

(Translation)

Briefing on 'Annual Report 2010'
by Mr Justice Woo
Commissioner on Interception of Communications and Surveillance
(5 December 2011 at 11 am)

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SPEECH

1. Welcome to this briefing.
2. The Interception of Communications and Surveillance Ordinance ('the Ordinance' or 'ICSO') came into force on 9 August 2006. It regulates the conduct of interception of communications and the use of surveillance devices in covert surveillance by four law enforcement agencies ('LEAs'), namely the Hong Kong Police Force, Independent Commission Against Corruption, Customs and Excise Department and Immigration Department. As the Commissioner on Interception of Communications and Surveillance ('the Commissioner'), my main function is to oversee the compliance of the LEAs and their officers with the requirements of the Ordinance including compliance with the Code of Practice and the conditions of the prescribed authorizations.
3. On 30 June this year, I submitted my fifth annual report 'Annual Report 2010' to the Chief Executive. The Report covers the period from January to December 2010.

Number of prescribed authorizations

4. In 2010, a total of 1,490 prescribed authorizations were issued of which 92% (1,375) were judge's authorizations for interception, 5% (75) were judge's authorizations for Type 1 surveillance and 3% (40) were executive authorizations for Type 2 surveillance (issued by designated authorizing officers of the LEAs).

5. Among the judge's authorizations for Type 1 surveillance, there were seven cases in which Type 2 surveillance was elevated as Type 1 surveillance. As the panel judges and the LEAs have different views on section 2(3) and section 2(4) of the Ordinance as to under what circumstances an LEA can apply to the panel judge for such authorization, I suggest the relevant provisions of the Ordinance should be amended to clarify the matter. For details, please refer to paragraphs 9.4 to 9.13 of Chapter 9 of the Report.

6. A total of 11 applications for authorization were refused (including 10 applications for interception and one application for Type 2 surveillance).

7. In 2010, a total of 365 persons were arrested as a result of or further to the interception or covert surveillance carried out pursuant to prescribed authorizations.

Legal Professional Privilege

8. According to paragraph 120 of the Code of Practice, the Commissioner should be notified of interception / covert surveillance operations that are likely to involve legal professional privilege ('LPP') information. In the report period, I received a total of 63 reports submitted pursuant to paragraph 120 of the Code, involving 27 cases (one subject was counted as one case). Of these cases, six were assessed to have LPP likelihood at the time of application for authorization but eventually no such information had been obtained and there was no increase in the risk of obtaining such information. As regards the other 21 cases, they were assessed to have such likelihood in the course of operation or assessed to have an increase or change in the LPP risk, resulting in the need to submit REP-11 reports to the panel judge on material change of circumstances. Consequently, the panel judges revoked four authorizations and allowed 12 authorizations to continue after imposing additional conditions, and five authorizations were discontinued by the LEAs of their own volition.

9. Among these cases, only one involved the actual obtaining of LPP information (ie LPP Case 1). The authorization was revoked by

the panel judge.

10. In LPP Cases 2 to 4, their authorizations were revoked due to the increased risk in obtaining LPP information.

11. In LPP Case 5, I was not satisfied that the department did not take prompt action in preserving the recordings. As a result, only the recordings that were still available as of the 12th day of the month instead of the 9th day of the month were preserved. They did not seem to understand that apart from reviewing the LPP Call reported by them, I also needed to review if there was concealment of previous calls also containing LPP information that should have been reported but were not reported. Preserving the recordings of calls preceding the reported LPP Call is for this purpose.

12. In my review of LPP Case 6, I found that the listener had listened to a call between the subject and a 'prohibited number', breaching an additional condition of the prescribed authorization. I requested the department to submit a report under section 54 of the Ordinance. An initial report was received in late December 2010 (ie Report 6 in Chapter 7).

13. Before I started to review LPP Case 7, the department notified me in late December 2010 by way of an initial report under section 54 of the Ordinance that two listeners had inadvertently listened to calls between the subject and a 'prohibited number' violating an additional condition of the authorization (ie Report 7 in Chapter 7).

14. When reviewing LPP Case 8 in March 2011, I discovered that between November and December 2010, there were five occasions on which a listener listened to calls made to or received from three 'prohibited numbers', in breach of the additional condition of the prescribed authorization. I requested the department to submit a report under section 54 of the Ordinance. The report has been received and I am reviewing this case.

