

**Bills Committee on
Interception of Communications and Surveillance Bill
Code of Practice**

We have amended the draft code of practice taking into account discussion of the Bills Committee regarding the draft issued under cover of paper SB Ref : ICSB 22/06. The pages with the material amendments to that draft are attached for Members' ease of reference. Samples of the forms at the Annex of the code are also enclosed.

Security Bureau
August 2006

GENERAL

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Balancing the “needs of public security or of investigation into criminal offences”, and freedoms and rights.

4. Article 30 of the Basic Law (BL 30) provides that –

“[t]he freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.”

5. Other provisions in Chapter III of the Basic Law protect other rights and freedoms. The underlying principle of the Ordinance is that any interference with any such rights and freedoms by the covert operations authorized and conducted under the Ordinance must be necessary for and proportionate to the purposes that such operations seek to achieve. These purposes are defined in Section 3 of the Ordinance³. For further guidance, see the section on Conditions for Issue, Renewal or Continuance of Prescribed Authorization below.

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³ The Secretary for Security stated at the resumption of the second reading debate of the draft legislation that

“[law enforcement agencies would under no circumstances undertake surveillance activities for a political purpose.]”

COVERT SURVEILLANCE

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10.12. The term “private information” should be given a broad interpretation, covering any information about a person’s private and family life, including his personal relationship with others, and— may include activities of a professional or business nature.

13. A person has a reasonable expectation of privacy if (a) he, by his conduct, has exhibited a subjective expectation of privacy, that is, he has shown that he seeks to preserve something as private; and (b) his subjective expectation of privacy is one that society is prepared to recognize as reasonable, that is, the expectation, viewed objectively, is justifiable under the circumstances. ~~The test for determining whether a person is entitled to a “reasonable expectation of privacy” has two prongs. The first one is whether the person’s conduct will exhibit a subjective expectation of privacy. The second is whether the person’s subjective expectation of privacy is one that society is willing to recognize as reasonable⁵~~ An individual does not have a subjective expectation of privacy if he has been put on notice that his activities in a specified area would be watched by others for a legitimate purpose

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15. The following provides further guidance in respect of covert surveillance with listening devices and optical surveillance devices.

Aural surveillance

16. With regard to covert surveillance using a listening device, one of the factors that may be relevant in determining whether there is a reasonable

⁵ See the Hong Kong Law Reform Commission (LRC) Report on Civil Liability for Invasion of Privacy (2004), para. 6.26

expectation of privacy in respect of a communication is whether the communication would be audible to someone who is not a party to such communication, such as a passer-by, without the use of a sense-enhancing device. If not, the parties may reasonably expect privacy in their communication.

17. A person may reasonably expect that his communications would not be listened to or recorded by persons other than persons who could hear the communications without the aid of a device. This is the case whether the communications take place in a public place or private premises. It should be noted that the expectation to be free from aural surveillance is distinct from the expectation to be free from optical surveillance. A person can be visible to the public without forfeiting his right to the privacy of his communications. Persons having dinner in a restaurant with no one else sitting or standing nearby have a reasonable expectation of privacy in relation to their conversations if the conversations are not audible to other persons without the aid of a listening device, even though the restaurant is a public place.

18. Conversely, a person speaking loudly from private premises may not have a reasonable expectation of privacy in respect of the words spoken, if these words can be heard without the aid of a device by persons outside the premises.

19. In considering whether a proposed surveillance operation with listening device would intrude into the subject's reasonable expectation of privacy and require authorization under the Ordinance, officers should consider carefully the circumstances of the operation, taking into account the factors in paragraph 14 above. Officers should only decide that the operation does not require authorization under the Ordinance if it is clear that the operation would not intrude into the subject's reasonable expectation of privacy throughout the

operation. This would cover the case, for example, of a person making a public speech in a public place, if the operation only seeks to monitor or record that public speech. Conversely, if the operation is also designed to capture that speaker's conversations with fellow speakers at the backstage which is outside the hearing range of the audience, that part of the operation may intrude into the reasonable expectation of privacy of the speakers.

