

立法會

Legislative Council

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by the Administration)

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Panel on Security

**Minutes of special meeting
held on Monday, 7 December 2009, at 2:30 pm
in the Chamber of the Legislative Council Building**

Members present : Hon LAU Kong-wah, JP (Chairman)
Hon James TO Kun-sun (Deputy Chairman)
Hon Albert HO Chun-yan
Dr Hon Margaret NG
Hon CHEUNG Man-kwong
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung
Hon CHIM Pui-chung
Hon Cyd HO Sau-lan
Hon CHAN Hak-kan
Hon WONG Kwok-kin, BBS
Hon WONG Yuk-man

Members absent : Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, SBS, JP
Hon LAU Wong-fat, GBM, GBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon IP Kwok-him, GBS, JP
Hon Paul TSE Wai-chun

Public Officers attending : Item I

The Administration

Mr Ambrose LEE, GBS, IDSM, JP
Secretary for Security

Ms CHANG King-yiu, JP
Permanent Secretary for Security

Ms Carol YIP Man-kuen, JP
Deputy Secretary for Security

Mrs Millie NG
Principal Assistant Secretary for Security

Mr Ian WINGFIELD
Solicitor General
Department of Justice

Mr Godfrey KAN
Senior Government Counsel, Legal Policy Division
Department of Justice

Independent Commission Against Corruption

Dr Timothy TONG Hin-ming
Commissioner of ICAC

Mr Daniel LI Ming-chak, IDS
Deputy Commissioner and Head of Operations

Mr Ryan WONG Sai-chiu, IDS
Director of Investigation (Government Sector)
Operations Department

Mr Ricky YAU Shu-chun
Assistant Director 3
Operations Department

Clerk in attendance : Mr Raymond LAM
Chief Council Secretary (2) 1

Staff in attendance : Ms Connie FUNG
Senior Assistant Legal Adviser 1

Mr Bonny LOO
Assistant Legal Adviser 3

Miss Josephine SO
Senior Council Secretary (2) 1

Ms Kiwi NG
Legislative Assistant (2) 1

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I. Results of study of matters raised in the Annual Report 2008 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance

(LC Paper Nos. CB(2) 396/09-10(01), CB(2)407/09-10(01) and CB(2)467/09-10(01))

Secretary for Security ("S for S") briefed members on the results of the Administration's study of matters raised in the Annual Report 2008 to the Chief Executive ("the Annual Report 2008 ") by the Commissioner on Interception of Communications and Surveillance ("the Commissioner"), as detailed in the Administration's paper.

2. Commissioner, Independent Commission Against Corruption ("C/ICAC") briefed members on the responses of ICAC to issues raised in the Annual Report 2008 which were related to ICAC, details of which were set out in the paper submitted by ICAC.

3. Members noted the following papers tabled at the meeting -

- (a) Speech delivered by the Commissioner at his briefing held in the morning of 7 December 2009; and
- (b) Summary of the Commissioner's Annual Report 2008, which was distributed at the briefing on 7 December 2009.

(Post-meeting note: The above papers were issued to members vide LC Paper No. CB(2)492/09-10 on 8 December 2009.)

Attitude problem among officers of the law enforcement agencies

4. Referring to the Commissioner's comments about the attitude of Officer Z in Report 3 which was described as "arrogant and presumptuous, bordering and recalcitrance", the Deputy Chairman, Ms Emily LAU, Mr Albert HO and Mr CHAN Hak-kan expressed deep concern about the overall attitude of law enforcement officers towards the Commissioner's oversight and review functions. Noting that a total of 11 cases of irregularities/non-compliance or incidents were reported to the Commissioner by the law enforcement agencies ("LEAs") in 2008, they asked about the measures taken by the Administration and ICAC to address the attitude problem among law enforcement officers and to ensure their strict compliance with the law and full cooperation with the Commissioner.

