

**Commissioner on Interception of Communications and Surveillance**  
**Annual Report 2017**

**Summary**

1. The Interception of Communications and Surveillance Ordinance (Cap. 589) ('the Ordinance' or 'ICSO') came into force on 9 August 2006 and was amended in June 2016. Pursuant to section 49 of the Ordinance, Mr. A. R. Suffiad, the Commissioner on Interception of Communications and Surveillance ('Commissioner'), submitted his third annual report, i.e. Annual Report 2017, to the Chief Executive on 29 June 2018. The report covers the period 1 January 2017 to 31 December 2017. The following is a summary of the report.

2. The Commissioner's main functions are to oversee the compliance by the four law enforcement agencies ('LEAs') and their officers with the statutory requirements in relation to interception of communications and covert surveillance; and to conduct reviews to ensure full compliance by these LEAs with the requirements of the Ordinance, the Code of Practice ('COP') issued by the Secretary for Security and the prescribed authorizations. The four LEAs are Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption.

3. During the report period, a total of 1,314 prescribed authorizations (including fresh and renewed authorizations) were issued. Among them, 1,303 were judge's authorizations for interception, eight were judge's authorizations for Type 1 surveillance, and three were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs. These authorizations included 29 cases that had been renewed more than five times. No oral application was made by the LEAs.

4. During the report period, one application for interception was refused. The reason for refusal is stated in paragraph 2.3 of Chapter 2 of the report. No application for Type 1 or Type 2 surveillance was refused.

5. There was no application for emergency authorization during the report period.

6. A total of 170 persons were arrested in 2017 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. The Ordinance makes specific reference to legal professional privilege ('LPP') and journalistic material ('JM') for particular caution when interception or covert surveillance is to be authorized and carried out. The COP provides that the LEAs should

notify the Commissioner of cases that are likely to involve LPP information/JM as well as other cases where LPP information/JM has been obtained.

8. When making an application for a prescribed authorization, the LEA applicant is obligated to state his assessment of the likelihood of obtaining LPP information. If subsequently there is anything that transpires which may affect the assessment, the officer concerned has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, to notify the authorizing officer by way of an REP-13 report. If the subject of the interception or covert surveillance has been arrested and the officer concerned considers that the operation should continue, the officer should submit a section 58 report to the relevant authority assessing the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the interception or covert surveillance. The concerned LEA is required to give the Commissioner a similar notification of each of such occurrences. When reporting to the panel judge and the Commissioner on the suspected obtainment of LPP information, the LEAs should detail the contents of such information in an annex to the REP-11 report/notification and place the annex in a separate sealed envelope for opening by the relevant authority and the Commissioner personally. During the year, the Commissioner reviewed the record-keeping arrangement regarding obtainment of LPP information or possible LPP information. To provide further protection

of LPP information, the Commissioner recommended to LEAs that they should remove and seal in a separate envelope the part of the transcripts, summaries, notes, etc. containing the LPP information or possible LPP information and restrict the access to the sealed documents to avoid any unnecessary disclosure of such information.

9. For cases with assessment that there was likelihood of involving LPP information, the panel judges would impose additional conditions if they granted the authorization or allowed it to continue. These additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice.

10. In the report period, LEAs submitted notifications, in accordance with the COP, on 86 new LPP cases. In 80 of these cases, the LEAs submitted REP-11 or section 58 reports to the panel judges on the subsequent change in circumstances relating to LPP involvement or likelihood. These 80 cases included seven cases of inadvertent obtaining of LPP information, two cases of suspected/possible obtaining of LPP information and 71 cases of heightened likelihood of obtaining LPP information. For the remaining six LPP cases, it was assessed at the grant of the prescribed authorizations that the operations sought to be authorized would likely obtain LPP information and the panel judges had imposed additional conditions in the authorizations. As regards JM, in the report period, reports on three new JM cases were received.

11. Having the express power to examine the protected products after the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016, the Commissioner and his delegated officers have carried out the relevant examinations since October 2016.

12. The protected products of the LPP and JM cases reported in 2017 had been examined and details of the Commissioner's reviews of these cases are given in Chapters 4 and 6 of the report. Besides, the Commissioner has selected from the weekly reports, on the basis of the information provided therein or at random, interception and surveillance products of other cases for examination. During the report period, with the basis of selection as mentioned above, interception products of 316 authorizations and surveillance products of two authorizations were examined. Of the 316 authorizations for interception, one involved an incident of delay in preservation of protected products and another two authorizations related to irregularities connected with non-reporting of calls with information indicating heightened LPP likelihood. Reviews of these three cases are stated in Chapter 6 of the report. With regard to the remaining 313 authorizations for interception and the two authorizations for surveillance selected for checking, no irregularity was found.

13. The preserved protected products of 74 LPP and five JM cases that were reported before 2016 were also checked. The examination of protected products of these LPP and JM cases, four of which required explanations from relevant LEAs, did not reveal anything to justify any deviation from the assessments given by the Commissioner or his predecessors on the handling of cases reported in the past years.

