

# 立法會

## *Legislative Council*

LC Paper No. LS44/05-06

**Paper for the House Committee Meeting  
on 10 March 2006**

### **Legal Service Division Report on Interception of Communications and Surveillance Bill**

#### **I. SUMMARY**

- 1. Objects of the Bill**      To make provisions to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers, and to provide for related matters.
  
- 2. Comments**              The Bill proposes to regulate the conduct of interception of communications and the use of surveillance devices by prescribed authorizations, by oversight of the Commissioner on Interception of Communications and Surveillance to be established under the Bill, and by regular reviews within the law enforcement agencies concerned.
  
- 3. Public Consultation**      According to the LegCo Brief, the Administration has taken into account discussions with Members and interested parties in the past months before drawing up the key parameters of the legislative proposals.
  
- 4. Consultation with LegCo Panel**      The Panel on Security discussed the Administration's proposals regulating the conduct of interception of communications and covert surveillance by law enforcement agencies at its meetings on 7, 16 and 21 February as well as 2 and 7 March 2006. Members had raised various concerns and queries about the proposals in the Bill.
  
- 5. Conclusion**              The Legal Service Division is still scrutinizing the Bill. However, in view of the concerns expressed by the Panel on Security and the public, it is recommended that a Bills Committee be formed to consider the Bill in detail.

## **II. REPORT**

### **Objects of the Bill**

To make provisions to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers, and to provide for related matters.

### **LegCo Brief Reference**

2. SBCR 3/2/3231/94 issued by the Security Bureau in March 2006.

### **Date of First Reading**

3. 8 March 2006.

### **Comments**

4. The existing statutory provisions on interception of communications are contained in the Post Office Ordinance (Cap. 98), the Telecommunications Ordinance (Cap. 106) and the Interception of Communications Ordinance (Cap.532). Section 13 of the Post Office Ordinance empowers the Chief Secretary for Administration to authorize the Postmaster General to open and delay specified postal packets or specified classes of packets. Section 33 of the Telecommunications Ordinance empowers the Chief Executive, when he considers that the public interest so requires, or any public officer authorized by him to order that any message or any class of messages be intercepted or detained or disclosed to the Government. The Interception of Communications Ordinance was passed in June 1997 but has not come into operation. The object of the Ordinance was to provide laws on and in connection with the interception of communications transmitted by post or by means of a telecommunication system. The Law Enforcement (Covert Surveillance Procedures) Order made by the Chief Executive on 30 July 2005 is also relevant. The Order purported to set out the legal procedure in accordance with which covert surveillance may be carried out by or on behalf of officers of law enforcement agencies.

5. Details of events leading to presentation of this Bill are contained in paragraphs 2 to 7 of the paper entitled *Proposed Legislative Framework on Interception of Communications and Covert Surveillance* prepared by the Security Bureau (Annex B to the LegCo Brief). In essence, members may recall that the issue of legislating on interception of communications dates back to the consultation paper "*Privacy: Regulating Surveillance and the Interception of Communications*" issued by the Law Reform Commission in 1996, and the Commission's report "*Privacy: Regulating the Interception of Communications*" in December 1996. Members may also recall that the immediate reason for the presentation of this Bill is the judicial review judgment in *Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region* (Case No. HCAL 107/2005) handed down on 9 February 2006. In that case, the Court of First Instance held that section 33 of the Telecommunications Ordinance is inconsistent with Articles 30 and 39 of the Basic Law and with article 14 of the Bill of Rights, and that the Law Enforcement (Covert Surveillance Procedures) Order does not comply with Article 30 of the Basic Law. The court also made an order that the

effect of the declarations be suspended for a period of six months in view of the legal vacuum which would be caused by the judgment. There is an appeal in process in relation to this judgment.

6. The Bill proposes to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers and to provide for related matters. Under the Bill, such regulation would be by different types of authorizations, by oversight by the office of the Commissioner on Interception of Communications and Surveillance to be established under the Bill, and by regular reviews within the law enforcement agencies concerned.

7. At the meeting of the Panel on Security on 7 March 2006, the Administration informed members that it would propose in the Bill that authorization for all interception of communications should be by judges. As to covert surveillance, there would be a two-tier authorization system under which authorization for “more intrusive” operations would be made by judges, and “less intrusive” operations by designated authorizing officers within law enforcement agencies. Surveillance that does not infringe on the reasonably expected privacy of individuals would not require authorization. Whether a covert surveillance operation is “more intrusive” or “less intrusive” depends mainly on two criteria: whether surveillance devices are used, and whether the surveillance is carried out by a party participating in the relevant communications. In general, operations involving the use of devices would be considered more intrusive. On the other hand, when the use of devices involves a party participating in the relevant communications, the operation would be considered less intrusive because that party’s presence is known to the other parties and that party may in any case relate the discussion to others afterwards.

8. In the Bill the “more intrusive” covert surveillance is called Type 1 surveillance, the “less intrusive” covert surveillance is called Type 2 surveillance. The Bill provides that any covert surveillance which is Type 2 surveillance under the definition would be regarded as Type 1 surveillance if it is likely that any information which may be subject to legal professional privilege will be obtained.

9. Clause 3 of the Bill provides that the conditions for the issue, renewal or continuance of an authorization are that (a) the purpose is preventing or detecting serious crime, or protecting public security and (b) the interception or covert surveillance is proportionate to the purpose. “Serious crime” is defined to mean an offence punishable by imprisonment or not less than 7 years. The factors to be considered in determining whether the interception or covert surveillance is proportionate to the purpose is in clause 3(1).

