

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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22 October 2015

Miss Betty MA
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Miss MA,

At the meetings of Bills Committee on Interception of Communications and Surveillance (Amendment) Bill 2015 on 6 and 12 October 2015, Members raised some issues in relation to the operation of the existing Interception of Communications and Surveillance Ordinance. The Government's response is at Annex.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Millie Ng', written over a faint circular stamp.

(Mrs Millie Ng)
for Secretary for Security

Encl (5 pages)

c.c.

Department of Justice

(Attn: Mr Godfrey KAN, Senior Assistant Solicitor General
Ms Monica LAW, Senior Assistant Law Draftsman)

**Interception of Communications
and Surveillance (Amendment) Bill 2015**

**Response to Issues Raised
at the Bills Committee's Meetings held on 6 and 12 October 2015**

**Operation of the Existing Interception of Communications and
Surveillance Ordinance (Cap. 589) (the "ICSO")**

Whether any application for prescribed authorization involving information subject to legal professional privilege ("LPP") or journalistic material ("JM") had been rejected and whether any prescribed authorization had been revoked by a panel judge on the ground that there was a material change in circumstances which involved LPP information or JM

Under the ICSO regime, all applications for prescribed authorizations with a likelihood of obtaining information which may be subject to LPP or JM are considered by the panel judges. The panel judge shall not issue an authorization or allow the continuation of an authorization unless he is satisfied that the conditions for its issuance or continuance under section 3 of the ICSO are met.

2. According to the Commissioner's annual reports published since the commencement of the ICSO in August 2006 (the "Annual Reports"), there were some cases in which the panel judges had refused applications for prescribed authorization assessed to have a likelihood of obtaining LPP information or contents of JM. The Annual Reports have not set out the exact yearly figures of such refused cases.

3. As for the total number of cases from August 2006 to December 2013 where LPP information had been obtained inadvertently after the issue of the prescribed authorizations concerned, there were nine according to the Annual Reports. In eight of these cases, the panel judges revoked the authorizations concerned after receipt of reports from the law enforcement agencies ("LEAs") concerned. In the remaining case which occurred in 2011, the LEA initially classified it as a case of heightened likelihood of obtaining LPP information and the panel judge allowed the prescribed authorization to continue with additional conditions imposed on this basis. Upon review, the Commissioner considered

that the case should have been classified as “LPP information having been obtained”.

4. According to the Annual Reports, there were a total of four cases from August 2006 to December 2013 where JM had been obtained inadvertently after the issue of the prescribed authorizations concerned. In three of these cases, the panel judges revoked the authorizations concerned after receipt of reports from the LEAs concerned. In the remaining case which occurred in 2009, the panel judge, after considering the report of the LEA concerned, was satisfied that the conditions under section 3 of the ICSO continued to be met and allowed the relevant authorization to continue.

Whether LEAs are required to retrieve devices deployed in a covert surveillance operation after its completion and the need to set out such requirement in the ICSO

5. Paragraph 136 of the Code of Practice (“CoP”) sets out that as a matter of policy, surveillance devices should not be left in the target premises after the completion or discontinuance of the covert surveillance operation, in order to protect the privacy of the individuals affected and the covert nature of the operation. Apart from authorizing the carrying out of the covert surveillance concerned, a prescribed authorization also authorizes the retrieval of the surveillance device within the period of authorization, and surveillance devices should, as a matter of policy, be retrieved before the expiry of the authorization. However, it is accepted that in some cases it may not be reasonably practicable to retrieve the device before the expiry of the authorization. As a general rule, after the expiry of the authorization, unless it is not reasonably practicable to retrieve the device, an application must be made for a device retrieval warrant if the device has not yet been retrieved. Paragraph 137 of the CoP further provides that any decision of not applying for a device retrieval warrant where the device has not been retrieved after the expiry of an authorization should be endorsed by an officer at the directorate rank and a report on the decision, together with the reasons and steps taken to minimize possible intrusion into privacy by the device, should be submitted to the Commissioner. The Commissioner may then carry out a review based on the information provided and reasons advanced.