15. In early 2011 when I reviewed LPP Case 9, I found that a listener had accessed a call when monitoring was supposed to be put on

hold. The listener explained that it was due to accidental access. I have received the department's investigation report and am reviewing the case.

16. In the review of LPP Cases 10 and 11, I noted that apart from the LPP calls reported to the panel judges ('Reported LPP Calls'), there had been other calls preceding the Reported LPP Calls that were made between the two telephone numbers concerned. The listeners maintained that the preceding calls did not involve any LPP information; hence there was no need to report them to the panel judge.

17. As the Ordinance does not have express provision empowering me and my staff to listen to intercept product (or surveillance product), we did not listen to the recording of the intercept product when we reviewed these cases. Hence, we could not discern what had been reported by the department or the listener in the REP-11 report was true or not and whether there was any concealment including concealing any preceding calls which should have been reported but were not reported.

18. The lack of power to listen to intercept product affects the efficacy of unearthing non-compliance or concealment. This is understood by all. In April 2009, I made a recommendation to the Security Bureau. My recommendation is to require LEAs to preserve the intercept product of each and every interception and related records to enable my staff and me to check (by listening to the audio recording of the intercept product) cases of special interest or chosen at random. All such records should be preserved at the premises of individual LEAs concerned and only I and such staff as designated by me could have access to them. LEA officers and any other persons should not be allowed access to these materials. Details of my recommendation to empower us to examine intercept and covert surveillance products were set out in paragraphs 9.2 to 9.11 of Chapter 9 of my Annual Report 2008 and paragraphs 5.90 to 5.93 of Chapter 5 of this Report. It has been two and a half years since I made the recommendation but regrettably it has not yet been accepted by the Security Bureau.

19. The inability to listen to the recording of intercept product or surveillance product also debilitated me in reviewing certain cases comprehensively. The following are some instances:

- (a) Report 2 in Chapter 7 (paragraphs 7.70 to 7.98 thereof): As I did not listen to the recording of the surveillance product, I could not find out whether the caller was the subject and whether things said by the caller had been recorded.
- (b) In Report 3 in Chapter 7, the junior supervisor claimed that the 51 calls did not involve any LPP information. The two senior officers who were tasked to re-listen to these calls also confirmed the same. I had no way to verify the claim and could only accept their claim as proffered (paragraphs 7.107, 7.110 and 7.131 of the Report).
- (c) Regarding paragraphs 7.155 to 7.156 under Report 4 in Chapter 7, if the recording of the meeting could be listened to, it could be known whether one of the two persons who attended the meeting with Subject H was, as the department claimed, the intended nicknamed Subject J. If it was not, the covert surveillance on that occasion was unauthorized. In the absence of power to allow me to listen to the recording of surveillance product, I could not review or query the veracity of the department's claim.

20. More importantly, the provision of power for me to listen to and inspect intercept and surveillance products would act as a strong deterrent against any malpractice or concealment by LEA officers.

Journalistic material

21. In the report period, I did not receive any report on obtaining of information which was the contents of journalistic material (JM).

22. In Chapter 9 of the Report, I recommended that paragraph 120 of the Code should be amended so as to formalize the requirement that apart from reporting LPP cases to me, LEAs should also report to me

cases where information that is or may be the contents of JM has been obtained or may likely be obtained.

Applications for examination

23. In the report period, I received 23 applications for examination under section 43 of the Ordinance of which four could not be entertained (not within the ambit of my function as the Commissioner or failing to follow proper application procedures) and six were subsequently not pursued by the applicants. I carried out examination on the remaining 13 cases and found them not in the applicants' favour.

24. In the report period, I gave a notice to a relevant person pursuant to section 48 of the Ordinance stating that there had been a case of covert surveillance carried out by officers of a department without the authority of a prescribed authorization and informing the relevant person of the right to apply to me for examination. Up till now, I still have not received any response from the relevant person.

Cases of non-compliance and irregularities

25. There were five outstanding cases brought forward from 2009, the reviews of which have now been completed. They are listed below:

Outstanding Case (i): Interceptions that had been discontinued were re-activated for three hours. After conducting a review, I was satisfied that the reactivation was not due to the fault of LEAs.

