

## **Legislative Council Panel on Security**

### **Review of the Interception of Communications and Surveillance Ordinance and Intelligence Management**

#### **PURPOSE**

This paper briefs Members on our legislative amendment proposals under the review on the Interception of Communications and Surveillance Ordinance (ICSO), and the review on the management of intelligence by law enforcements agencies (LEAs).

#### **ICSO REVIEW**

2. Interception of communications and covert surveillance operations are critical to the capability of our LEAs in combating serious crime and protecting public security. The ICSO, enacted in August 2006, provides a statutory regime to regulate the conduct of interception of communications and covert surveillance by the LEAs. The operation of the ICSO regime has been smooth on the whole since the commencement of the ICSO. In discharging his oversight function, the Commissioner on Interception of Communications and Surveillance (the Commissioner) has made a number of recommendations to enhance the operation of the ICSO regime. For the majority of the recommendations especially those which improve on operational procedures and which do not require legislative amendments, we have already implemented them in the first instance and amended the Code of Practice as required. As to the recommendations which will require legislative amendments, we have studied them carefully in the review of the ICSO. We briefed Members on the scope of the ICSO review at the meeting held on 6 July 2010. Taking into account the comments of the Commissioner, the panel judges and Members, we are considering the feasibility and implications of pursuing legislative amendments in the following areas in particular.

#### **(1) Power of Panel Judges and Authorizing Officers**

3. The Commissioner has made a number of observations and recommendations in his annual reports in relation to the power of panel judges and authorizing officers. While we have addressed them through administrative means as far as possible, we are also considering legislative amendments to regularize the following areas:

(a) Partial revocation of a prescribed authorization

4. At present, the ICSO already enables a panel judge to revoke a prescribed authorization in its entirety. However, there were cases where a prescribed authorization granted by a panel judge authorized the interception of two or more telecommunications services, and the LEA concerned subsequently dropped the interception of one of the services. There is no express provision in the ICSO providing for the partial revocation of a prescribed authorization. We would consider amending the ICSO to the effect that the LEA may apply for partial revocation of a prescribed authorization, whereupon the panel judge may revoke the authorization in respect of only part of the services covered by that authorization as he thinks fit. We are also considering similar legislative amendments to provide for partial revocation in other circumstances specified in the ICSO to enable the relevant authority to revoke part of a prescribed authorization as he thinks fit.

(b) Revocation of a prescribed authorization after the submission of an REP-11 report

5. One of the standard conditions imposed by the panel judges on prescribed authorizations is that any initial material inaccuracies or material changes in circumstances must be reported to the panel judges. The LEAs report such initial material inaccuracies or material changes in circumstances to the panel judges through "REP-11" reports. The ICSO does not contain any express provision enabling a panel judge or authorizing officer to revoke a prescribed authorization upon receipt of such a report. To strengthen the functions and powers of panel judges and authorizing officers, we are considering imposing a statutory obligation on the LEAs to report any initial material inaccuracies and material changes in circumstances to the panel judges or authorizing officers for all types of prescribed authorizations, and enabling the panel judges and authorizing officers to, upon receipt of these reports, (i) revoke the authorizations if they consider that the conditions in section 3 of the ICSO are no longer met, or (ii) vary any conditions specified in the prescribed authorizations and to impose conditions subject to which the prescribed authorizations are to continue to have effect.

(c) Revocation of device retrieval warrant

6. The ICSO provides for the power of a panel judge to issue a device retrieval warrant authorizing the retrieval of any of the devices authorized to be used under a prescribed authorization. The

Commissioner noted that there is no express provision in the ICSO with regard to the revocation of a device retrieval warrant. We are considering imposing a statutory obligation on the LEAs to submit reports to the panel judges on any material changes in circumstances during the validity of the device retrieval warrants, and to introduce legislative amendments to enable the panel judges to revoke the warrants upon receiving such reports. We are also considering imposing statutory obligation on the LEAs to report to the relevant authority on the execution of the device retrieval warrant and its outcome, so that whether the warrant should be revoked fully or partially or its validity period be extended should be decided by the relevant authority.