Optical surveillance

20. One of the factors that may be relevant in determining whether the subject has a reasonable expectation of privacy with respect to covert surveillance carried out with the use of an optical surveillance device is whether the subject's activities in question would be visible to other persons such as passers-by, without the use of a sense-enhancing device.

21. Accordingly, a person does not normally have a reasonable expectation of privacy in respect of optical surveillance when he is in an area open to the view of the general public. More specifically, under Section 2 (2) of the Ordinance, "*a person is not regarded as being entitled to a reasonable expectation of privacy ... in relation to any activity carried out by him in a public place*".

22. In general, a person is likely to have a reasonable expectation of privacy if he has secluded himself in private premises, such as his home or office. However, where the individual is in plain view (for example, he is right before an open window) and is visible to the naked eye of passers-by, an officer may observe the individual's activities without infringing on his privacy, whether the observation is done with the naked eye or an ordinary binocular. However, an individual standing before an open window would not be visible to the naked eye if, for example, he is at the top levels of a high-rise building or facing the open sea. In such circumstances, that individual would have a

reasonable expectation to be free from being observed by others with their naked eyes. If an operation aims to observe or record that individual's activities using a sense-enhancing device (e.g. a long-range electronic optical surveillance device), it may intrude into his reasonable expectation of privacy.

23. As noted in paragraph 19 above in relation to listening devices, officers formulating a proposed operation with optical device should think through the circumstances of the operation, taking into account the factors in paragraph 14 above. Bearing in mind that an individual's reasonable expectation to be free from optical surveillance may change with changes in circumstances as discussed in paragraph 22 above, officers should only decide that the operation does not require authorization under the Ordinance if it is clear that the operation would not intrude into the subject's reasonable expectation of privacy throughout the operation.

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13.26. Under the Ordinance, ~~The~~ ~~the~~ term "public place" is defined to mean any premises which are a public place as defined ~~has the same meaning as that~~ in section 2(1) of the Summary Offences Ordinance (Cap. 228), but does not include any such premises that are intended for use by members of the public as a lavatory or as a place for taking a bath or changing clothes. According to section 2(1) of Cap. 228, "*public place includes all piers, thoroughfares, streets, roads, lanes, alleys, courts, squares, archways, waterways, passages, paths, ways and places to which the public have access either continuously or periodically, whether the same are the property of the Government or of private persons.*" Section 2(2) of Cap. 228 further provides that "*(w)here no specific description is given of the ownership of any property, the word 'property' shall be taken to apply to all such property of the kinds specified, whether owned by the Government, by a public department or by a*

private person.” Since “premises” is defined in the Ordinance to include any conveyance, under the Ordinance and hence “public place” may also include a means of transport made available to the public.⁷

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PRESCRIBED AUTHORIZATIONS

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Conditions for Issue, Renewal or Continuance of Prescribed Authorization

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23-36. Section 2(1) defines the term “serious crime”. In relation to interception, serious crime means any offence punishable by a maximum sentence of not less than 7 years’ imprisonment. In respect of covert surveillance, serious crime means any offence punishable by a maximum sentence of not less than 3 years’ imprisonment or a fine of not less than HK\$1,000,000. The serious crime threshold is no more than an initial screen. Officers must be satisfied that the conditions in section 3 are met in the circumstances of the case regarding the particular serious crime before submitting an application. It should be noted that the word “particular” in Section 3 and relevant provisions in the Ordinance seeks to make clear that any application for authorization must specify a “particular” serious crime or threat to public security.

