

For information
5 August 2005

Legislative Council Panel on Security
Law Enforcement (Covert Surveillance Procedures) Order

INTRODUCTION

This paper briefs Members on the Law Enforcement (Covert Surveillance Procedures) Order (the Order) (at the Annex), which was made by the Chief Executive on 30 July 2005 pursuant to the power vested in him under Article 48(4) of the Basic Law, as well as the way forward regarding the regulation of covert surveillance activities.

BACKGROUND

2. Covert surveillance is part and parcel of any law enforcement agency's repertoire of investigative techniques. The law enforcement agencies in Hong Kong are no exception. The product of such surveillance has been introduced into evidence in our criminal courts in the past on many occasions. Hitherto the carrying out of such surveillance has been subject to the internal guidelines and procedures of the law enforcement agencies.

3. Arising from two District Court rulings, in late April and early July 2005 respectively, there has been public concern over how our law enforcement agencies carry out covert surveillance in the course of their work. There is a general consensus that these agencies should not be denied this useful tool in performing their duties of preventing and detecting crime and protecting public safety and security. At the same time, there have been suggestions for enhancing the transparency regarding the criteria and procedures governing surveillance operations.

4. The Administration fully appreciates the community's concerns and their wish for more transparency in the procedures, including the safeguards, governing the carrying out of covert surveillance. We have come to the view that ultimately we should put the measures governing covert surveillance into the form of legislation. In the meantime, to expeditiously address the above concerns and the need of law enforcement agencies for a clearer legal basis in

this important area of their work, the Chief Executive has made the Order.

THE ORDER

5. Under Article 48(4) of the Basic Law, the Chief Executive may, *inter alia*, issue executive orders. The Public Service (Administration) Order 1997 has been made under this Article. Procedures promulgated under an executive order are legal procedures.

6. The Order is an administrative direction from the Chief Executive to law enforcement agencies to maintain and implement the existing policy on covert surveillance. We have also taken the opportunity to update the relevant procedures and safeguards in the process of preparing the Order. The Order sets out the procedures in accordance with which covert surveillance may be carried out by or on behalf of officers of law enforcement agencies which undertake law enforcement investigations or operations. No officer may carry out any covert surveillance without an authorization granted under the Order (section 5(1)).

7. The procedures for application for authorization for covert surveillance, and renewal of the authorization, are stipulated in Parts 2 and 3 of the Order. An officer who needs to carry out covert surveillance may apply to an authorizing officer of the department concerned for an authorization (section 5(2)), by setting out certain prescribed particulars in writing (section 6). These particulars include, for example, the purpose of the covert surveillance, the form of the surveillance, the identity of the person who is to be subject to the surveillance, the proposed duration of the surveillance and an assessment of the impact of the surveillance on persons other than the subject of the surveillance.

8. The head of department concerned may designate officers at or above the rank of senior superintendent of police or equivalent to be authorizing officers. An authorizing officer may only grant the authorization if he is satisfied with the conditions for granting it under section 3 of the Order, namely

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(a) that the purpose sought to be furthered by carrying out the covert surveillance is that of -

- (i) preventing or detecting crime; or
- (ii) protecting public safety or security; and

- (b) that the surveillance is proportionate to the purpose sought to be furthered by carrying it out, having regard to its intrusiveness on the persons affected and availability of other less intrusive means (section 7).

The authorizing officer is required to indicate the reason for his determination, whether the application is approved or refused, in writing.

9. An authorization for covert surveillance may have effect for a maximum period of 3 months (section 8), and may be renewed in accordance with the same conditions as those applicable to a new application (sections 9 to 12). Again the authorizing officer is required to indicate the reason for his determination in writing.

10. Part 4 of the Order sets out the arrangements for applications in urgent situations. In such cases, the application (being either an application for authorization or an application for renewal) may be made orally (section 13(1)). As a safeguard, however, the authorization or renewal granted may only have effect for a maximum period of 72 hours (section 13(4)). Furthermore, the authorizing officer and the officer making the application have to prepare prescribed records in relation to the application in prescribed circumstances within a short time after determination of the application (section 14).