Outstanding Case (ii): A technical staff misconnected a cable during relocation of equipment resulting in erroneous duplicated distribution of intercept products to a section which should not have received such products. The mistake was not discovered until a listener of the section listened to some of the calls. The technical staff and his supervisor were both warned.

Outstanding Case (iii): Type 2 surveillance was conducted on a telephone call between a participating agent and a person unrelated to the investigation, which was outside the ambit of the authorization. The mistake was caused by the over-zealousness of the surveillance officer and the lack of due caution on his part. The department gave him a verbal warning for the non-compliance. However, knowing that an irregularity had occurred, the surveillance officer only stopped covert surveillance on that telephone call but did not stop the whole operation. This was non-compliant with paragraph 9 of the Code of Practice in respect of which I recommended to the department to give him another verbal warning. Regarding the supervisor of the surveillance officer, the department originally suggested the issue of a written warning to him for his failure to mention in the discontinuance report that one other reason for the discontinuance was that possible unauthorized covert surveillance had been conducted. Taking into account the circumstances of the case, I was of the view that there was no deliberate concealment on the part of the supervisor. However, he did fail to comply with the requirement stated in paragraph 160 of the Code. I recommended that a verbal warning should be given instead. This was accepted by the department. I also suggested that the Security Bureau should improve the wording of paragraphs 9 and 160 of the Code to make the two paragraphs less cryptic.

Outstanding Case (iv): The covert surveillance conducted on the seven telephone calls of the representative of the subject was outside the ambit of the authorization which only authorized covert surveillance on telephone conversations between the participating agent and the subject. This amounted to non-compliance. The department issued written warning to each of the four responsible officers. One of them was removed from acting appointment and another one of them was transferred from operational duties to a non-investigative post. I considered the department's actions appropriate.

Outstanding Case (v): A call between two persons unrelated to the investigation was wrongly intercepted. After conducting a review, I was satisfied that the mistake was due to a functional deficiency in the system of the communications service provider, not due to any fault of the LEA officers.

26. In 2010, seven reports on non-compliance or irregularity were received.

Report 1: In the past two years, there were authorizations for interception or covert surveillance on a certain subject but in the latest application, the applicant declared that there was no such application or authorization against the subject in the past. My memory told me that this was not the fact. I requested the department to conduct an investigation which revealed that there were a number of authorizations against the subject in the past two years. However due to compartmentalization principle, the applicant and the endorsing officer of the application were not in the know. The department agreed that departmental knowledge of previous applications, instead of personal knowledge, should be provided in future applications for authorization.

Report 2: A department conducted covert surveillance on an incoming call but was not certain whether the caller was the subject and what was said by the caller had been recorded. As I have not been given the power to listen to the recording of surveillance products, I could not make any finding on this case.

Report 3: A junior supervisor listened to 51 intercepted calls, breaching an additional condition imposed by the panel judge at the grant of the authorization that listening should be undertaken by officers not below a certain rank ('the Specified Rank'). The junior supervisor, who was below the Specified Rank, claimed that he misunderstood the

effective period of the additional conditions. He thought that he could, after the lifting of the additional conditions, listened to those 51 calls intercepted before the lifting. The department considered that the mistake was caused by the junior supervisor's misunderstanding and suggested that he be given an advice only. In my view, the junior supervisor was fully aware of the normal practice that after the lifting of additional conditions, there would be a designated Specified Rank listener to complete listening to those 51 unlistened calls intercepted before the lifting of additional conditions, but he took it upon himself to listen to those calls recklessly disregarding the normal practice, resulting in the breach of the additional condition imposed by the panel judge. I considered that the punishment was too lenient. However, the department's response was that due to the 'double jeopardy' consideration, it was unable to administer additional disciplinary action against him. It could only issue a formal letter to him to strengthen the previous advice given to him. Hence, I made a recommendation in the Report that in future, a disciplinary award should be given to any offending officer after the head of any LEA should first be apprised of my view at the conclusion of my review, whether he agrees with that view or not. My recommendation can be found under the heading of 'Time to make disciplinary award' in paragraphs 9.16 to 9.20 of Chapter 9.