10. In the Bill, “interception” means the carrying out of any intercepting act (defined as the inspection of some or all of the contents of the communication, in the course of its transmission by a postal service or by a telecommunications system, by a person other than its sender or intended recipient). Under clause 4, no public officer shall, directly or through any other person, carry out any interception unless it is pursuant to a prescribed authorization, or the excepted prescribed situations exist.

11. “Covert surveillance” is defined as any systematic surveillance carried out with the use of any surveillance device for the purposes of a specific investigation or operation, if the surveillance (i) is carried out in circumstances where any person who is the subject of the surveillance is entitled to a reasonable expectation of privacy; (ii) is carried out in a

manner calculated to ensure that the person is unaware that the surveillance is or may be taking place; and (iii) is likely to result in the obtaining of any private information about the person. Under clause 2(2), 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. Under clause 5, no public officer shall, directly or through any other person, carry out any covert surveillance unless it is carried out pursuant to a prescribed authorization.

12. Clause 6 enables the Chief Executive, on the recommendation of the Chief Justice, to appoint 3 to 6 judges of the Court of First Instance to be panel judges.

13. The Bill proposes different levels of authorization for interception and covert surveillance. For interception of communication or Type 1 surveillance (“more intrusive”), “judicial authorization” to be issued by a panel judge is required. For Type 2 surveillance (“less intrusive”), “executive authorization” to be issued by an authorizing officer of the department concerned suffices. An officer of a department may apply to the head of the department for the issue of an “emergency authorization” for interception of communication or Type 1 surveillance if there is immediate need (conditions prescribed in clause 20(1)), and it is not reasonably practicable to apply for judicial authorization. In such a situation confirmation within 48 hours by a panel judge is required. Under clause 25, an application for authorization may be made orally to a panel judge or an authorizing officer, as the case may be, where it is not reasonably practicable to make the application in writing, and the said authorities may give authorizations orally. Again, confirmation within 48 hours by the authorizing authority concerned is required.

14. An office by the name of the Commissioner on Interception of Communications and Surveillance is established under clause 38. The Commissioner would be appointed by the Chief Executive on the recommendation of the Chief Justice for a term of 3 years. A Justice of Appeal of the Court of Appeal, a judge of the Court of First Instance, a former permanent judge of the Court of Final Appeal, a former Justice of Appeal of the Court of Appeal or a former judge of the Court of First Instance would be eligible for appointment. The functions of the Commissioner are generally to oversee the compliance by departments and their officers with the relevant requirements. Specifically, his functions would include (i) to conduct reviews on compliance by department and their officers; (ii) to carry out examinations on an application made by a person who believes himself to be the subject of interception or covert surveillance; and (iii) to submit reports to the Chief Executive and make recommendations to the Secretary for Security and heads of departments.

15. The Commissioner is required to submit annual reports on matters specified in clause 47(2) (i.e. information relating to the operation of the authorizations and internal review systems) to the Chief Executive. Under clause 47(4), the Chief Executive is required to cause a copy of the report to be laid on the table of the Legislative Council. However, if the Chief Executive considers that the publication of any matter in the report would be prejudicial to the prevention or detection of crime or the protection of public security, he may exclude such matter from the copy to be laid on the table of the Legislative Council.

16. The Bill proposes to repeal the Interception of Communications Ordinance (Cap. 532), section 13 of the Post Office Ordinance and section 33 of the Telecommunications Ordinance.

### **Public Consultation**

17. According to the LegCo Brief, the Administration has taken into account discussions with Members and interested parties in the past months before drawing up the key parameters of the legislative proposals.

### **Consultation with LegCo Panel**

18. At its meetings on 7, 16 and 21 February as well as 2 and 7 March 2006, the Panel on Security discussed the Administration's proposals on regulating the conduct of interception of communications and covert surveillance by law enforcement agencies.

19. Members of the Panel on Security raised various concerns and queries about the Administration's proposals. Some members expressed concern on how "more intrusive" and "less intrusive" operations were differentiated, and opposed the proposal that the panel of judges authorizing interception and the "more intrusive" covert surveillance should be appointed by the Chief Executive. Members also opposed that integrity check should be conducted on panel judges prior to their appointment. Members expressed concern about the resource implications on the Judiciary, and had asked the Administration to provide past statistics on interception of communications and covert surveillance. Some members suggested that there should be penalty provisions for non-compliance with any code of practice. They also suggested that a committee should be established as an independent oversight authority to keep under review law enforcement agencies' compliance with the provisions of the legislation and any code of practice made under the legislation, instead of appointing a judge as the Commissioner. A member suggested that the "less intrusive" covert surveillance activities should also be authorized by judges. Another member considered that some highly intrusive covert surveillance, for example the use of bugging device, should require a higher threshold and could only be used in the investigation of offences punishable with imprisonment of not less than seven years.

20. The Panel on Security has also noted a submission by the Law Society to the Administration, copied to the Panel, on certain points relating to the legislative proposals.

### **Conclusion**

21. The Legal Service Division is still scrutinizing the Bill. However, in view of the concerns expressed by members of the Panel on Security and the public, it is recommended that a Bills Committee be formed to consider the Bill in detail.

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