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**Panel on Security**

**Background brief prepared by the Legislative Council Secretariat  
for the meeting on 4 December 2012**

**Results of Study of Matters Raised in the Annual Report  
to the Chief Executive by the Commissioner  
on Interception of Communications and Surveillance**

**Purpose**

This paper summarizes past discussions by the Panel on Security ("the Panel") on the results of study of matters raised in the annual reports to the Chief Executive ("CE") by the Commissioner on Interception of Communications and Surveillance ("the Commissioner").

**Background**

2. Under section 49 of the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO"), the Commissioner shall, for each report period, submit a report to CE. The report is to be submitted within six months after the expiry of the report period. CE shall cause to be laid on the table of the Legislative Council ("LegCo") a copy of the report.

3. In the course of examination of the Interception of Communications and Surveillance Bill in 2006, the Administration undertook, inter alia, to report to the Panel the results of the Administration's study of matters raised in the Commissioner's annual report to CE.

**Deliberations of the Panel**

4. Since the commencement of ICSO on 9 August 2006, the Commissioner has submitted five annual reports to CE. The results of the Administration's

study of matters raised in the five annual reports have been discussed at the Panel meetings on 6 November and 6 December 2007, 16 February, 3 March and 7 December 2009, 29 November 2010, 5 December 2011 and 3 January 2012. The deliberations are summarized below.

Attitude problem and compliance with the statutory requirements among officers of the law enforcement agencies

5. Concern was raised about the overall attitude of law enforcement officers towards the Commissioner's oversight and review functions. Information was sought about the measures taken by the Administration and the Independent Commission Against Corruption ("ICAC") to address the attitude problem among law enforcement officers and to ensure their strict compliance with ICSO and full cooperation with the Commissioner.

6. According to the Administration, the Commissioner's comments in his Annual Report 2008 were related to the attitude of a law enforcement officer in a reported case involving 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 in which the officer responded to the Commissioner's enquiry appeared to be unsatisfactory, it was an isolated incident due possibly to the fact that the officer had not got used to the Commissioner's oversight authority. With the benefit of more practical experience gained in the implementation of ICSO, law enforcement agencies ("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 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 amended the Code of Practice ("CoP"), as and where appropriate, to resolve common issues that had implications across LEAs.

7. Members were informed that ICAC was committed to ensuring ICAC officers' full compliance with the ICSO requirements in conducting interception and covert surveillance. In tandem with the introduction of a package of improvement measures, a dedicated Compliance Assurance Group had been set up to deal with ICSO-related matters. Although investigations into the cases of irregularities/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. ICAC would continue to render full cooperation and support to the Commissioner to facilitate his performance of the statutory functions under ICSO.

Protection of information subject to legal professional privilege and privacy of members of the public

8. Concern was raised about how LEAs handled interception products involving information which might be subject to legal professional privilege ("LPP"). Members considered that LEAs should be mindful of the need to protect LPP in carrying out interception or surveillance operations, as failure to observe the requirements of ICSO regarding handling of LPP would have an adverse impact on LEAs' reputation.

9. Members noted that section 59(2)(b) of ICSO and CoP provided safeguards for protected products, including those containing information subject to LPP. ICSO and CoP required that any intercepted product containing information that was subject to LPP should be destroyed as soon as reasonably practicable.

10. Information was sought on whether there were guiding principles for law enforcement officers to decide whether or not to discontinue an interception, when they came to notice that the operation might cover a telecommunications service used at an office of a lawyer or any telecommunications service known or reasonably expected to be known to be ordinarily used by a lawyer for the purpose of providing legal advice to clients.

11. Members were advised that officers were always reminded that they should exercise extreme care when making possible applications that concerned the premises and telecommunications services used by a lawyer. A risk assessment must be conducted if the interception might acquire information that might be subject to LPP. Officers were also reminded that LPP would apply if a lawyer was giving legal advice to a person who was suspected of having committed a criminal offence. Unless officers were fully satisfied that the exceptional circumstances under section 31 of ICSO existed, they should not make an application for an authorization targeting these premises and telecommunications services. In all such exceptional cases, a panel judge's authorization must be obtained and justification for the proposed interception or covert surveillance should be provided in the affirmation or affidavit supporting the application.

