

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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13 November 2015

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

Dear Miss Ma,

We refer to the Submission from Law Society of Hong Kong dated 28 October 2015. The Government's response is at Annex.

Yours sincerely,

(Mrs Millie Ng)
for Secretary for Security

Encl (4 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
("the Bill")**

**Response to the Submission from
Law Society of Hong Kong dated 28 October 2015
("the Submission")**

This paper responds to the Submission on the safeguards in relation to information subject to legal professional privilege ("LPP") provided for in the regulatory regime governing the conduct of interception of communications and covert surveillance operations by the specified law enforcement agencies ("LEAs").

Existing Safeguards

2. The right to confidential legal advice is guaranteed by Article 35 of the Basic Law. LPP protects client-lawyer communications from disclosure to a client's prejudice. There is a possibility that the LEAs may inadvertently obtain LPP information during an authorized interception or covert surveillance operation which is carried out for the purpose of preventing or detecting serious crime or protecting public security. Whilst the Interception of Communications and Surveillance Ordinance ("ICSO") (Cap. 589) does not preclude the obtaining of LPP information nor require the termination of the operation as and when LPP information has been obtained, the ICSO and the Code of Practice ("CoP") issued under section 63 of the Ordinance have introduced stringent measures to protect LPP so that any LPP information (inadvertently obtained by the LEAs by authorized covert operations) will not be passed to the investigators of the LEAs and will not be used for investigations or in any legal proceedings. The relevant safeguards are as follows –

- (a) section 62 makes it clear that any information that is subject to LPP is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization;

- (b) section 59(1) requires that the disclosure of protected products must be limited to the minimum that is necessary for the relevant purpose of the prescribed authorization;
- (c) section 59(1)(c) read with section 59(2) requires that any telecommunications interception product containing LPP information must be destroyed as soon as reasonably practicable while any surveillance product containing such information must be destroyed not later than one year after its retention ceases to be necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted;
- (d) Schedule 3 of the ICSO requires that an application for a prescribed authorization for interception or covert surveillance must be supported by an affidavit/statement in writing setting out the likelihood of the operation obtaining information which may be subject to LPP so that the relevant authority could take that into account in considering the application;
- (e) it is a standard condition imposed by the relevant authority on prescribed authorizations that the LEAs should report any material change of circumstances that occur during the validity of the prescribed authorizations, including inadvertent obtaining information which may be subject to LPP;
- (f) to minimize the risk of inadvertently obtaining information that may be subject to LPP during an interception or covert surveillance operation, section 31(1) prohibits the conduct of telecommunications interception by reference to a telecommunications service used at an office, a residence or other relevant premises of a lawyer (or a telecommunications service known to be used by a lawyer for the purpose of providing legal advice to clients) or the conduct of covert surveillance in respect of oral or written communications taking place at an office, a residence or other relevant premises of a lawyer, except in the exceptional circumstances prescribed in section 31(2);
- (g) section 58 requires that the officer in charge of an interception or covert surveillance must report to the relevant authority the arrest of the subject of interception or covert surveillance as soon as reasonably practicable after he becomes aware of the arrest. The report must assess the effect of the arrest on the likelihood that any information which may be subject to LPP will be obtained by continuing the interception or covert surveillance. The relevant authority will

revoke the authorization if he considers that the conditions for the continuance of the authorization under section 3 are not met;

- (h) paragraph 121 of the CoP requires that dedicated units must be kept separate from the investigation team and must screen out any information protected by LPP and withhold such information from the investigators;
- (i) paragraph 121 of the CoP also requires the LEAs to notify the Commissioner on Interception of Communications and Surveillance (“the Commissioner”) of any interception or covert surveillance operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently; and
- (j) the Commissioner may review the information passed on by the dedicated units to the investigators to check that it does not contain any LPP information that should have been screened out.

3. Besides, section 2(3) of the ICSO provides that any covert surveillance which is otherwise Type 2 surveillance is regarded as Type 1 surveillance if it is likely that any information which may be subject to LPP will be obtained by carrying it out. Paragraph 29 of the CoP further requires that if an LEA has to apply to a panel judge for the issue of a prescribed authorization for Type 1 surveillance in these circumstances, the LEA should state clearly in its application that the covert surveillance sought to be carried out by it is regarded as Type 1 surveillance under section 2(3) of the ICSO. The LEA should also provide information in the supporting documents explaining why it is likely that LPP information will be obtained by carrying out the proposed covert surveillance.

Further Safeguards under the Bill

4. The Commissioner plays an important oversight role under the ICSO. In their Annual Reports, the Commissioners reported that the panel judges had been very cautious in dealing with cases that might possibly involve LPP information being obtained by an LEA. When it was assessed that there was a likelihood of LPP information being obtained by an LEA and if the authorization was granted or allowed to continue despite such likelihood, the panel judge would impose additional conditions. These additional conditions required the LEA to report back to the panel judge when the likelihood of obtaining LPP information was heightened or when there was any material change of circumstances so that the panel judge could reconsider the matter in the new light. The former and current Commissioners considered that these

additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice. These conditions would be put on a statutory footing by the new section 58A proposed in the Bill.

5. In addition, in order to facilitate the Commissioner in performing his functions, the Bill seeks to amend section 53(1)(a) of the ICSO so that the Commissioner will have an express power to require, for the purpose of performing any of his functions, any public officer or any other person to provide “any protected products” (including any protected products that contain information that is or may be subject to LPP) in his or her possession to the Commissioner. This express power will further facilitate the performance of the Commissioner’s function in overseeing the compliance by the LEAs and their officers with the requirements of the ICSO and the CoP, including those for the protection of LPP information.

Conclusion

6. As illustrated above, the ICSO and the CoP already provide comprehensive safeguards for LPP information, which will be further strengthened by the Bill. The LEAs will continue to act in a responsible manner and comply strictly with the provisions in the ICSO and the CoP.

**Security Bureau
November 2015**