(d) Conditions imposed on emergency authorizations

7. There is no express provision in the ICSO enabling a panel judge to impose conditions when confirming an emergency authorization. We are considering amending the ICSO to the effect that a panel judge may impose conditions when confirming an emergency authorization and the emergency authorization so confirmed shall continue to have effect subject to any such conditions imposed by the panel judge.

**(2) Checking of Intercept Products by the Commissioner**

8. It is a standard condition imposed by the panel judges on prescribed authorizations that the LEAs should report any material change of circumstances (which include, for example, inadvertent obtaining of information which might be subject to legal professional privilege (LPP) or journalistic material (JM)). In addition, for an operation which the LEA has assessed to have the likelihood of obtaining information which might be subject to LPP or JM, the panel judge may require the LEA to report to him any incident in which LPP information or JM has been obtained. When reporting such an incident in the REP-11 report, the LEA will need to give a summary of what has been obtained that could have an LPP or a JM dimension. Separately, the LEA is also required to notify the Commissioner of any operation that is likely to involve LPP information or JM as well as other cases where LPP information or JM has been obtained inadvertently, and preserve all relevant documents and records of the case for his inspection.

9. While the ICSO already empowers the Commissioner to require any LEA or any other person to provide him with any information, document or other matter for the purpose of performing his oversight function, there is no express provision in the ICSO empowering the Commissioner to listen to intercept products. However, to ensure that

no LPP information has been passed to the investigators or could be used for the latter's investigative purposes, the Commissioner may rely on existing provision in the ICSO to require the LEAs to provide him with all written documents of the intercept products available as well as the audit trail records on the listening activity for his inspection. The Commissioner may exercise this power for the purposes of reviewing cases of special interest or any cases chosen by him at random.

10. Furthermore, the Commissioner has proposed in his annual reports a checking system whereby he and his designated officers can listen to and check any intercept products so as to ensure that the content of the REP-11 reports, if any, truly represent the intercept products as heard by the listeners. In addition, the Commissioner sees the need for him and his designated officers to be empowered to listen to or check any intercept products for all interception cases, perhaps on a random basis, so as to address the possibility of an LEA not fulfilling its duty to submit a report to the panel judge and/or the Commissioner on cases with possible involvement of LPP information or JM. We note that there has been no evidence that such kind of concealment has been committed by any of the LEAs or any of their officers. The Commissioner considers that this proposal may operate as deterrence against the LEA officers from committing any malpractice or concealment in this connection.

11. Under the ICSO regime, any interception carried out by the LEAs must be for the purpose of preventing or detecting serious crime or protecting public security and the panel judges must be satisfied that the proportionality and necessity tests are met before issuing the respective authorizations. The Commissioner is appointed by the Chief Executive as an independent authority to ensure full compliance of the LEAs with all relevant requirements of the ICSO. A fundamental principle that the ICSO has sought to uphold is that disclosure of intercept products must be kept to the minimum, and all practicable steps must be taken to ensure that the intercept products are protected against any unauthorized access. The ICSO has therefore imposed stringent requirements on the disclosure, preservation and disposal of the intercept products by the LEAs to minimize the risk of unauthorized use of, or inadvertent access to, the intercept products. For instance, in order to fulfil the statutory requirement of limiting the disclosure of intercept products to the minimum that is necessary for the relevant purpose of the prescribed authorization, LEAs only allow their designated listeners to listen to the intercept products. Even the supervisors of the listeners will not listen to the intercept products unless there are operational requirements, for example, when the supervisors find it necessary to listen to the intercept products themselves to verify the contents of certain specific calls. Any

proposal that has the effect of widening the scope of access to, particularly listening to, the intercept products under the ICSO will have to be examined with due regard to the importance of the right to confidential legal advice, the right to privacy and freedom of the press, as the products may well contain LPP information, private confidential information and JM. Allowing wider access may also increase the risk of leakage of highly sensitive information.

12. Notwithstanding the above, the Administration is committed to supporting and facilitating the Commissioner's oversight functions. We have no objection in principle to the Commissioner's proposal on listening to intercept products. In terms of implementation arrangements, however, we are not aware of such powers being granted to similar supervisory authorities in other common law jurisdictions enabling these authorities or their staff to listen to intercept products. Therefore, in pursuing the Commissioner's proposal, we have little overseas experience to which we may refer but will consider the detailed arrangements in local context only. In fact, for the time being, the LEAs have been preserving, at the Commissioner's request, intercept products of all cases of special interest for his inspection.