In the course of investigating this non-compliance, it was also discovered that the Senior Listening Officer who was tasked to re-listen to those 51 calls to verify the claim of the junior supervisor that no LPP information was involved, omitted to listen to 10 of the calls but reported to his supervisors that no LPP information was involved. His two supervisors failed to detect his omission and reported to the panel judge accordingly. The department suggested that the Senior Listening Officer and his two supervisors should be advised. [In 2011 in reviewing another case, it was found that the Senior Listening Officer used to omit listening to a

number of calls. The punishment was therefore changed to verbal warning.]

Report 4: A covert surveillance operation conducted in early 2009 was outside the terms of the authorization. The authorization authorized the department to conduct covert surveillance when Subject 1 met with Subject 2. However, the department conducted covert surveillance when Subject 2 met with other persons, which was beyond the terms of the authorization. After the conclusion of the operation, the departmental reviewing officer (Senior Assistant Head of Department) reviewed the case but failed to detect that the covert surveillance amounted to non-compliance.

During an inspection visit to the department on 6 August 2010, I requested the department to provide information on the use of surveillance devices under certain authorizations. This led to the discovery of the above non-compliance. It was discovered by the Unit responsible for investigating non-compliance under ICSO. Sometime between 6 and 13 August 2010, a female investigating officer of the Unit discovered the unauthorized covert surveillance and reported it to the head of the Unit who in turn reported it to an Assistant Head of Department. The Senior Assistant Head of Department mentioned above was the direct superior officer of the head of the Unit and also the direct superior officer of the Assistant Head of Department.

It was not until 10 September 2010 that the department first notified me of the above non-compliance. But the female investigating officer, the head of the Unit and the Assistant Head of Department all coincidentally forgot the date of discovering the non-compliance. This was dubious.

In my view, as the Senior Assistant Head of Department failed to detect the non-compliance when he reviewed the covert surveillance in question, he had erred. To avoid any conflict of interest, the head of the Unit should have reported

the discovery of the irregularity to the superior officer of the Senior Assistant Head of Department, ie the Deputy Head of Department, instead of to the Assistant Head of Department who was the subordinate of the Senior Assistant Head of Department. As regards the Assistant Head of Department, after he had received the report from the head of the Unit, he should have asked the head of the Unit to report the matter to the Head of Department or the Deputy Head, or he should have done so himself.

After conducting a review, I agreed with the department's view that written warning should be given to a total of five officers, namely the officer in charge of the operation and his supervisor for carrying out the unauthorized covert surveillance, the Senior Assistant Head of Department for failure to detect the non-compliance when he reviewed the case, and the Assistant Head of Department and the head of the Unit for not paying heed to the conflict of interest issue. The Assistant Head of Department and the head of the Unit were also transferred out of their current posts and debarred from acting appointment for one year.

I also recommended that in future, in case of any possible conflict of interest, the head of the Unit should report the matter directly to the Head of Department or at least to the Deputy Head of Department.

Report 5: When replacing two listener's workstations, the old audit trail report ('ATR') setting, instead of the enhanced ATR setting, was installed in two new workstations. The mistake was due to technical problem.

Reports 6 and 7: These were the two cases mentioned under LPP Cases 6 and 7. Detailed investigation reports were received in 2011. The reviews have not been completed.

Recommendations

27. Chapters 8 and 9 of the Report set out my recommendations to the heads of LEAs and the Secretary for Security. Some of these recommendations have been mentioned above.

Conclusion

28. In Chapter 11, I gave my assessment on the compliance by LEAs with the relevant requirements. The non-compliance or irregularities were mainly consequences of careless mistakes or unfamiliarity with the rules and procedures of the ICSO scheme.

29. I would like to express my gratitude to the panel judges, the Security Bureau, the LEAs, the communications service providers and other parties concerned for their assistance and co-operation.

30. Questions on my 'Annual Report 2010' are welcome. I shall try my best to answer your questions insofar as prejudice to the prevention or detection of crime or the protection of public security would not be caused. Thank you.

[Remarks: The Report has been uploaded onto the webpage of the Secretariat, Commissioner on Interception of Communications and Surveillance (<http://www.sciocs.gov.hk>) for access by members of the public.]