5. S for S said that the Administration noted the Commissioner's comments about the attitude of Officer Z in Report 3, which involved an irregularity due to system failure in effecting discontinuance resulting in the facilities covered by five prescribed authorizations being disconnected six to 18 minutes after the expiry of the authorizations. Although the way how Officer Z responded to the

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Commissioner's enquiry appeared to be unsatisfactory, it was an isolated incident possibly due to the fact that Officer Z had not got used to the Commissioner's oversight authority. As a matter of fact, the Commissioner had stated in the Annual Report 2008 that the heads of LEAs had provided him with all the assistance he needed, enabling him to perform his review and oversight functions under the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO").

6. S for S further said that with the benefit of more practical experience gained in the implementation of the regime under ICSO, LEAs were more readily able to offer useful comments from the operational perspective in response to recommendations and suggestions made by the Commissioner for improving the checking mechanism. Regarding the recommendations made by the Commissioner to LEAs, the LEAs concerned had accepted them in full or were actively identifying improvement measures to address the Commissioner's concerns. The Security Bureau ("SB") had also amended the Code of Practice, as and where appropriate, to resolve common issues that had implications across LEAs.

7. C/ICAC also said that -

- (a) ICAC remained committed to ensuring ICAC officers' full compliance with the ICSO requirements in conducting interception and covert surveillance. It would continue to render full cooperation and support to the Commissioner in the course of discharging his duties in overseeing and supervising the performance of LEAs over their compliance with the ICSO requirements;
- (b) ICAC welcomed the Commissioner's comments and suggestions for the improvement of ICAC's work. Although investigations into the cases of non-compliance had not revealed any evidence of bad faith on the part of ICAC officers, the ICAC management agreed that officers should have been more vigilant in the implementation of ICSO and in responding to the Commissioner's enquiries or requests; and
- (c) in the light of practical experience gained since the implementation of ICSO and the advice and recommendations given by the Commissioner in his annual reports, ICAC had introduced a number of improvement measures with a view to ensuring that the relevant statutory activities were carried out in strict compliance with legal requirements. They included -
 - (i) setting up a dedicated Compliance Assurance Group to deal with ICSO-related matters and to ensure ICAC's full

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compliance with the law and the relevant requirements;

- (ii) conducting regular briefings and training workshops to ensure that officers deployed to undertake ICSO-related duties were kept abreast of the latest legal and administrative requirements;
- (iii) strengthening the existing internal guidelines for conducting interception and covert surveillance, such as procedures in handling information which might be subject to legal professional privilege ("LPP") and procedures to verify telecommunications facilities; and
- (iv) preserving all interception products and records relating to the obtaining of LPP information, including the summaries, to facilitate the Commissioner's enquiry and examination.

8. Ms Audrey EU and Mr LEUNG Kwok-hung expressed strong dissatisfaction with the arrogant and presumptuous attitude of Officer Z towards the Commissioner's oversight and review functions. Ms EU asked whether Officer Z belonged to ICAC or another LEA.

9. S for S said that to the knowledge of the Administration, the Commissioner had raised the issue with the LEA concerned after completion of his Annual Report 2008, and the head of that LEA had accepted the Commissioner's recommendation to re-deploy Officer Z to undertake other duties that were not related to ICSO implementation. Regarding the question of whether Officer Z belonged to ICAC or another LEA, S for S pointed out that the Commissioner had made it clear in paragraph 7.106 of the Annual Report 2008 that it was not appropriate to disclose further details about the case as that would probably divulge information relating to the prevention or detection of crimes and protection of public security, which could put LEAs in a disadvantageous position as against criminals or possible criminals.