13. The Commissioner proposes to confer express authority on him to access and listen to any intercept products and the same power should also be extended to those staff designated by him. In this regard, we are considering how to strike a balance between the LEAs' statutory obligation of minimizing the disclosure of intercept products and destroying the same as soon as their retention is not necessary on the one hand, and our objective of facilitating the Commissioner to carry out his oversight function on the other. Whilst the Commissioner is required by law to perform comprehensive oversight functions under the ICSO, we need to consider whether those staff designated by him should also be empowered to listen to the intercept products, so as to assist him to carry out his function; and if so, whether there should be specified requirements on those staff to ensure that any risks of improper use or disclosure of the intercept products will continue to be contained robustly. In this regard, the Commissioner has suggested a corps of staff consisting of five to ten officers to provide him with such assistance. The number of staff aside, we also need to consider whether and how similar requirements and safeguards applicable to the LEA listeners should also be made applicable to the staff designated by the Commissioner. For example, whether and how there should be in place stringent management control measures to ensure the designated staff's compliance with the secrecy requirements and internal guidelines as may be prescribed by the Commissioner.

14. The ICSO also imposes stringent requirements on the preservation and disposal of intercept products. The ICSO requires that protected intercept products should be destroyed as soon as their retention is not necessary for the relevant purposes of the prescribed authorizations. To implement the destruction policy, the originals of the intercept products and any summaries and extracts of the originals are destroyed within prescribed periods. We need to consider how to reconcile the need to extend the retention period of intercept products for random checking by the Commissioner with the principle that intercept products should be destroyed as soon as their retention is no longer necessary for the relevant purposes of the prescribed authorizations.

### **(3) Mechanism for examination and notification by the Commissioner**

15. Under the ICSO, a person may apply in writing to the Commissioner for an examination if he suspects that he is the subject of any interception or covert surveillance that has been carried out by LEA officers. The Commissioner can give notice to the relevant person whenever, during the performance of his functions under the ICSO, he discovers any interception or covert surveillance which has been carried out by an LEA officer without the authority of a prescribed authorization. The Commissioner has made a number of comments regarding the examination and notification mechanisms under the ICSO. We are considering legislative amendments in the following areas –

#### **(a) The proper construction of the terms “relevant person” and “duration”**

16. Under the ICSO, if the Commissioner considers that there is any case in which any interception or covert surveillance has been carried out by an LEA officer without the authority of a prescribed authorization, the Commissioner can notify the relevant person and indicate in the notice, among others, the duration of the unauthorized interception or covert surveillance. “Relevant person” is defined in the ICSO as meaning “any person who is the subject of the interception or covert surveillance concerned”. The Commissioner pointed out in his Annual Report 2007 that the word “subject” was far from pellucid in some situations. For example, it is not clear whether the “subject” refers to the caller or respondent of a wrongly intercepted call. In addition, there is no definition of the term “duration” in the ICSO, and it is not clear at first sight whether it is date and time specific.

17. On “duration”, we accept that it should be reasonable for the Commissioner to also state in the notice the approximate period in which the unauthorized operation concerned has taken place, on top of the length of time concerned. For the sake of clarity, we propose to amend the ICSO to empower the Commissioner to notify the relevant person “the relevant period” (for example, the Commissioner may indicate in his notice to the relevant person that the unauthorized activity took place in “the first half of June 2011” or “mid-June 2011”) in which the case had taken place, in addition to “duration”. On “relevant person”, we would further consider the need to add clarity to the definition.

*(b) Circumstances where notifying the relevant person is undesirable*

18. The Commissioner expresses concern that while the ICSO requires him to notify the relevant person of any unauthorized interception or covert surveillance and of his right to make an application for examination, the Commissioner is precluded from carrying out the examination applied for by the relevant person if any relevant criminal proceedings are pending or are likely to be instituted. There is no provision in the ICSO enabling the Commissioner to withhold the giving of notice to the relevant person in these circumstances. It may cause embarrassment to the Commissioner as the Commissioner would be obliged to invite the relevant person to apply for an examination on the one hand but an application made in response to the Commissioner’s invitation may not be processed by the Commissioner on the other hand. To address this concern, we propose to amend the ICSO so that the Commissioner needs not give notice to the relevant person if and when any relevant criminal proceedings are pending or are likely to be instituted. We are also considering whether to introduce legislative amendments to enable the Commissioner to state in his notice to the applicant that he has not found the case in the applicant’s favour under the circumstances where the applicant applies to the Commissioner for an examination but relevant criminal proceedings are likely to be instituted.

