutional in the judicial review.

44. S for S responded that the Administration had always respected human rights and had done a lot in the protection of such rights since reunification. The Order did not deprive anyone of his rights. It only regulated covert surveillance conducted by law enforcement agencies. He reiterated that covert surveillance had long been one of the effective investigation techniques used by law enforcement agencies. Evidence thus obtained had been admitted by the court on many occasions. He stressed that the Administration had accorded top priority to the formulation of legislative proposals on covert surveillance. The Administration hoped to introduce the relevant legislative proposals into LegCo as soon as possible in the first half of the 2005-06 session.

45. The Chairman said that legislation on covert surveillance should have been enacted long ago. He considered that the Administration had accorded priority to the enactment of such legislation only because it was forced to do so under the circumstances. He expressed concern that the Administration might seek an interpretation of BL, if the Order was ruled unconstitutional in the judicial review. He asked whether the Administration had drawn up any contingency plan to cope with the situation where the Order was ruled unconstitutional in the judicial review.

46. S for S responded that if the Order was ruled unconstitutional in the judicial review, the Administration would seek the cooperation of Members in enacting the relevant legislation urgently.

47. The meeting ended at 6:45 pm.

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Council Business Division 2
Legislative Council Secretariat
8 December 2005