11. To ensure that applications under the Order are properly dealt with and that the requirements of the Order are observed, the head of department concerned is required to appoint officers senior to the authorizing officers to keep under regular review the exercise and performance by the authorization officers of powers and duties under the Order (section 16). In addition, internal guidelines must be drawn up by individual departments for guidance of their officers in execution of the Order (section 17). These guidelines must be in place before any officers are authorized to perform any function under the Order.

WAY FORWARD

12. The Independent Commission Against Corruption, Hong Kong Police Force, Immigration Department and Customs and Excise Department have already prepared the internal guidelines required under section 17 of the Order. They may, therefore, engage in covert surveillance in accordance with

the provisions of the Order on its commencement on 6 August 2005. The Administration will keep the implementation of the Order under close review and update the Order and the departmental guidelines where appropriate.

13. As mentioned in paragraph 4 above, our ultimate goal is to put the measures governing covert surveillance into the form of legislation. We are actively considering how best to do so as a matter of priority. This is nonetheless likely to take some time because, among other things, surveillance is carried out by not only law enforcement agencies but also the private sector, e.g., the media and private detectives. In the process we will seek to balance the needs of, on the one hand, the effective prevention and detection of crimes and protection of public safety and security, and of adequately protecting the right to privacy on the other. We will consult Members on our proposals as soon as practicable, and welcome their comments.

Security Bureau
5 August 2005

LAW ENFORCEMENT (COVERT SURVEILLANCE PROCEDURES) ORDER

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EXECUTIVE ORDER
No. 1 of 2005

I, Donald TSANG, Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China, pursuant to the power vested in me by Article 48(4) of the Basic Law, make the following Order—

PART 1

PRELIMINARY

1. Citation and commencement

(1) This Order may be cited as the Law Enforcement (Covert Surveillance Procedures) Order.

(2) This Order shall come into operation at the beginning of 6 August 2005.

2. Interpretation

(1) In this Order, unless the context otherwise requires—

“authorizing officer” (授權人員), in relation to any department, means any officer designated by the head of the department to be an authorizing officer under section 15;

“covert surveillance” (秘密監察) means the systematic surveillance of any person for the purposes of a specific law enforcement investigation or operation, if the surveillance—

- (a) is carried out in circumstances where the person is entitled to a reasonable expectation of privacy;
- (b) is carried out in a manner calculated to ensure that the person is unaware that the surveillance is or may be taking place; and
- (c) is likely to result in the obtaining of any private information about the person;

“department” (部門) means any department of the Government which, as part of its functions, undertakes law enforcement investigations or operations, and includes the Independent Commission Against Corruption;

“officer” (人員) means any officer of a department whose duties include undertaking law enforcement investigations or operations;

“writing” (書面) includes any mode (whether electronic, mechanical, optical or otherwise) of representing words in a visible form.

(2) In this Order—

- (a) any reference to an authorization granted under this Order (however expressed) includes an authorization renewed under this Order; and
- (b) any reference to an officer or authorizing officer (however expressed) includes—
 - (i) where the person who has been such officer or authorizing officer is no longer holding office as such officer or authorizing officer, the person for the time being holding such office or appointed to act in or perform the functions of such office or lawfully performing the functions of such office; or
 - (ii) where the person who is such officer or authorizing officer is unable to perform the functions of the office of such officer or authorizing officer, the person for the time being appointed to act in or perform the functions of such office or lawfully performing the functions of such office.

3. Conditions for grant of authorization for covert surveillance or renewal of authorization

In this Order, the conditions for the grant of an authorization for covert surveillance, or a renewal of an authorization for covert surveillance, are that, in the circumstances of the particular case—

- (a) the purpose sought to be furthered by carrying out the covert surveillance is that of—
 - (i) preventing or detecting crime; or
 - (ii) protecting public safety or security; and
- (b) the covert surveillance is proportionate to the purpose sought to be furthered by carrying it out, upon—
 - (i) balancing, in operational terms, the need for the covert surveillance against the intrusiveness of the covert surveillance on any person who is to be the subject of or may be affected by the covert surveillance; and
 - (ii) considering whether the purpose sought to be furthered by carrying out the covert surveillance can reasonably be furthered by other less intrusive means.

