

**For discussion
On 16 February 2009**

Legislative Council Panel on Security

**Annual Report 2007 to the Chief Executive by the Commissioner on
Interception of Communications and Surveillance**

**Information Paper by the ICAC
In response to issues raised in Chapter 5 of the Report**

Purpose

This paper provides information in response to issues raised in Chapter 5 of the Annual Report 2007 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance (the Report) that deals with legal professional privilege (LPP) and journalistic material.

Background

2. The Interception of Communications and Surveillance Ordinance (ICSO) does not preclude the granting of authorizations for applications that involve the likelihood of obtaining information subject to LPP, but stipulates various measures for the protection of the privilege. These measures seek to strike a balance between protecting privacy and LPP, while allowing law enforcement agencies (LEAs) to carry out covert operations for the prevention and detection of serious crimes and protection of public security in warranted circumstances.

3. Pursuant to section 63 of the ICSO, the Secretary for Security issued a code of practice (COP) for the purpose of providing practical guidance to officers of the ICAC, Police, Immigration and Customs and Excise in respect of matters provided for in the ICSO. Paragraph 120 of the COP requires that where information subject to LPP is inadvertently obtained through interception or covert surveillance, such information

must be screened out by a dedicated unit separate from investigation team and must be withheld from the investigators. It also requires that the Commissioner on Interception of Communications and Surveillance (C/ICS) be notified of interception/covert operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. On the basis of the department's notification, the Commissioner may, inter alia, review the information passed on by the dedicated units to the investigators to check whether it includes any information subject to LPP that should have been screened out.

4. Section 59(2)(b) of ICSO and paragraphs 124 and 169 of COP require that any intercepted product that contains information that is subject to LPP should be destroyed as soon as reasonably practicable. Since the implementation of ICSO, the ICAC has issued internal instructions on Telecommunications Interception (TI) operations, including a destruction policy in accordance with the relevant requirements under the ICSO.

The Four LPP Cases

5. In 2007, on its own volition and in compliance with the COP, the ICAC notified C/ICS of four cases in which information that might be subject to LPP had been obtained through interception under the authority of a prescribed authorization (PA) issued by a panel judge (PJ) under the ICSO. (C/ICS confirms that only one of the four cases is a sure case where information subject to LPP had actually been obtained.)

6. In Chapter 5 of the Report, C/ICS has commented on the performance of individual ICAC officers in their handling of matters relating to information that might be subject to LPP, and how they responded to subsequent enquiries conducted by C/ICS. The ICAC respects these comments and has taken appropriate actions to ensure strict compliance with the relevant requirements under the ICSO and full co-operation with C/ICS in the performance of his statutory duties. The actions taken include intensified training for the officers and improvement of operation procedures, and, where appropriate, disciplinary and administrative actions against those found to have acted

inappropriately or breached the relevant requirements under the ICSO and internal instructions.

7. The ICSO is a new statutory regime governing the conduct of covert operations including TI and the scrutiny by C/ICS over such operations. As already pointed out in the Report by C/ICS, there are a number of legal issues requiring clarification, possibly through legislative amendment. When in doubt, the ICAC will seek legal advice. For ICSO-related issues that have service-wide implication on law enforcement, the ICAC will consult the Security Bureau (SB).

8. With reference to the four LPP cases mentioned in Chapter 5 of C/ICS's Report, the ICAC would like to provide information and present its views on three major issues as set out in the following paragraphs.

a) Unauthorized Interception of Telecommunications (LPP cases 1 and 4)

9. Two out of the four LPP cases pertained to unauthorized interception of telecommunications. The first case (LPP 1 case) involved a duration of 105 minutes and the second (LPP 4 case) 34 minutes. The ICSO and the COP contain no provision in dealing with the situation where a PA was revoked by a PJ after submission of a REP-11 report by the relevant law enforcement agency (LEA) seeking to continue with the TI operation. In the event of a revocation occurring, the LEA will take immediate steps to cease listening to the intercepted product and cause discontinuance of the interception by disconnection of the relevant interception facility. The process takes time to complete. C/ICS considers the time gap between revocation and disconnection, no matter how brief the period, constitutes a period of unauthorized interception.

10. In LPP case 1, the PJ revoked the PA at 1115 hours. The decision for revocation was communicated to an ICAC officer waiting outside the PJ Office at 1125 hours. The officer immediately telephoned his supervisor, who there and then instructed cessation of listening. The cessation process was completed at 1130 hours. The supervisor also

caused disconnection of the interception facility, which was effected by a dedicated team¹. The disconnection process was completed at 1300 hours (90 minutes). Where the ICAC was concerned, the period of unauthorized listening lasted for only 15 minutes.

