

香港特別行政區政府
保安局



LC Paper No. CB(2)768/15-16(01)

The Government of the
Hong Kong Special Administrative Region
Security Bureau

香港添馬添美道 2 號

2 Tim Mei Avenue, Tamar, Hong Kong

本函檔號 Our Ref.: SBCR 14/2/3231/94 Pt. 27 / ICS(A) 2015-16

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電話號碼 TEL. NO.: 2810 2632

傳真號碼 FAX. NO.: 2877 0636

29 January 2016

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

Dear Miss Ma,

We refer to Hon James TO's letter of 11 January 2016 with a new set of proposed Committee Stage Amendments ("CSAs") to the Interception of Communications and Surveillance (Amendment) Bill 2015 ("the Bill"), and his letter of 12 January 2016 on questions in relation to the existing operation of the Interception of Communications and Surveillance Ordinance ("ICSO") (Cap. 589). Most issues in the letters have been discussed at length at the Bills Committee meetings over the last ten months. To avoid duplication, our reply below will, where appropriate, set out the references to the paragraphs in our previous written responses that have provided the relevant information/explanations.

Questions 1-6

According to the annual reports published by the Commissioner on Interception of Communications and Surveillance ("the Commissioner") since the commencement of the ICSO in August 2006 ("Annual Reports"), there were a total of 13 278 applications for prescribed authorizations, of which 13 089 were approved.

According to the Annual Reports, a total of 20 prescribed authorizations were issued as a result of an oral application between 2006 and 2014 and no emergency authorization was issued in the same period. None of these authorizations was for interception or Type 1 surveillance and as such, they did not require confirmation by a panel judge.

The Annual Reports did not provide any statistical breakdown on the types of interception or intercepted communications. On whether applications relating to the social media and instant messaging fall within the scope of the ICSO and the meaning of “intercepting act” and “communication transmitted by a telecommunications system”, please refer to paragraphs 1-5 in Annex B to our written response referenced LC Paper No. CB(2)1391/14-15(01) dated 8 May 2015 (“our response dated 8 May 2015”). As emphasised in our previous written responses and at the Bills Committee meetings, it is inappropriate to disclose detailed operational arrangements in relation to covert operations since doing so may reveal law enforcement agencies’ (“LEAs”) enforcement capabilities to criminals, who may be able to elude justice, thus undermining LEAs’ ability in crime investigation and protection of public security.

The making of requests by LEAs for subscribers’ information from the Internet service providers falls outside the scope of the ICSO. For further explanations, please refer to paragraphs 6-7 in Annex B to our response dated 8 May 2015, paragraphs 1-7 in Annex to LC Paper No. CB(2)1572/14-15(01) dated 28 May 2015, paragraph 3 in Annex A to LC Paper No. CB(2)1732/14-15(01) dated 19 June 2015 and paragraphs 5-9 in Annex to LC Paper No. CB(2)2152/14-15(01) dated 25 September 2015.

Question 7

Section 33(1) of the Telecommunications Ordinance (“TO”) (Cap. 106) provides that for the purpose of providing or making available facilities reasonably required for (a) the detection or discovery of any telecommunications service provided in contravention of any provision of the TO or any regulation made under the TO or any of the terms or conditions of a licence granted under the TO, or (b) the execution of prescribed authorizations for telecommunications interception that may from time to time be issued or renewed under the ICSO, the Chief Executive (“CE”) may order that any class of messages shall be intercepted. Section 33(2) provides that an order under section 33(1) shall not of itself authorize the obtaining of the contents of any individual message.

Since the inception of the ICSO, the CE has exercised the power under section 33(1) of the TO in strict accordance with the law and such order cannot authorize the obtaining of any data in association with any individual message. As the CE’s exercise of such power relates to sensitive operational arrangement in connection with provision of facilities required for authorized covert operations under the ICSO, the relevant statistics cannot be disclosed.

Questions 8-11

For our explanations of the requirement that an LEA, when it becomes aware that the subject has been arrested, shall provide a report under section 58 of the existing ICSO assessing the effect of the arrest on the likelihood that any information which may be subject to legal professional privilege will be obtained by continuing the interception or covert surveillance, please refer to paragraphs 23 and 45-46 of Annex to LC Paper No. CB(2)214/15-16(01) dated 6 November 2015 (“our response dated 6 November 2015”), paragraphs 1-3 of Appendix III to Annex of LC Paper No. CB(2)443/15-16(01) dated 11 December 2015 (“our response dated 11 December 2015”) and paragraphs 2-4 of Annex to LC Paper No. CB(2)546/15-16(01) dated 31 December 2015 (“our response dated 31 December 2015”).