37. The determination of what constitutes a threat to Hong Kong’s

⁷ Examples of “public places” under Cap. 228 are: (a) the pedestrian walkway inside the commercial complex on the ground floor of Tai On Building at Sai Wai Ho (HKSAR v 蔡就昌 (Choi Chau Cheung)); (b) the podium at the Golden Bauhinia Square outside the HK Convention and Exhibition Centre (HKSAR v Lau San Ching [2003] 2 HKC 378). Where the public may have access to the common area of a public housing estate and use it as a thoroughfare, the area would fall within the definition of “public place” under Cap 228. However, the common parts of a building would not be considered as a public place if access is restricted to the occupiers and their licensees or invitees.

public security is highly fact-based. Possible examples of such threats include activities connected with the illicit trafficking of weapons of mass destruction, terrorism related activities, human trafficking, etc. Schedule 3 of the Ordinance requires ~~An assessment of the impact of a particular threat to public security should include~~ an assessment of the impact, both direct and indirect, of the threat to the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong for applications on grounds of public security. In connection with “indirect impact”, this is a recognition of the fact that a threat to Hong Kong’s public security need not be direct, and may be grounded in events which are distant but may indirectly harm Hong Kong’s public security. It is the general understanding of the international community that the security of a jurisdiction may depend on the security of other jurisdictions. Advocacy, protest or dissent (whether in furtherance of a political or social objective or otherwise), unless likely to be carried on by violent means, is *not* of itself regarded as a threat to public security⁹. Grounds for believing that violent means are likely must be included in an application involving such activities.

38. The key concept underlying section 3 is the necessity and proportionality tests, which the various provisions in the section seek to embody¹⁰. In determining whether the operation is necessary and proportionate, the department has to:

- (a) balance the immediacy and gravity of the particular serious crime or threat and the likely value and relevance of the information likely to be obtained against the intrusiveness of

⁹ Any applications for authorization must comply with the following statement made by the Secretary for Security during the Second Reading of the Bill –

“[interception of communications and covert surveillance operations would not be carried out for offences that are yet to be created under Article 23 of the Basic Law].”

¹⁰ Paragraphs 3.21 and 3.22 of the LRC Report on *Privacy: the Regulation of Covert Surveillance* elaborate on the proportionality test, the key points of which have been reflected in the provisions of Section 3 of the Ordinance. Officers may wish to refer to the Report for further reference.

the operation;

(b) consider whether other less intrusive means are available;
and

(c) consider other matters that are relevant in the circumstances.

39. The proportionality test involves balancing the intrusiveness of the operation on the subject and others who may be affected by it against the need for the operation. The operation will not be proportionate if it is excessive in the circumstances of the case or if the information could reasonably be obtained by other less intrusive means.

25.40. Whenever possible, a less intrusive means should be used instead - for example, if the same objective can be achieved by a Type 2 surveillance instead of a Type 1 surveillance, or by overt means such as search warrants or court orders, the Type 2 surveillance or overt means respectively should be used as they are generally less intrusive to privacy.

41. An application for interception or covert surveillance which is likely to result in the acquisition of information subject to LPP should only be made in exceptional circumstances with full justifications. Full regard should be paid to the particular proportionality issues that such an operation would raise. The application must include an assessment of how likely it is that such privileged information will be obtained. For more details about the measures that should be put in place to protect such privileged information, see the section on “Protection of LPP information” below.

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APPLICATION PROCEDURES

General Rules

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28.45. Apart from the information required to be provided under the Ordinance, all information known to the applicant that is relevant to the determination of an application should be provided in the affidavit or affirmation for the relevant authority to make a balanced decision~~if there is any other information that the applicants consider to be likely to affect the determination, it should be included in the affidavit / affirmation or statement in writing (as the case may be) as well.~~ Where the particulars of previous applications are required to be provided, the determinations made in respect of such applications should also be included. The information provided should be sufficiently detailed to facilitate consideration on the basis of the written submission alone, if the relevant authority so decides. All applications except oral applications should be made in writing, and should be signed by the applicant. In this connection, officers are reminded that in no case should they wilfully making a false affidavit, affirmation or statement, as well as providing misleading information which is material (i.e. of a kind which might affect the decision). Such conduct is a criminal offence, and an authorization obtained on the basis of such false information could be determined to be invalid and any operation based on the authorization could be determined to have been conducted without the authority of an authorization (see paragraph 141 below).

