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Panel on Security

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 2 December 2014**

**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 a copy of the report to be laid on the table of the Legislative Council ("LegCo").

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 seven annual reports to CE. The results of the Administration's

study of matters raised in the annual reports have been discussed at a number of Panel meetings and the deliberations are summarized below.

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

5. Concern was raised over the Commissioner's comments about inadequate ICSO-related training for law enforcement officers and their lax attitude. Some members were concerned that law enforcement officers were still unfamiliar with the rules and procedures of the ICSO scheme. There was a view that sufficient training should be provided to newly appointed as well as existing staff, including those at the supervisory level. The rotation of staff members engaged in interception work should also be minimized.

6. According to the Administration, in response to the recommendations in the reports of the Commissioner, numerous revisions had been made to the Code of Practice ("CoP") in the past few years. The Administration was aware of the importance of getting existing and newly appointed ICSO-related law enforcement officers familiar with requirements under ICSO and CoP, including any new requirements. In this connection, the law enforcement agencies ("LEAs") concerned had been directed to provide appropriate induction training and refresher training for relevant officers. The comment of the Commissioner regarding the lax attitude of some law enforcement officers was made mainly in relation to the completion and checking of registers for the use of surveillance devices for non-ICSO related purposes.

7. Members noted that frontline and supervisory level law enforcement officers newly appointed to perform listening duties were provided with induction training, which covered the operation of the listening system, practical listening techniques, the conditions imposed by panel judges on prescribed authorizations and legal professional privilege ("LPP"). Training packages had been developed to enhance the knowledge of law enforcement officers in the requirements in ICSO and facilitate the adoption of a proper and prudent attitude towards ICSO-related matters. The LEAs concerned had been requested to minimize the rotation of staff members engaged in interception work.

Prevention of abuse of power by law enforcement officers

8. While noting that interception of communications and covert surveillance were critical to the combating of serious crime, some members expressed concern about the possibility of abuse of power by LEAs.

9. Members were informed that under ICSO, all interception required the prescribed authorization of a panel judge. When making an application for a

prescribed authorization, an LEA applicant had to submit with his application an affidavit or written statement on his assessment of the likelihood of involvement of LPP to a panel judge for issue of a prescribed authorization. Whenever there were any subsequent changes which might affect the assessment, the LEA concerned had to notify the panel judge, who would determine whether the prescribed authorization should continue or whether any condition needed to be imposed. LEAs were required to submit reports within specified time limits to the Commissioner, who monitored the compliance of LEAs with ICSO. Where there were cases of non-compliance or irregularity, follow-up actions were taken by LEAs in accordance with the established mechanisms of the LEAs concerned having regard to the Commissioner's advice and recommendations. Where disciplinary actions were to be taken against the officers concerned, the LEAs concerned would take into account the views of the Commissioner, if any, before actions were taken against the officers concerned.

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

10. 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.

11. 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.

12. Some members expressed the view that law enforcement officers should under no circumstances be allowed to listen to any communication between a client and a law firm. Law enforcement officers who listened to such communication should be prosecuted under ICSO.

13. According to the Administration, LPP was protected by the common law and Article 35 of the Basic Law, which guaranteed that "Hong Kong residents shall have the right to confidential legal advice". ICSO did not preclude LEAs from intercepting the communications of a lawyer provided that the interception was carried out pursuant to a prescribed authorization in accordance with the

requirements of ICSO. In relation to the protection of LPP in ICSO, section 3 of ICSO required the consideration of all relevant circumstances and the balancing of competing interests, including the protection of privacy and LPP, in the issue or renewal or continuance of a prescribed authorization. Schedule 3 to ICSO also required LEAs to assess the likelihood of obtaining LPP information when making an application for interception. Under section 31 of ICSO, no prescribed authorization might contain terms that authorize the interception of communications by reference to any telecommunications service used at an office or other relevant premises, or a residence, of a lawyer unless exceptional circumstances existed. Section 62 of ICSO further guaranteed that "Any information that is subject to legal professional privilege is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization". Administrative measures were in place supplementing the statutory safeguards.

Cases involving journalistic material ("JM")

14. Noting that there were three reports relating to JM in 2012, some members were concerned whether a prescribed authorization would be granted, if an LEA applicant indicated at the time of application that JM would be obtained. Concern was also raised about the possibility of cases where an application for a prescribed authorization was submitted without informing the panel judge that JM would likely be obtained.