10. Mr Albert HO considered the Administration's response far from convincing. He stressed that the information requested by Ms EU could facilitate members' understanding about the culture of that particular LEA in which Officer Z worked as well as the mentality of its officers as a whole towards the Commissioner's oversight and review functions. In his view, the staffing arrangement subsequently made in respect of Officer Z, instead of the taking of disciplinary action, had suggested that the head of the LEA concerned was shielding Officer Z. Mr HO said that to ensure fairness and in line with the Commissioner's practice to unveil in his annual reports the identity of ICAC in some cases of irregularities or non-compliance, the Administration should, unless it had very sound reasons for holding back the information, provide

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further information about Report 3, including the LEA to which Officer Z belonged as well as his rank.

11. In response, S for S stressed that there was no question of the head of LEA shielding Officer Z in Report 3. He said that ICSO had provided for a statutory regime for the conduct of interception of communications and covert surveillance by LEAs. While the implementation of some of the Commissioner's recommendations had led to additional workload for LEAs, the latter fully appreciated the importance of the Commissioner's oversight functions and would continue to put in their best endeavours to comply with the Commissioner's advice and facilitate the performance of his duties. SB would continue to play a co-ordinating role, and would strive to resolve common issues that had implications across LEAs.

12. Mr WONG Yuk-man doubted the sincerity of the Administration and LEAs in rendering full support and cooperation to the Commissioner in his performance of functions under ICSO. Mr WONG said that law enforcement officers, as evidenced by the arrogant and presumptuous attitude of Officer Z and the many irregularities identified in various cases reported to the Commissioner, appeared to regard investigation and detection of crimes as their first and foremost task, thus showing resistance towards the Commissioner's oversight of their interception of communications and covert surveillance operations.

Fairness of disciplinary actions taken by ICAC

13. Ms Audrey EU, Ms Emily LAU and Ms Cyd HO expressed grave concern that the Commissioner had doubted the fairness and appropriateness of the disciplinary actions taken by ICAC against various offending officers in Report 1, which related to an irregularity concerning the inclusion of a wrong facility number in the application for and the obtaining of a prescribed authorization for interception resulting in the interception for a few days of a facility of a person who was not the subject under investigation. Ms EU noted that the Commissioner had made inquiries with ICAC and sought the reasoning of its decision, and despite the Commissioner making known to ICAC his analyses of the blameworthiness of each of the officers concerned, ICAC did not consider that there was unfair treatment. She queried the propriety of ICAC's decision to uphold its stance. Ms LAU noted the Commissioner's view that the difference in treatments seemed to magnify the culpability of the case officer ("SI(B)") while playing down the mistakes committed by his supervisor ("CI(B)") and others who similarly lacked diligence and vigilance in checking the documents to which they had access and which they were duty bound to check. She cautioned that the unfairly severe disciplinary action taken against SI(B) as compared with the punishment on other officers concerned, particularly his supervisor CI(B), might give the public an impression that such decisions were not entirely impartial, and the fact that ICAC did not pay heed to the views of

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the Commissioner might affect the community confidence in the work of ICAC. Her view was echoed by Ms HO.

14. In response, C/ICAC and Director of Investigation (Government Sector), ICAC made the following points -

- (a) upon discovery, ICAC duly reported the incident to the Commissioner. A full investigation was then conducted by the Compliance Assurance Group to determine, among other things, the appropriate disciplinary actions to be taken. Taking into account a number of matters including the duties and responsibilities of the officers concerned, the nature and extent of contravention and mitigating circumstances, the four officers concerned were respectively awarded with either a disciplinary warning or a disciplinary advice;
- (b) in reviewing the case, the Commissioner considered that the disciplinary treatments of the officers were unequal and disparate. ICAC noted the Commissioner's comments and analyses and appreciated his concerns. In the light of his observations, the ICAC management had reviewed the disciplinary actions taken, but considered that they were not inappropriate or unfair. This notwithstanding, ICAC had assured the Commissioner that his comments would be taken into consideration in the performance review of each and every officer concerned together with other aspects of their performance;
- (c) as regards the disciplinary action taken against SI(B), it was noteworthy that he was given a disciplinary warning because of his lack of due diligence and vigilance in identifying the discrepancy between the facility number appearing in the initial report and that stated in the detailed report and in seeking to resolve the matter at an earlier opportunity; and
- (d) ICAC regretted the inconvenience and frustration caused to the Commissioner in his review of the two cases of more serious non-compliance, notably Report 1 and Report 2, involving ICAC officers. The Commissioner's comments and recommendations had been taken fully on board, and internal procedures and guidelines had been strengthened with a view to preventing occurrence of similar incidents in future.