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50. For the same investigation or operation, a single application may cover more than one subject. This is possible if the individuals concerned are involved in the same crime or threat and it is necessary to monitor their

~~communications or activities during the same period of time. the need to make an application on the same investigation or operation covering the various subjects arises at the same time.~~ In applying for authorization covering such specified subjects, the applicant should make an assessment on the proportionality and necessity tests having regard to the case of each of these subjects. However, separate applications may also be made at different times for the same case during its investigation or operation to take into account developments, for example, the identification of another suspect. A separate application should be made for different investigations or operations.

Issue of Judge's Authorizations

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Determination of Application for Judge's Authorization by the Panel Judge

37.54. The panel judge will deliver in writing his determination¹¹, and will return the determination and the certified copy of the application, the affidavit / affirmation and other supporting documents submitted with the application to the applicant.

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Issue of Executive Authorizations

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Application for Issue of Executive Authorization

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¹¹ The panel judge may consider the application in such manner as he considers appropriate. Where the panel judge decides to hold a hearing in respect of the application, it will be held in private and the panel judge ~~may will~~ arrange for the hearing to be audio-taped, or will record the information in writing. The officer should also make a note of the hearing to record the directives given by the panel judge or conditions imposed under the authorization. –

49.66. Should the case involve participant monitoring in Type 2 surveillance, the consent of the participating party should be obtained prior to the operation taking place, which, where practicable and without causing risks to the safety of the person concerned or prejudicing the operation, should be in written form unless the person is an officer of the department, and this should be so indicated in making the application.

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Oral Applications

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Oral Application for Prescribed Authorizations

73.90. An application for the issue or renewal of a prescribed authorization provided under the Ordinance may be made orally, if the applicant considers that it is not reasonably practicable, having regard to all the circumstances of the case, to make the application in accordance with the relevant written application provisions, but it is still practicable to submit the application to the same relevant authority as for a written application. For example, in an urgent case involving serious bodily harm, although it is not possible to have the supporting affidavit / affirmation in writing to be prepared, it may still be practicable for an applicant-officer to appear before a panel judge to apply-make an oral application for an authorization to carry out interception. Another example is where the written statement may havehas been prepared, the applicant cannot appear before the authorizing officer in person due to, say, very adverse weather conditions or bad road conditions but may ~~only~~ contact him by telephone ~~due to, say, very adverse weather conditions or bad road conditions.~~ An oral application would be justified if the operation is time-critical and cannot wait until the weather or road conditions return to normal. Also, if

arrangements have to be made for the applicant to take part in a participant monitoring Type 2 surveillance operation that ~~will take place~~ has to be carried out very soon due to the urgency of the case, an oral application may be made.

74.91. The oral application procedures under the Ordinance should only be resorted to in exceptional circumstances ~~eater for special circumstances and in time-critical cases~~ where the normal written application procedures cannot be followed. ~~They should only be resorted to in exceptional circumstances.~~

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77.94. Panel judges will audio-record the proceedings of oral applications made to them, or, in cases where recording is not practicable, make a written record of the applications. The applicant should also make a note of the proceedings. For executive authorizations and emergency authorizations, the authorizing officer should make a written record of the oral application and his determination with sufficient details to enable checking against the confirmation application.

Application for Confirmation of Prescribed Authorization or Renewal Issued or Granted upon Oral Application

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79.96. The application ~~should~~ shall be made in writing and ~~should~~ shall be supported by the documents set out in section 26(2) of the Ordinance. Apart from a record in writing containing all the information that should ~~–~~ have been provided to the relevant authority in writing under the application ~~–~~ form, it should also include an affidavit / affirmation or statement in writing (as the case may be) which is to verify all information provided orally during the initial oral application, as well as a record in writing setting out the determination delivered orally in respect of the initial oral application. In case of any discrepancy in

the records made by the relevant authority and the applicant, the decision as to which version to adopt would rest with the relevant authority.