15. According to the Administration, there was no question of an LEA submitting an application for a prescribed authorization without informing the panel judge if JM would likely be obtained. ICSO required an applicant to set out, at the time of applying for a prescribed authorization, the likelihood that any information which might be the contents of any JM would be obtained by carrying out the interception or covert surveillance sought to be authorized. LEAs were required to notify the panel judges of cases where information which might be the contents of any JM had been obtained. Among one of the three JM cases in 2012, the panel judge had imposed additional conditions on the prescribed authorization. In the other two cases, REP-11¹ reports and discontinuance reports were submitted to the panel judge who revoked the prescribed authorizations.

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 for empowering him and staff designated by him to examine intercept and covert

¹ Form REP-11 is used to report on material change of circumstances or initial material inaccuracies under a prescribed authorization.

surveillance products had not yet been adopted by the Administration. The Commissioner considered that the provision of such power for himself and his designated staff to listen to and inspect intercept and surveillance products would serve as a strong deterrent against malpractice or concealment. Some members considered 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 himself to listen to intercept products, such power was not granted to similar supervisory authorities in other common law jurisdictions. 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. Following a review of ICSO, the Administration reverted to the Panel in July 2013 on its proposals, inter alia, to amend ICSO -

- (a) to make an express provision to empower the Commissioner, for the purpose of performing his functions under ICSO, to require any public officer or any other person to provide "protected products" for his inspection irrespective of whether the products contain LPP information; and
- (b) so that the existing statutory requirements to destroy protected products and products which contained LPP information would be subject to the Commissioner's requirement that any of such products be preserved for his inspection.

18. Members noted that the Administration had already issued drafting instructions regarding legislative amendments to give effect to the former Commissioner's recommendations. It was working with the Department of Justice on the legislative amendments and would communicate with the Commissioner and panel judges where necessary in the process. According to the Administration, it was working towards introducing the relevant legislative amendments to ICSO into LegCo within 2014.

Documentation requirement on cases of non-compliance

19. Noting from a non-compliance case in which three officers involved did not remember the exact date of discovering the mistake, some members raised queries over the absence of any written records of the internal communications among different ranks regarding the case. 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.

20. According to the Administration, 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.

Interception of communications and surveillance by the non-government sector

21. Some members expressed concern that ICSO only regulated four designated LEAs. Information was sought on whether the Administration had any plans to extend the application of ICSO to members of the public and private investigators.

22. According to the Administration, the purpose of ICSO was to empower four designated LEAs to undertake lawful interception of communications and covert surveillance operations to prevent and detect serious crimes and protect public security. Regarding the interception of communications and surveillance by the non-government sector, the Law Reform Commission ("LRC") had published five reports related to privacy between 1996 and 2006, including reports on regulating the interception of communications and the regulation of covert surveillance. The Administration noted that when the reports were published, the media sector and journalists expressed grave concern that the recommendations might compromise press freedom. Given the complexity and sensitivity of the issues involved, the Constitutional and Mainland Affairs Bureau ("CMAB") was handling the relevant reports by stages and would consider very carefully the views of all parties concerned. The issues raised in the LRC report on stalking were comparatively less controversial, and CMAB would first deal with it. Members may wish to note that at its meeting on 16 June 2014, the Panel on Constitutional Affairs was informed that in the light of the public concerns over the impact of anti-stalking legislation on press freedom and freedom of expression, the Administration was of the view that there were no favourable conditions for the Administration to pursue the matter further.

Surveillance devices

23. Some members had expressed concern about whether there was regulation of the use of surveillance devices. Members noted that all surveillance devices were subject to stringent control, including the use of

surveillance devices for non-ICSO purposes.

24. There was a view that measures such as the deployment of a seal should be adopted to prevent the possible removal of memory cards from surveillance devices and copying of data from these memory cards to other devices. Members were advised that there was mechanism and procedures in place to prevent the removal of memory storage media from surveillance devices.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
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**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**

Committee	Date of meeting	Paper
Panel on Security	6.11.2007 (Item V)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	6.12.2007 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	16.2.2009 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	3.3.2009 (Item IV)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	7.12.2009 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	6.7.2010 (Item III)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	29.11.2010 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	5.12.2011 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	3.1.2012 (Item VI)	<u>Agenda</u> <u>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>
Panel on Security	4.12.2012 (Item IV)	<u>Agenda</u> <u>Minutes</u>

Committee	Date of meeting	Paper
Panel on Security	2.7.2013 (Item III)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	3.12.2013 (Item III)	<u>Agenda</u> <u>Minutes</u>

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