15. The Deputy Chairman said that to his knowledge, the Commissioner had separately written to the Chief Executive ("CE"), expressing his concern over the disparate disciplinary actions taken against SI(B) and CI(B) and providing CE with all the details of the case and the reasoning as to why the difference in

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treatments was considered as magnifying the culpability of the junior while playing down the mistakes committed by the superior. The Deputy Chairman enquired whether CE himself had given any instructions to ICAC on how the matter should be followed up.

ICAC

16. In response, C/ICAC advised that in view of the seriousness of the matter, CE had directed that an independent review be conducted. In this connection, the matter was subsequently referred to the ICAC Advisory Committee on Corruption ("ACOC") for advice. The conclusion of ACOC was that ICAC had acted within a reasonable range. The Deputy Chairman requested ICAC to provide the Panel with the findings of the review conducted by ACOC concerning the disciplinary case in which the Commissioner considered the disciplinary treatments of various offending officers unequal and disparate.

17. In response to Ms Emily LAU's enquiry on the number of staff against whom disciplinary actions had been taken in the report year 2008 for having acted inappropriately or breached the relevant requirements under ICSO and the forms of disciplinary actions taken against the staff, Director of Investigation (Government Sector), ICAC advised that in 2008, actions had been taken by the management against a total of 15 ICAC officers in view of their inadequacies in performance of ICSO-related duties, with details as follows -

<u>Management and disciplinary actions taken</u>	<u>Number of officers</u>
Warning	3
Advice	3
Management advice	5
Counselling	4

Director of Investigation (Government Sector), ICAC added that detailed information on how ICAC applied management actions and disciplinary procedures and the consequence of these actions on individual officers were set out in Annex B to the paper provided by ICAC for the Panel meeting on 3 March 2009 (LC Paper No. CB(2)990/08-09(01)).

Commissioner's power and authority to listen to interception product and the need for legislative amendments

18. Ms Audrey EU recalled that at the briefing held in the morning of 7 December 2009 by the Commissioner on his Annual Report 2008, the Commissioner advised that there had been arguments regarding the legality of his listening to interception products, which had been lawfully obtained by LEAs, for the purposes of performing his functions under ICSO. Pointing out that there was an absence of express provisions in ICSO empowering the Commissioner to listen to interception products, the Commissioner had made a recommendation

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to the Administration for amending ICSO to give express power and authority to the Commissioner to listen to interception products held by LEAs. In view of the length of time that could take before the legislative amendments to remove the legal uncertainty came into operation, Ms EU sought clarification on how the Commissioner's requests for listening to interception products would be handled during the interim period.

19. Director of Investigation (Government Sector), ICAC responded that ICAC had since the release of the Commissioner's Annual Report 2007 implemented new preservation procedures which were followed in LPP Case 4 reported in the Annual Report 2007, and the only LPP Case reported in the Annual Report 2008. Such preservation requirements were now strictly followed by ICAC officers in reporting any LPP case to the Commissioner, who was satisfied with the current arrangements under which all interception products and records relating to the obtaining of LPP information, including the summaries, would be preserved to facilitate the Commissioner's enquiry and examination.

20. S for S said that in the light of the recommendations made by the Commissioner in his annual reports, LEAs had adopted similar records preservation policy to keep all interception products and records relating to cases of irregularities or non-compliance for access by the Commissioner.