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Secretary for Security

August 2006

ICSO No.:

INTERCEPTION OF COMMUNICATIONS AND
SURVEILLANCE ORDINANCE

(Chapter XXX)

(Section 8(1))

APPLICATION FOR AN AUTHORIZATION
FOR INTERCEPTION / TYPE 1 SURVEILLANCE*

This is an application under section 8(1) of the Interception of Communications and Surveillance Ordinance, Cap. for the issue of an authorization for the interception of a communication transmitted by post / a telecommunications system / Type 1 Surveillance* to be carried out by or on behalf of any of the officers of the [insert name of department] (the Department).

This application is made by [name, rank and post] of the Department.

This application is supported by an affidavit / affirmation* of the applicant.

Dated this day of

Signature of Applicant

* Delete as appropriate.

ICSO No.:

INTERCEPTION OF COMMUNICATIONS AND
SURVEILLANCE ORDINANCE

(Chapter XXX)

(Section 11(1))

APPLICATION FOR RENEWAL OF AN AUTHORIZATION
FOR INTERCEPTION / TYPE 1 SURVEILLANCE*

This is an application under section 11(1) of the Interception of Communications and Surveillance Ordinance, Cap. for the renewal of an authorization for the interception of a communication transmitted by post / a telecommunications system / Type 1 surveillance* to be carried out by or on behalf of any of the officers of the **[insert name of department]** (the Department).

The authorization for which renewal is sought is ICSO No. issued by **[name of panel judge]** J on day of (the authorization).

This application is made by **[name, rank and post]** of the Department.

This application is supported by an affidavit / affirmation* of the applicant, a copy of the authorization sought to be renewed and a copy of all affidavit/s* / affirmation/s* that was / were* provided for the issue of that authorization / and renewal/s* of that authorization*.

Dated this day of .

Signature of Applicant

* Delete as appropriate.

ICSO No.:

INTERCEPTION OF COMMUNICATIONS AND
SURVEILLANCE ORDINANCE

(Chapter XXX)

(Section 23(1))

APPLICATION FOR CONFIRMATION OF AN EMERGENCY
AUTHORIZATION FOR INTERCEPTION / TYPE 1 SURVEILLANCE*

This is an application under section 23(1) of the Interception of Communications and Surveillance Ordinance, Cap. for confirmation of an emergency authorization for the interception of a communication transmitted by post / a telecommunications system / Type 1 surveillance* carried out / to be carried out by or on behalf of any of the officers of the **[insert name of department]** (the Department).

The emergency authorization for which confirmation is sought was issued by **[name, rank and post]** of the Department on day of at hours (the emergency authorization).

This application is made by **[name, rank and post]** of the Department.

This application is supported by an affidavit / affirmation* of the applicant and a copy of the emergency authorization.

Dated this day of .

Signature of Applicant

* Delete as appropriate.

ICSO No.:

INTERCEPTION OF COMMUNICATIONS AND
SURVEILLANCE ORDINANCE

(Chapter XXX)

(Section 23(1) and Section 28(1))

APPLICATION FOR CONFIRMATION OF AN EMERGENCY
AUTHORIZATION FOR INTERCEPTION / TYPE 1 SURVEILLANCE*
ISSUED UPON ORAL APPLICATION

This is an application under section 23(1) of the Interception of Communications and Surveillance Ordinance, Cap. _____ for confirmation of an emergency authorization issued upon oral application.

The emergency authorization for which confirmation is sought is an emergency authorization for the interception of a communication transmitted by post / a telecommunications system / Type 1 surveillance* carried out / to be carried out by or on behalf of any of the officers of the **[insert the name of department]** (the Department). This emergency authorization was issued by **[name, rank and post]** of the Department on _____ day of _____ at _____ hours.