6. The above arrangement involves operational details and is clearly set out in the CoP, which is promulgated pursuant to section 63 of the ICSO, and serves to provide practical guidance to LEAs on the principles and requirements set out in the ICSO. Given the definition of “relevant requirement” in section 2(1) of the ICSO, non-compliance with any applicable requirement under the

CoP amounts to non-compliance with a “relevant requirement” which has to be reported to the Commissioner under section 54. LEA officers who fail to comply with the CoP would be subject to disciplinary action or, depending on the circumstances of the case, the common law offence of misconduct in public office. We do not consider it necessary to amend the existing ICSO to incorporate the relevant operational arrangement which has already been covered in the CoP and has operated effectively over the years. In addition, the use of surveillance devices for ICSO operations are subject to stringent review by the Commissioner, and all devices used for such operations have to be returned to the ICSO device store after each operation and the movements of such devices are properly documented in the device registers, which are required to be submitted to the Commissioner regularly.

Meaning of “retrieval” for “device retrieval warrant”

7. The terms “retrieve” and “retrieval” are neither defined in the Interpretation and General Clauses Ordinance (Cap. 1) nor in section 2(1) of the ICSO. According to *The Oxford English Dictionary* (2nd edition, 1989), Volume XIII, the word, “retrieve”, when used as a verb, bears the following meanings, amongst others:

- (a) “To recover, regain, get or take possession of (a thing, etc) again.” (item 3);
- (b) “To bring back; to cause to turn back or return”; or “To bring back from or out of a place or state; to rescue or save”. (item 4).

Whether there was any case in which the surveillance device(s) used in the covert operation(s) was/were lost and could not be recovered

8. According to the Annual Reports, there was **no** case in which a device used in a covert surveillance operation under ICSO was lost or could not be recovered. We have also confirmed with the LEAs that there has not been any such case since the commencement of the ICSO.

The meanings of “without prejudice to section 53(4)” under section 46(3) of the existing ICSO and “except as otherwise provided in this Ordinance” under section 53(4) thereof

9. The existing section 46(3) of the ICSO provides that “[w]ithout prejudice to section 53(4), for the purposes of an examination, the applicant is not entitled to have access to any information, document or other matter compiled by, or made available to, the Commissioner in connection with the examination”. Section 53(4) provides that “[e]xcept as otherwise provided in this Ordinance, the Commissioner shall not be required to produce in any court or to divulge or communicate to any court, or to provide or disclose to any person, any information, document or other matter compiled by, or made available to, him in the course of performing any of his functions under this Ordinance”.

10. As envisaged in section 53(4) of the ICSO, there are circumstances in which the Commissioner is under a statutory obligation to disclose “information, document or other matter compiled by, or made available to, him in the course of performing any of his functions under [the ICSO]”. Examples include the Commissioner’s obligations: (i) under section 48 to give notice to the relevant person whenever, in the course of performing his functions, the Commissioner discovers that any interception or covert surveillance has been carried out by an officer of one of the specified LEAs without the authority of a prescribed authorization; and (ii) under section 49 to submit annual reports to the Chief Executive providing information on various issues such as the number of prescribed authorizations issued, the number of renewals, the number of applications refused, the major categories of offences involved, a summary of reviews conducted by the Commissioner, and the broad nature of any irregularities or errors. All such information was compiled by, or made available to, the Commissioner in the course of performing his functions, and the provision or disclosure of which is required by the ICSO.

11. The expression “[w]ithout prejudice to section 53(4)” in section 46(3) makes it clear that the provision that a person applying to the Commissioner for an examination is not entitled to have access to any information compiled by, or made available to, the Commissioner in connection with the examination does not in any way affect the general provision in section 53(4) that the Commissioner is not required to provide or disclose to any person, any information compiled by, or made available to, him in the course of performing his functions. The expression “[e]xcept as otherwise provided in this Ordinance” in section 53(4) makes it clear that the Commissioner’s obligation to provide or disclose information under the relevant provisions of the Ordinance (such as those imposed by sections 48 and 49 discussed above) is not

affected by the provision that the Commissioner is not required to provide or disclose to any person, any information compiled by, or made available to, him.

Security Bureau
October 2015