21. Ms Cyd HO and the Deputy Chairman noted with grave concern that after the compilation of his Annual Report 2007, the Commissioner was apprised of doubts regarding the legitimacy or propriety of his listening to interception products. According to the Commissioner, the queries arose from a ruling made by the Supreme Court of Canada in 2008, which concluded that the Canadian law did not entail the privacy commissioner to compel production of documents over which LPP (solicitor-client privilege) was claimed, even for a limited purpose. The Commissioner considered that although the case did not have any binding effect on Hong Kong, it could invite questions as to whether this conduct amounted to an unlawful or arbitrary interference with privacy and an infringement of the right to confidential legal advice. Ms HO and the Deputy Chairman took the view that the Commissioner's listening to interception products was both necessary and proportionate in the incursion into the subject's right to privacy and even LPP. The ruling of the Canadian Supreme Court that the provisions conferring general power on the statutory authority to order production of documents did not amount to clear and explicit language to allow compelled production of LPP documents would constitute a great obstacle to the Commissioner in the performance of his oversight and other functions under ICSO. Ms HO and the Deputy Chairman sought clarification as to whether the queries were raised by S for S or the Secretary for Justice ("SJ").

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22. In response, S for S made the following points -
- (a) section 54 of ICSO provided that where the head of any LEA considered that there might have been any case of failure by the LEA concerned or any of its officers to comply with any relevant requirement, the head should submit to the Commissioner a report with details of the case, including any disciplinary action taken in respect of any officer;
 - (b) according to section 53(1)(a) of ICSO, for the purpose of performing any of his functions under ICSO, the Commissioner might require any public officer or any other person to answer any question, and to provide any information, document or other matter in his possession or control to the Commissioner, within the time and in the manner specified by the Commissioner when making the requirement;
 - (c) there was an absence of express and unambiguous provisions in ICSO empowering the Commissioner to listen to interception products. It was doubtful whether section 53(1)(a) regarding the power of the Commissioner to require any person to provide information for the purpose of performing his functions under ICSO could be construed as having the effect of empowering the Commissioner to listen to interception products. With the existence of legal uncertainty, the Commissioner suggested that the safest way was to amend ICSO to give express power and authority to the Commissioner to request the preservation of interception products and related records and allow him and the staff designated by him to conduct the checking;
 - (d) the Commissioner had made a number of recommendations in his annual reports to improve the checking mechanisms and operational procedures. While LEAs had either accepted the recommendations in full or were actively identifying measures to address the Commissioner's concerns, SB had also amended the Code of Practice, where appropriate, to provide clearer guidelines to all LEAs. For those recommendations which would have longer-term implications and require legislative amendments for implementation, the Administration maintained an open mind and would consider them in detail in the context of the comprehensive review of ICSO; and
 - (e) in the meantime, the Administration would continue to closely monitor the operation of the ICSO regime, and fully cooperate with the Commissioner with a view to better carrying out the objects of ICSO. The Administration would strive for further

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improvements to the regime during the comprehensive review of ICSO.

23. The Deputy Chairman, Ms Emily LAU and Ms Cyd HO considered the Administration's response unacceptable. The Deputy Chairman insisted that a definite answer on whether the queries were raised to the Commissioner by SJ or S for S should be provided to members.

24. In response, S for S advised that -

- (a) in implementing ICSO, the Administration and the Commissioner had a mutual ethos to act in accordance with the law;
- (b) noting that there was an absence of express provisions in ICSO empowering the Commissioner to listen to interception products and in view of the queries about the legitimacy of the Commissioner's listening to any recorded products obtained under a valid authorization, including those that contained, or might contain, LPP information, SB had sought advice from and requested the Department of Justice ("DoJ") to study the legislation and practices of other overseas jurisdictions for reference;
- (c) upon knowing the ruling of the Supreme Court of Canada, SB decided to draw the Commissioner's attention to the court ruling in question. It was the decision of the Administration, instead of individual officials, to keep the Commissioner abreast of the developments;
- (d) admittedly, the ruling of the Canadian Supreme Court had caused a great deal of concern to the Commissioner over the power conferred on him under ICSO to carry out his oversight functions, in particular the legitimacy of his listening to interception records that contained, or might contain, LPP information. Against this background, the Commissioner had indicated that he would stop listening to the recordings in view of the queries, unless there were cases of serious non-compliance. He had also requested the Administration to consider the need for legislative amendments in its review of the ICSO regime; and
- (e) the Administration would carefully consider the recommendations raised in the Commissioner's annual reports, including the one related to listening by the Commissioner which required legislative amendments for implementation, in the course of reviewing ICSO. The Administration noted that the Commissioner would stop listening to the recordings before it took any final decision on the