*(c) Application for examination in respect of a deceased person*

19. The Commissioner raises concern that there is no express provision in the ICSO to address the issue of how the Commissioner should proceed with an application for examination if the applicant dies before the Commissioner carries out the examination or before he concludes the examination. We propose to amend the ICSO to the effect that the Commissioner may refuse to carry out the examination or, where the examination has been commenced, refuse to proceed with the carrying out of the examination if the applicant has died.

**(4) Time gap between the revocation of the prescribed authorization and the actual discontinuance of the operation**

20. The Commissioner has raised concerns regarding the time gap between the revocation of a prescribed authorization and the actual discontinuance of an operation resulting from the time required for the communication of the revocation decision to the officers responsible for discontinuing the operation, no matter how brief or necessary the time gap appears to be. For instance, where an LEA provides an arrest report to a panel judge and the panel judge revokes the prescribed authorization with immediate effect, the continuing interception or surveillance from the time of the revocation till the actual cessation of the operation, in the Commissioner's view, constitutes an unauthorized activity even when it involves a few minutes only. While we have already worked out pragmatic measures to minimize the time gap between the revocation of the prescribed authorization and actual cessation of the operation, the Commissioner proposes that the ICSO be amended to allow the LEA which faces revocation of a prescribed authorization to cause the disconnection of the facility concerned to be effected within a reasonable time after the revocation so as to render any interception taking place in between revocation and disconnection as not being unauthorized.

21. In view of the Commissioner's recommendation, we propose to amend the ICSO to the effect that if a prescribed authorization has been revoked by the relevant authority in its entirety or in part, the LEA shall take immediate steps to discontinue the interception or covert surveillance in question as soon as reasonably practicable. Further, any interception or surveillance products obtained after the revocation but before the actual discontinuation of the interception or covert surveillance shall be deemed to have been obtained pursuant to a prescribed authorization for the purposes of the ICSO so that these products would have to be dealt with in accordance with the provisions of the ICSO. To provide practical guidance to LEA officers in respect of the proposed requirement to take immediate steps to discontinue the interception or covert surveillance "as soon as reasonably practicable", the Code of Practice would stipulate a timeframe within which discontinuation should normally be effected. Any LEA which fails to discontinue the operation within the stipulated benchmark timeframe would be required to make a report to the Commissioner to explain the reasons.

**(5) Reporting of non-compliance by the Head of an LEA to the Commissioner**

22. The ICSO provides that where the head of any of the LEAs considers that there may have been any case of failure by the LEA or any of its officers to comply with any relevant requirement, he shall submit to the Commissioner a report with details of the case. In circumstances where the head of an LEA considers that there is an irregularity but does not consider that the irregularity is due to the failure by the LEA or any of its officers to comply with the relevant requirements, the LEA would submit an incident report to the Commissioner as a matter of practice.

23. The Commissioner suggests that appropriate amendments be made to the ICSO to impose a duty on the LEA heads requiring them to report to him promptly whatever irregularity in the operation of the ICSO regime, regardless of whether or not it is due to the fault of the LEA or its officers. We suggest amending the ICSO to the effect that the LEAs shall report to the Commissioner any cases of non-compliance or irregularity with the relevant requirements which come to their attention irrespective of whether or not the LEAs consider that such non-compliance are due to their fault, so that the Commissioner could verify any claims made by the LEAs that the non-compliance or irregularity in a particular case is not due to their fault if he wishes.