This application is made by **[name, rank and post]** of the Department.

This application is supported by:

- (i) an affidavit / affirmation* of the applicant; and
- (ii) a record in writing containing all the information that would have been provided under the relevant application provision had the oral application been made in writing; and
- (iii) a record in writing setting out the determination that was orally delivered in respect of that oral application.

Dated this _____ day of _____ .

Signature of Applicant

* Delete as appropriate.

ICSO No.:

INTERCEPTION OF COMMUNICATIONS AND
SURVEILLANCE ORDINANCE

(Chapter XXX)

(Section 26(1))

APPLICATION FOR CONFIRMATION OF
AN AUTHORIZATION FOR INTERCEPTION /
TYPE 1 SURVEILLANCE ISSUED /
THE RENEWAL OF AN AUTHORIZATION
FOR INTERCEPTION / TYPE 1 SURVEILLANCE GRANTED*
UPON ORAL APPLICATION

This is an application under section 26(1) of the Interception of Communications and Surveillance Ordinance, Cap. for confirmation of an authorization issued / the renewal of an authorization granted* upon oral application.

The authorization / renewal of the authorization* for which confirmation is sought is an authorization for the interception of a communication transmitted by post / a telecommunications system / Type 1 surveillance* to be carried out by or on behalf of any of the officers of the [insert name of department]. This is an authorization that was issued / whose renewal was granted* by [name of panel judge] J on day of at hours.

This application is made by [name, rank and post] of [name of department].

This application is supported by:

- (i) an affidavit / affirmation* of the applicant; and
- (ii) a record in writing:
 - (a) containing all the information that would have been provided under the relevant application provision had the oral application been made in writing; and
 - (b) setting out the determination that was orally delivered in respect of that oral application.

Dated this day of .

Signature of Applicant

* Delete as appropriate.

ICSO No.:

INTERCEPTION OF COMMUNICATIONS AND
SURVEILLANCE ORDINANCE

(Chapter XXX)

(Section 32(1))

APPLICATION FOR A DEVICE RETRIEVAL WARRANT

This is an application under section 32(1) of the Interception of Communications and Surveillance Ordinance, Cap. for the issue of a device retrieval warrant.

The application is made in respect of a device/s* authorized to be used under and installed pursuant to a prescribed authorization issued by **[name of panel judge]** J on the day of and numbered ICSO No.

This application is made by **[name, rank and post]** of **[name of department]**.

This application is supported by an affidavit / affirmation* of the applicant and a copy of the prescribed authorization.

Dated this day of

Signature of Applicant

* Delete as appropriate.

ICSO No.:

INTERCEPTION OF COMMUNICATIONS AND
SURVEILLANCE ORDINANCE

(Chapter XXX)

(Section 55(3))

REPORT ON THE DISCONTINUANCE
OF INTERCEPTION / TYPE 1 SURVEILLANCE*
CARRIED OUT UNDER A PRESCRIBED AUTHORIZATION

This is a report under section 55(3) of the Interception of Communications and Surveillance Ordinance, Cap. , on the discontinuance of interception of a communication transmitted by post / a telecommunications system / Type 1 surveillance* carried out under a prescribed authorization.

The prescribed authorization under which the discontinued interception of a communication transmitted by post / a telecommunications system / Type 1 surveillance* was carried out by or on behalf of any officers of the **[insert name of department]** (the Department) is a prescribed authorization, ICSO No. , which was issued by the Honourable Mr / Madam* Justice* on the day of (the authorization).

The interception / Type 1 surveillance* was discontinued on day of **[date]** at hours **[time]** on the ground that the conditions for its continuance were not met. **[set out details of how the conditions for its continuance were not met]**

This report is made by **[name, rank and post]** of the Department.-

Dated this day of

Signature of Reporting Officer

* Delete as appropriate.