4. Order not to apply to covert surveillance provided for by law

This Order does not apply to any covert surveillance which is or has been authorized, permitted or required to be carried out by or under any law.

PART 2

AUTHORIZATION FOR COVERT SURVEILLANCE

5. Application for authorization

(1) No officer may, directly or through any other person, carry out any covert surveillance without an authorization granted under this Order.

(2) Any officer of any department may apply to an authorizing officer of the department for an authorization for any covert surveillance to be carried out by or on behalf of any of the officers of the department.

6. Information to be set out in application for authorization and form of application

- (1) An application for authorization for covert surveillance shall—
- (a) state which of the purposes specified in section 3(a)(i) or (ii) is sought to be furthered by carrying out the covert surveillance;
 - (b) set out—
 - (i) the form of the covert surveillance and the information sought to be obtained by carrying out the covert surveillance;
 - (ii) if known, the identity of any person who is to be the subject of the covert surveillance;
 - (iii) if known, particulars of any place (including any conveyance and any structure, whether movable or not) where the covert surveillance is to be carried out;
 - (iv) the proposed duration of the covert surveillance, with an indication of when it is to start and finish;
 - (v) the benefits likely to be obtained by carrying out the covert surveillance; and
 - (vi) an assessment of the impact, if any, of the covert surveillance on any person other than that referred to in subparagraph (ii); and

- (c) identify by name and rank the officer making the application.
- (2) The application shall be made in writing.

7. Determination of application for authorization

(1) Upon considering an application for authorization for covert surveillance made under this Part, the authorizing officer may, subject to subsection (2)—

- (a) grant the authorization sought under the application, whether with or without variation; or
- (b) refuse to grant the authorization.

(2) The authorizing officer shall not grant the authorization unless he is satisfied that the conditions for the grant of the authorization under section 3 have been met.

(3) The authorizing officer shall deliver in writing his determination under subsection (1) and the reason for the determination.

8. Duration of authorization

An authorization for covert surveillance—

- (a) takes effect at the time specified by the authorizing officer when granting the authorization, which in any case shall not be earlier than the time when it is granted; and
- (b) subject to any renewal under Part 3, ceases to have effect upon the expiration of the period specified by the authorizing officer when granting the authorization, which in any case shall not be longer than the period of 3 months beginning with the time when it takes effect.

PART 3

RENEWAL OF AUTHORIZATION FOR COVERT SURVEILLANCE

9. Application for renewal of authorization

At any time before an authorization for covert surveillance ceases to have effect, any officer of the department concerned may apply to an authorizing officer of the department for renewal of the authorization.

10. Information to be set out in application for renewal of authorization and form of application

(1) An application for renewal of an authorization for covert surveillance shall—

(a) set out—

- (i) whether the renewal sought is the first renewal and, if not, each occasion on which the authorization has been renewed previously;
- (ii) any significant change to the information previously provided for the purposes of any application for the authorization or for renewal of the authorization;
- (iii) the value of the information so far obtained with the authorization;
- (iv) the reason why it is necessary to apply for the renewal; and
- (v) the proposed duration of the covert surveillance, with an indication as to when it is to finish; and

(b) identify by name and rank the officer making the application.

(2) The application shall be made in writing.

11. Determination of application for renewal of authorization

(1) Upon considering an application for renewal of an authorization for covert surveillance made under this Part, the authorizing officer may, subject to subsection (2)—

(a) grant the renewal sought under the application, whether with or without variation; or

(b) refuse to grant the renewal.

(2) The authorizing officer shall not grant the renewal unless he is satisfied that the conditions for the grant of the renewal under section 3 have been met.

(3) The authorizing officer shall deliver in writing his determination under subsection (1) and the reason for the determination.

(4) An authorization for covert surveillance may be renewed more than once under this Order.

12. Duration of renewal of authorization

A renewal of an authorization for covert surveillance—

(a) takes effect at the time when the authorization would have ceased to have effect but for the renewal; and

- (b) subject to any further renewal under this Part, ceases to have effect upon the expiration of the period specified by the authorizing officer when granting the renewal, which in any case shall not be longer than the period of 3 months beginning with the time when it takes effect.