The existence of a material inaccuracy or a material change in circumstances is a matter of fact that can be ascertained by reference to objective evidence. For our examples and full explanations on the requirement imposed under the proposed section 58A on LEAs to report any material inaccuracy and any material change in circumstances to the relevant authority, please refer to paragraphs 8-9, 23 and 47 of our response dated 6 November 2015.

Question 12

The immediate destruction arrangements under sections 23(3)(a) and 26(3)(b)(i) relate to a failure to apply for confirmation of an emergency authorization or confirmation of a prescribed authorization issued, or a renewal granted, upon an oral application, while that under sections 24(3)(b) and 27(3)(b) refers to one of the orders that the relevant authority may make where he refuses to confirm the authorization or renewal in determining an application for confirmation made in compliance with section 23(1) or 26(1).

According to the Annual Reports, there was no case from 2006 to 2014 requiring immediate destruction of information under sections 23(3)(a), 26(3)(b)(i), 24(3)(b) and 27(3)(b). For explanations on the policy intent underlying the immediate destruction arrangements, please refer to paragraphs 15-17 of our response dated 6 November 2015 and paragraphs 1-5 of our response dated 11 December 2015.

Question 13

On whether section 57 of ICSO obliges an officer conducting a review under section 56(1) or (2) to order in writing the discontinuance of the interception or covert surveillance concerned so as to mandate compliance by

the officer-in-charge of that interception or covert surveillance, please refer to paragraphs 43-44 of our response dated 6 November 2015 and paragraph 1 of our response dated 31 December 2015.

Questions 14-16

On the current arrangement for retrieval of surveillance devices, the mechanism for applying for a device retrieval warrant as well as the respective roles of the Commissioner and panel judges under this mechanism, please refer to paragraphs 33-39 of our response dated 6 November 2015 and paragraphs 9-11 of Appendix III to our response dated 11 December 2015.

Questions 17-19

On whether criminal sanctions should be introduced under the ICSO, the Government's position is set out in paragraphs 26-27 of our response dated 6 November 2015, and paragraphs 13-14 of Appendix II and paragraphs 4-7 of Appendix III to our response dated 11 December 2015.

Since the enactment of the ICSO, disciplinary actions have been taken against more than 60 officers who had failed to comply with the ICSO, the Code of Practice ("CoP") and/or related internal guidelines. According to the Annual Reports, the numbers of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such actions are tabulated below -

	2007-2014
Reprimand	1
Written warning of dismissal	2
Written admonishment	1
Warning	41
Advice	25
Total	70

There was no case in which an officer had failed to provide the information as per the Commissioner's request under section 53(1)(a) and disciplinary action was taken for such failure.

Questions 20-21

On the management of intelligence derived from interception or covert surveillance operations, please refer to paragraph 14 in Annex B to our response dated 8 May 2015, paragraphs 12-13 of Appendix III to our response dated 11 December 2015 and paragraph 2 in Annex A to LC Paper No. CB(2)616/15-16(01) dated 11 January 2016.

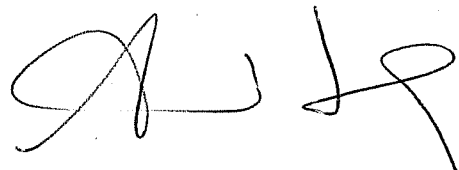
Question 22

The CoP is promulgated pursuant to section 63 of the ICSO, and serves to provide practical guidance to LEAs on the principles and requirements of the ICSO. The CoP was last revised and gazetted in November 2012: a copy of which is available at our Bureau's website: http://www.sb.gov.hk/eng/special/sciocs/2011/Annex%20B_CoP_eng.pdf (English); http://www.sb.gov.hk/chi/special/sciocs/2011/Annex%20B_CoP_chi.pdf (Chinese).

Proposed CSAs to Clause 18 - Section 58A

On the proposed introduction of the "reasonable suspicion" threshold in section 58 of the existing ICSO and the proposed section 58A under the Bill, please refer to paragraphs 23 and 45-46 of our response dated 6 November 2015, paragraphs 1-3 of Appendix III to our response dated 11 December 2015 and paragraphs 2-4 of our response dated 31 December 2015 for the Administration's position and explanations. The Government does not find these proposed CSAs agreeable.

Yours sincerely,



(Andrew TSANG)
for Secretary for Security

c.c.

Department of Justice

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