11. Subsequently legal advice was sought with a view to clarifying the PJ's power to revoke a PA after submission of a REP-11 report. In the interim, measures were introduced to minimize unauthorized intrusion of privacy by ceasing to listen to the intercepted product while pending a decision of the PJ upon submission of REP-11 report, and by making prior arrangement with the dedicated team to minimize the time required to effect disconnection in case the PJ so decides. Since the ICSO and COP are silent on the details of some practical aspects of dealing with situations where LPP information might possibly be obtained, the ICAC has additionally implemented a set of procedures on handling of information obtained through interception that may be subject to LPP.

12. In LPP case 4, the period of unauthorized interception during the gap between the PJ's revocation of the authorization and the disconnection of the interception facility was reduced to 34 minutes with no unauthorized listening by ICAC officers having followed the above interim measures.

b) Delaying Matters by Not Submitting a Case Report to C/ICS(LPP case 1)

13. With regard to LPP case 1, the legal issue and the sequence of events leading to the submission of section 53 report (providing information to C/ICS) as opposed to section 54 report (reporting on non-compliance) by the ICAC to C/ICS was given in paragraphs 5.14 to 5.23 of the Report. Seven months elapsed between the time C/ICS received a report and the time when the report was actually delivered. Much of the delay was caused by the inability of the parties concerned to reach an agreement as to whether the PJ has inherent power to revoke a PA after submission of a REP-11 report. In the end, a case report under

¹ With reference to paragraph 2.33 of the Report, the dedicated team, whilst being part of the LEAs, operates independently of their investigative arms.

section 53 was submitted to C/ICS in January 2008. The inconvenience caused to C/ICS is regretted. However, such delay was not the cause of the destruction of the intercepted product and related records required by C/ICS. The fact is that the intercepted product and related records had already been destroyed on 22 March 2007 in accordance with ICAC's destruction policy, just before C/ICS first raised the issue during his inspection visit to the ICAC on 28 March 2007 and long before his subsequent request on 13 June 2007 for the ICAC to submit a report of non-compliance under section 54.

c) Destruction of Intercepted Products and Relevant Records (LPP cases 2 and 3)

14. The ICAC's destruction policy on intercepted product and related records is formulated based on the relevant requirements under the ICSO and the principle of protection of privacy and minimization of intrusion. The circumstances in which the destruction of the relevant records in LPP cases 2 and 3 took place were commented upon by C/ICS in Chapter 5 of his Report. The ICAC regrets the way certain ICAC officers had conducted themselves in the circumstances which appeared to be unsatisfactory. The ICAC fully accepts that the officers involved in implementing ICSO must be highly vigilant in dealing with information inadvertently obtained that may be subject to LPP, and that they must be prompt and alert in responding to requests by C/ICS to facilitate the fulfilment of his statutory duties. Such vigilance is best represented by the increased alertness in their daily operations and proactiveness on the part of the officers in facilitating enquiries conducted by C/ICS.

15. The impact of C/ICS's concern over the destruction of records emanating from LPP cases was felt towards the end of 2007. By January 2008, the ICAC has implemented a set of procedures on handling information that may be subject to LPP. The procedures were formulated taking into account of the comments and advice by C/ICS. They entail cessation of listening once information that may be subject to LPP has been inadvertently obtained and preservation of all relevant records for examination by C/ICS. C/ICS also brought to SB's attention the enhanced procedures in handling LPP matters for other LEAs to

follow. LPP case 4 was handled in accordance with the principles of the said procedures.

16. As stated in C/ICS's Report, he has identified some inadequacies of individual officers concerned in the handling of suspected LPP cases. He considers that such inadequacies were glitches at the initial stage of the implementation of the ICSO regime. He also observes that the handling of the last case (LPP case 4) demonstrated that such initial glitches had been rectified.

17. To better equip our officers in dealing with ICSO matters, we have:-

- i. conducted regular briefings, training workshops and experience sharing sessions to all concerned officers with a view to ensuring their full understanding of the law and relevant requirements taking into account of their day-to-day experience in the implementation of the ICSO;
- ii. revised and improved the existing procedures in handling information which may be subject to LPP obtained through telecommunications interception; and
- iii. with effect from April 2008, established a dedicated unit (a compliance assurance unit) to ensure full compliance with the law and relevant requirements and to answer any queries raised by C/ICS in the performance of his statutory duties.

Way forward

18. The ICAC will continue to support the work of C/ICS and fully cooperate with him in discharging his statutory duties under the ICSO.

19. The ICAC will continue to work closely with the Administration to address issues of common concern, including the clarification of relevant legal provisions. It is hoped that those outstanding issues identified during the implementation of the ICSO can be satisfactorily resolved in the forthcoming comprehensive review on ICSO with the objective of maintaining a right balance to ensure

effectiveness in the prevention and detection of serious crimes and to protect the privacy of individuals.

Independent Commission Against Corruption
15 February 2009