**(6) Discrepancy in the English and Chinese versions of a provision in the ICSO**

24. The Commissioner observes that there is a discrepancy in the meaning of the English and Chinese versions of a provision concerning confirmation of a prescribed authorization issued or granted upon oral application in the ICSO. While the English version provides that the head of department shall cause an officer to apply for confirmation of the prescribed authorization as soon as reasonably practicable after the time when the prescribed authorization or renewal is *issued or granted*, the Chinese version stipulates that such application for confirmation should be made as soon as reasonably practicable after the prescribed authorization or renewal *has taken effect*. We propose to rectify the discrepancy between the English and Chinese versions by amending the provision to the effect that the head of department shall cause an officer to apply for confirmation of the prescribed authorization as soon as reasonably practicable after the time when the prescribed authorization or renewal is *issued or granted*.

## **Next Steps**

25. We are consulting key stakeholders, including the legal profession, law faculties, journalist associations and the Privacy Commissioner for Personal Data, on our ICSO legislative amendment proposals set out in paragraphs 3 to 24 above. Taking into account the comments received, we shall examine the need to revise or refine our legislative proposals. We shall also take into account the comments of Members, the Commissioner and panel judges in the process of the drafting of the amendment bill.

## **INTELLIGENCE MANAGEMENT**

26. Interception and covert surveillance operations have proven to be an effective tool for LEAs to combat serious crime. According to the information revealed in the annual reports of the Commissioner, a total of 1807 persons were arrested as a result of or further to operations carried out pursuant to prescribed authorizations during August 2006 to 2009.

27. Under the ICSO, the disclosure, protection and destruction of interception and surveillance products obtained from covert operations are regulated by section 59 of the ICSO. The Code of Practice also requires that the head of the department should make arrangements to ensure that the requirements in section 59 of the ICSO are satisfied. It also requires that LEAs should, on the basis of their mode of operation, set up system(s) to document the information obtained from interception/covert surveillance authorized under the ICSO, with restricted access to the different types of information depending on the confidentiality level, and keep a proper paper trail on access, disclosure and reproduction.

28. We have carefully reviewed with the LEAs how to further strengthen their intelligence management system, including the keeping and destruction of intelligence obtained. At present, information obtained as a result of a covert operation, together with the information obtained by an LEA from other sources such as crime reports from the public, case investigation and open source materials, can be aggregated into intelligence after being screened, evaluated and analyzed for use by the LEA for the purpose of prevention or detection of crime. In order to strengthen the management of the intelligence management system, we have worked out with the LEAs that the following guidelines have to be complied with in their intelligence management system:

- (i) The collection, processing and use of information by the LEAs for the purpose of carrying out their functions must comply with all relevant legal requirements, which include the Personal Data (Privacy) Ordinance (Cap. 486), the ICSO, the Official Secrets Ordinance (Cap. 521) and the Hong Kong Bill of Rights Ordinance (Cap. 383);
- (ii) Tight control must be exercised regarding the input of data into the intelligence database. Intelligence should be accurate, reliable, relevant and not excessive. An audit trail is established and kept for all entries of intelligence;
- (iii) Stringent control measures must be in place to ensure system security. Direct access to the intelligence database in an LEA should be restricted to the system management team and specifically designated officers. Audit trail record is kept for all access to the database;
- (iv) Intelligence has to be compartmentalized such that designated officers only have access to the intelligence strictly required on a "need to know" basis through personalized access code; and
- (v) LEAs must establish procedures for reviewing their intelligence in a timely manner to ensure that the intelligence remains accurate and relevant. Arrangements should be made to dispose of intelligence which is outdated and irrelevant.

29. Furthermore, to enhance accountability in the overall operation of the intelligence database of the LEAs, it has been agreed that each LEA should designate an officer (at or above a rank equivalent to the Assistant Commissioner of Police) as the system owner who is responsible for the overall management of the intelligence database system. He is supported by the system management team. He has overall responsibility for monitoring officers' compliance with the internal guidelines and procedures drawn up by the LEAs on intelligence management. For this purpose, he should conduct regular and random checks on inputs and access to the system for possible irregularities. The head of the LEA has the ultimate responsibility to ensure LEA officers' compliance with the requirements set out in the internal guidelines and procedures. Officers who are found in breach of the internal guidelines and procedures are subject to disciplinary action.

30. Overall speaking, the intelligence management system of LEAs is tightly controlled. The LEAs have adopted the above guidelines in strengthening their intelligence management system. Furthermore, stringent control measures have already been put in place by the LEAs for ensuring their officers' compliance with the requirements set out in the internal guidelines and procedures.

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