12. Concern was raised over the increasing number of requests for interception of communication by LEAs where information obtained was or likely to be subject to LPP while the Commissioner could not verify the cases.

13. According to the Administration, LEAs were required to notify the Commissioner of operations that were likely to involve LPP information or where LPP information had been obtained inadvertently. An LEA applicant

was required to state his assessment of LPP likelihood in his affidavit or statement in support of his application. At the request of the Commissioner, all intercept products and related records had been preserved to enable him and his designated staff to check cases of special interest or chosen at random and there was an audit trail record for all access to the intercept products. To avoid being criticized for operating above the law, the Commissioner had chosen not to listen to the intercept products until relevant amendments to ICSO had been enacted.

#### Journalistic material

14. Members noted that in 2009, the Commissioner received two reports, which involved three prescribed authorizations, on inadvertent obtaining of information which contained journalistic material. Information was sought about the measures to protect the source and content of the journalistic material. There was a view that the Administration should have a clear and well defined policy regarding the protection of journalistic material against access by LEAs for the purpose of investigation.

15. According to the Administration, ICSO required an applicant seeking authorization for interception or covert surveillance to state in the affidavit or statement in writing in support of the application the likelihood that any information which might be subject to legal professional privilege, or might be the contents of any journalistic material, would be obtained by carrying out the interception or covert surveillance. This allowed the relevant authority to take account of these factors when considering whether the issue of a prescribed authorization met the conditions set out in ICSO. For those cases which were assessed by a panel judge to have journalistic material implications, additional conditions were imposed to better protect the freedom of the media.

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

16. The Panel noted that the recommendation of the Commissioner made in April 2009 for empowering him and staff designated by him to examine intercept and covert surveillance products had not been adopted by the Administration. The Commissioner considered that the provision of such power for him and his designated staff to listen to and inspect intercept and surveillance products would serve as a strong deterrent against malpractice or concealment. There was a view that the Commissioner should be expressly empowered to listen to intercept products in order to effectively monitor the compliance of LEAs with the requirements of ICSO.

17. According to the Administration, while it had no objection in principle to the Commissioner's recommendation of empowering him to listen to intercept

products, such power was not granted to similar supervisory authorities in other common law jurisdictions, therefore, the Administration considered it necessary to study the recommendation and conduct consultation. In the Administration's view, a proper balance had to be struck between protecting privacy and facilitating the performance of the oversight function by the Commissioner. The Administration was undertaking a comprehensive review of ICSO and the recommendation would be considered in the context of the review.

18. Some members expressed concern over the legal liability and the penalty imposed on the Commissioner and his staff for unauthorized disclosure of information relating to data privacy or subject to LPP. Noting that the power to listen to intercept products was not granted to similar supervisory authorities in other common law jurisdictions, some members asked whether it was necessary for the Administration to consult these jurisdictions and understand the rationale behind for not doing so.

19. According to the Administration, there was no precedent in overseas jurisdictions in respect of empowering similar supervisory authorities to listen to intercept products. In the process of consultation, there were concerns about whether a mechanism and procedures would be put in place, similar to those regulating the conduct of the officers concerned in LEAs, to ensure the confidentiality of the information if the Commissioner and his staff were allowed to listen to the intercept products. The Administration needed to strike a balance. While supporting the Commissioner's discharge of duties under ICSO, the Administration considered it necessary to put in place a mechanism to ensure the confidentiality of the information in view of its sensitive nature.

20. According to the Administration, if an officer of LEAs intentionally intercepted communications or conducted covert surveillance without obtaining prior authorization, he might commit the offence of misconduct in public office under the common law, and would be liable to conviction. This would apply to all public officers, including the Commissioner and his staff.

21. In anticipation of the time needed for amendment of ICSO, some members requested the Administration to study the feasibility of introducing interim administrative measures to enable the Commissioner to listen to intercept products before ICSO was amended. Such interim measure was necessary for the Commissioner to review the non-compliant cases and to verify the claims of LEA officers.