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matter. Nevertheless, LEAs would continue to preserve the recorded products containing LPP information or possible LPP information and other related materials for the purposes of his inquiry or performance of his oversight functions under ICSO.

25. Ms Emily LAU and Ms Cyd HO said that they had grave reservations about the Administration's sincerity in facilitating the Commissioner's work, based on the way how the Administration handled the queries about the Commissioner's authority to listen to interception products and the Canadian court case.

26. In response, S for S reiterated that the Administration had all along been rendering its full support and cooperation to the Commissioner, with a view to better carrying out the objects of ICSO. He emphasized that in bringing the matter to the attention of the Commissioner, the Administration had no intention to put any obstacles in the way of the Commissioner. It was noteworthy that the Commissioner had suggested that the Administration should amend ICSO to remove the legal uncertainty in connection with the Commissioner's authority to listen to interception products. The Administration would consider the proposal carefully in the comprehensive review of ICSO.

27. Ms Cyd HO and Dr Margaret NG queried the motive of the Administration in asking DoJ to study the legislation and practices of other overseas jurisdictions in implementing regulatory frameworks similar to ICSO. Dr NG considered that if the Administration questioned the power of the Commissioner to listen to interception products, it should seek remedy from the court for a proper interpretation of the law. Her views were shared by Mr LEUNG Kwok-hung.

28. Reiterating the stance of the Administration, S for S said that the Administration agreed with the Commissioner that it was more appropriate to resolve the legal uncertainty through a comprehensive review of ICSO, including examining the need for legislative amendments.

Comprehensive review of the Interception of Communications and Surveillance Ordinance

29. Ms Cyd HO and Mr WONG Yuk-man enquired about the timetable of the Administration for concluding the review and introducing the legislative amendments to ICSO.

30. S for S replied that the review was underway. The Administration aimed to revert to the Panel within the 2009-2010 legislative session on the preliminary outcome of the review.

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31. Mr LEUNG Kwok-hung expressed strong dissatisfaction with the tardiness of the Administration in taking forward the review of ICSO. He said that if the proposal to include a sunset clause in the Interception of Communications and Surveillance Bill to the effect that the Administration should review the legislation at a specific point of time had been approved, the Administration would have no excuse to procrastinate the comprehensive review of ICSO. He said that as the reports released by the Commissioner had revealed that there were malpractices in LEAs' interception of communications and covert surveillance operations, the Administration should embark on the review as early as possible.

32. The Deputy Chairman considered that the Administration and LEAs did not have any sincerity to facilitate the Commissioner in performing his statutory duties under ICSO. The attitude problem among officers of LEAs, the queries raised against the Commissioner's power and authority to listen to interception products and the Administration's deliberate procrastination in conducting the comprehensive review of ICSO could validate whether the Administration and LEAs had made any attempt to put obstacles in the way of the Commissioner.

33. S for S said that he could not subscribe to the view of the Deputy Chairman because the Administration and LEAs, as previously advised, had all along been cooperative and taking reasonably practicable measures to address the issues raised in the annual reports of the Commissioner. The Commissioner had also indicated in his Annual Report 2008 that the leadership of LEAs was cooperative and helpful in facilitating his work.

34. The meeting ended at 4:32 pm.