14. During the report period, five applications for examination were received. Of these applications, one application was subsequently not pursued by the applicant. The remaining four applications all claimed a combination of interception and covert surveillance. After making all necessary enquiries, the Commissioner found all the four cases not in the applicants' favour and accordingly notified each of them in writing. Under the Ordinance, the Commissioner is not allowed to provide reasons for his determination. The Commissioner has observed that there were occasions where the applicants expressed strong discontent at not being given the details of the reasons for his determinations. It is hoped that the public will understand that the statutory prohibition is designed to forbid the disclosure of any information which might prejudice the prevention or detection of crime or the protection of public security. There should not be any doubt that the Commissioner carries out his duties and functions under the Ordinance with utmost good faith and sincerity.

15. Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person when the Commissioner discovers a case in which interception or covert surveillance has been carried out by an officer of any of the four LEAs covered by the Ordinance without a prescribed authorization. However, section 48(3) provides that the Commissioner shall only give a notice when he considers that doing so would not be prejudicial to the prevention or detection of crime or the protection of public security. Section 48(6) also exempts the Commissioner from his obligation if the relevant person cannot, after the use of reasonable efforts, be identified or traced, or where he considers that the intrusiveness of the interception or covert surveillance on the relevant person is negligible. During the report period, no notice pursuant to section 48 of the Ordinance was issued.

16. In 2017, there were 18 cases of non-compliance/irregularity/incident while none of them involved report submitted under section 54 of the Ordinance. Moreover, there were four outstanding cases brought forward from the Annual Report 2016. One outstanding case was first reported in 2014 and the reporting of which will be made after the relevant court proceedings have concluded. For the other three outstanding cases, the relevant protected products had been examined in 2016 and the Commissioner completed his review of these cases in 2017. These are set out in Chapter 6 of the report. One case relating to surveillance devices for non-ICSO purposes is covered in Chapter 3 of the report.

17. The protected products of four selected past cases of non-compliance, irregularity or incident that did not involve the obtainment of LPP information or JM or such likelihood, including one case reported in 2015 and three in 2016 involving covert surveillance, were also examined. The Commissioner did not find anything that deviated from what had been reported to the relevant authority and/or him.

18. During the report period, three disciplinary actions in the form of verbal advice or verbal warning were taken for cases mentioned in Chapter 6 of the report. Table 12 in Chapter 8 of the report sets out the details.

19. To better carry out the objects of the Ordinance, a number of recommendations were made to the LEAs under section 52 of the Ordinance in the report period. Details of the recommendations are given in Chapter 7 of the report.

20. The Commissioner has set out in Chapter 9 of the report an assessment of the overall performance of the LEAs in their compliance with the relevant requirements of the ICSO during the report period. In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. In the report period, various forms of checking did not reveal any case of wrong or unauthorized interception/covert surveillance nor any sign of abuse of surveillance devices for any

unauthorized purposes. With the implementation of examination of protected products since October 2016, the Commissioner is able to check the veracity of the gist of communications or information as stated in the REP-11/REP-13 reports and whether there were any communications or information subject to LPP or with JM that had been accessed by the LEA officers but not reported to the relevant authority. Apart from those specifically mentioned in Chapter 4 and Chapter 6 of the report, nothing untoward was found for the LPP cases reported in 2017. As for the JM cases reported in 2017, they were all found in order. In the handling of LPP and JM cases, the LEAs continued to adopt a very cautious approach, save for some occasions where some of the LEA officers still failed to exercise enough vigilance and care as revealed in various cases reported in Chapters 4 and 6 of the report. The Commissioner also noted that there was a marked increase in the number of cases involving obtainment of LPP information in 2017. The Commissioner is of the view that a high level of alertness maintained by LEA officers in performing their intercepting duties is important for guarding against the risk of obtaining LPP information.

21. Overall, the Commissioner is satisfied with the performance of the LEAs and their officers in their compliance with the requirements of the ICSO in 2017. The Commissioner did not find that there was deliberate disregard of the statutory provisions or the COP nor did the Commissioner find any ulterior motive or ill will on the part of the officers involved. Most of the cases of

non-compliance/irregularity/incident in 2017 were consequences of inadvertence or carelessness of the officers concerned, reflecting that some of the officers were still not vigilant and cautious enough in discharging ICSO duties. In a few cases, the Commissioner noted that the officers were not conversant with the operating procedures of the systems concerned or the requirements on handling of ICSO cases. The heads of LEAs should endeavour to provide their officers with sufficient training to facilitate them to better perform the ICSO duties. Furthermore, officers of the LEAs should stay alert and exercise care in different stages of the operations conducted under the ICSO.

22. The Commissioner is pleased to see that in the report period, LEAs continued to be positive to his recommendations in regard to new arrangements for better operation of the ICSO regime and took initiative to implement system enhancements to prevent recurrence of technical mistakes or to avoid human errors.

23. In the report, the Commissioner expresses his gratitude to the panel judges, the Security Bureau, the LEAs and the communications services providers for their assistance and co-operation. In particular, the Commissioner is grateful that relevant parties continued with their prompt and effective support without which he could not have performed his functions smoothly and efficiently. The Commissioner looks forward to the continuous support and cooperation of all the parties involved for any new arrangement that will facilitate his oversight work.

24. The report has been uploaded onto the website of the Secretariat, Commissioner on Interception of Communications and Surveillance (<https://www.sciocs.gov.hk>) for access by members of the public.