22. According to the Administration, it would consult the Department of Justice and make reference to overseas practices to see whether the Commissioner under the existing ICSO could be authorized by panel judges to

listen to intercept products before reverting to the Panel.

#### Differences in the interpretation of provisions in the legislation

23. Concern was raised over LEAs and panel judges having different interpretations on a number of provisions in ICSO, such as the power of panel judge to revoke an authorization that had been granted, to impose additional conditions when confirming an emergency authorization and to revoke a device retrieval warrant. Concern was also raised over whether LEAs were challenging the rule of law, the power of panel judges and the views of the Commissioner. There was a view that if LEAs questioned the power of the panel judge to revoke the prescribed authorization, LEAs should seek remedy from the court, such as to quash the panel judge's decision of revocation or his refusal to allow the continuance of the prescribed authorization or to seek for a declaration of a proper interpretation of the statutory provision.

24. According to the Administration, the annual reports had revealed that there was occasional disagreement between LEAs and the Commissioner on the interpretation of certain provisions of ICSO. However, there was no question of LEAs being disrespectful to panel judges or the Commissioner. LEAs had adopted pragmatic measures to address the Commissioner's concerns and resolve the differences in views between them regarding the power of panel judge to revoke an authorization. SB had amended CoP where appropriate to address the issues identified in the annual reports.

#### Documentation requirement on cases of non-compliance

25. Concern was raised over a non-compliance case in which three officers involved did not remember the exact date of discovering the mistake. Queries were raised over the absence of any written records of the internal communications among different ranks regarding the case and the absence of disciplinary action taken against the officers concerned. Information was sought on whether there was any requirement within LEAs on the keeping of records in government departments to facilitate internal monitoring and checking by the Commissioner.

26. According to the Administration, there was no question of LEAs covering up the non-compliance of their personnel. The Government Records Service had formulated records management procedures and guidelines to ensure proper management of government records. Policy bureaux and government departments, including LEAs, should create and capture adequate but not excessive records to meet operational, policy, legal and financial purposes. While the code of practice provided a general overview on record management, under the regime of ICSO, LEAs were further required to follow the Commissioner's more stringent requirements in reporting on cases of

irregularity or non-compliance. All written documents and file records of such cases would need to be preserved for inspection by the Commissioner, in addition to a full investigation report on each of such incidents.

### Political monitoring

27. Some members raised concern over whether law enforcement officers would carry out interception of communications for political monitoring under the name of crime investigation. They suggested that the Commissioner should consider disclosing in his annual report any political monitoring identified.

28. Members were advised that law enforcement officers had always conducted interception and covert surveillance operations strictly in accordance with the law and only for the purpose of prevention or detection of crime or protection of public security. There was no question of covert operations under ICSO being conducted for political monitoring.

### **Relevant papers**

29. A list of the relevant papers on the LegCo website is in the **Appendix**.

Council Business Division 2  
Legislative Council Secretariat  
29 November 2012

**Relevant papers on  
Results of Study of Matters Raised in the Annual Report  
to the Chief Executive by the Commissioner  
on Interception of Communications and Surveillance**

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Security	6.11.2007 (Item V)	<u>Agenda Minutes</u>
Panel on Security	6.12.2007 (Item I)	<u>Agenda Minutes</u>
Panel on Security	16.2.2009 (Item I)	<u>Agenda Minutes</u>
Panel on Security	3.3.2009 (Item IV)	<u>Agenda Minutes</u>
Panel on Security	7.12.2009 (Item I)	<u>Agenda Minutes</u>
Panel on Security	6.7.2010 (Item III)	<u>Agenda Minutes</u>
Panel on Security	29.11.2010 (Item I)	<u>Agenda Minutes</u>
Panel on Security	5.12.2011 (Item I)	<u>Agenda Minutes</u>
Panel on Security	3.1.2012 (Item VI)	<u>Agenda Minutes</u>
Legislative Council	18.1.2012	<u>Motion on "Annual Report 2010 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance"</u>



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