PART 4

SPECIAL PROVISIONS FOR URGENT CASES

13. Oral application and its effect

(1) Notwithstanding sections 6(2) and 10(2), an application for authorization for covert surveillance or an application for renewal of an authorization for covert surveillance may be made orally, if the officer making the application considers that the particular case is of such urgency as to justify the making of such an oral application.

(2) Notwithstanding sections 7(1) and 11(1) and without prejudice to sections 7(2) and 11(2), where an oral application is made under subsection (1), the authorizing officer shall not grant the authorization or renewal sought under the application unless he is satisfied that the particular case is of such urgency as to justify the making of the oral application.

(3) Notwithstanding sections 7(3) and 11(3), where an oral application is made under subsection (1), the authorizing officer may deliver orally his determination under section 7(1) or 11(1) (as the case may be) and the reason for the determination.

(4) Notwithstanding sections 8(b) and 12(b), where, as a result of an oral application made under subsection (1), the authorization or renewal sought under the application is granted by the authorizing officer, the period specified by the authorizing officer when granting the authorization or renewal (as the case may be), being the period upon the expiration of which the authorization or renewal (as the case may be) ceases to have effect, shall in any case not be longer than the period of 72 hours beginning with the time when the authorization or renewal (as the case may be) takes effect.

(5) Except as otherwise provided in this section, this Order, with necessary modifications, applies to an oral application made under subsection (1), and any authorization or renewal granted as a result of that application, as it applies to an application made in writing, and any authorization or renewal granted as a result of that application.

14. Records for oral application

(1) Where an oral application has been made under section 13(1), the authorizing officer shall, as soon as reasonably practicable after his determination of the application under section 7(1) or 11(1) (as the case may be), record in writing—

- (a) a brief note of all information provided under section 6(1) or 10(1) (as the case may be) for the purposes of the application; and
- (b) where under section 13(3) he has delivered orally his determination under section 7(1) or 11(1) (as the case may be) and the reason for the determination, the determination and the reason he has so delivered.

(2) Where, as a result of an oral application made under section 13(1), the authorization or renewal sought under the application has been granted, the officer making the application shall, within the period of 72 hours beginning with the time when the authorization or renewal (as the case may be) takes effect, provide to the authorizing officer a record in writing containing all information provided under section 6(1) or 10(1) (as the case may be) for the purposes of the application.

PART 5

MISCELLANEOUS

15. Designation of authorizing officers

The head of any department may designate in writing any officer not below a rank equivalent to that of senior superintendent of police to be an authorizing officer for the purposes of this Order.

16. Regular reviews

Where the head of any department has made any designation under section 15, he shall make arrangements for officers of a rank higher than those held by the authorizing officers of the department to keep under regular review the exercise and performance by the authorizing officers of the powers and duties conferred or imposed on them by this Order.

17. Internal guidelines

(1) Before any department is to authorize, permit or require any of its officers to make any application under this Order or to perform any function under this Order, it shall issue internal guidelines for the purpose of providing guidance to its officers in respect of matters provided for in this Order.

(2) The department may from time to time revise the whole or any part of the internal guidelines, in a manner consistent with its power to issue the internal guidelines under this section, and unless the context otherwise requires, any reference to the internal guidelines, whether in this Order or otherwise, shall be construed as a reference to the internal guidelines as so revised.

(3) Any officer of the department shall, in performing any function under or for the purposes of any provision of this Order, have regard to the provisions of the internal guidelines.

(4) A failure on the part of any person to comply with any provision of the internal guidelines—

- (a) shall not of itself be regarded as a failure to comply with any provision of this Order; and
- (b) without prejudice to the generality of paragraph (a), shall not affect the validity of any authorization granted under this Order.

Made this 30th day of July 2005

Donald TSANG
Chief Executive

Explanatory Note

This Order is made by the Chief Executive under Article 48(4) of the Basic Law to set out the legal procedures in accordance with which covert surveillance may be carried out by or on behalf of officers of Government departments which undertake law enforcement investigations or operations.

2. The Order does not apply to covert surveillance which is or has been provided for by any law.