

Commissioner on Interception of Communications and Surveillance

Annual Report 2007

Summary

1. The Interception of Communications and Surveillance Ordinance, Cap 589 ('the Ordinance') came into force on 9 August 2006. Mr Justice WOO Kwok-hing, Commissioner on Interception of Communications and Surveillance ('the Commissioner'), submitted his second annual report, ie Annual Report 2007, to the Chief Executive on 30 June 2008. The report covers the period from 1 January 2007 to 31 December 2007. The following is a summary of the report.

2. The Commissioner's main function is to oversee the compliance by four law enforcement agencies ('LEAs'), as specified in the Ordinance, with the statutory requirements in relation to interception of communications and covert surveillance; and to conduct reviews to ensure full compliance by these LEAs and their officers with the requirements of the Ordinance, the Code of Practice issued by the Secretary for Security and the conditions prescribed in the 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 1,785 prescribed authorizations (including fresh and renewed authorizations) were issued.

Among them, 1,525 were judge's authorizations for interception, 134 were judge's authorizations for Type 1 surveillance, and 126 were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs. These 1,785 authorizations included 23 that had been renewed more than five times.

4. During the report period, a total of 33 applications were refused (including 31 applications for interception and two applications for Type 1 surveillance). For reasons for refusal, please see paragraph 2.6 of Chapter 2 and paragraph 3.3 of Chapter 3 of the report.

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

6. A total of 661 persons were arrested in 2007 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 for particular caution when interception and covert surveillance are to be authorized and carried out. During the report period, there was no reported case of journalistic material having been obtained. There were, however, four reported cases of inadvertent obtaining of information which might be subject to LPP. Among them, there was only one sure case that information subject to LPP

had been obtained. Of the three other cases, the nature of the information in one of them is unknown because of the destruction of the relevant records and the remaining two cases did not show that information subject to LPP had in fact been obtained. Please refer to Chapter 5 for details of the Commissioner's review of these four cases and Table 11 in Chapter 11 of the report.

8. The Commissioner has also observed that the Ordinance and the Code of Practice are silent on the details of some practical aspects of dealing with situations where LPP information might possibly be obtained. The handling of the LPP cases in 2007 has also highlighted some issues which are worthy of consideration such as the extent of listening; whether supervising officers should be allowed to listen so as to confirm or rebut the listener's belief or understanding; whether a panel judge is entitled to listen before deciding how to deal with the authorization; whether the Commissioner should listen for carrying out his review functions; whether the Commissioner is entitled to require the preservation of the recorded product with possible LPP information and other related materials, and if so, what is the maximum period of retention he may require; and last but not the least, can information subject to LPP be used for criminal investigation purposes? Please refer to paragraphs 5.82 to 5.100 of Chapter 5 of the report for details of these issues. The Security Bureau has been apprised of and will take them into account when conducting a comprehensive review of the Ordinance in 2009.

9. During the report period, a total of 27 applications for examination were received, among which one was subsequently not pursued by the applicant and another one was not within the ambit of the Commissioner's functions. Of the remaining 25 applications, eight concerned suspected cases of interception and five alleged surveillance. The other 12 related to a combination of both. The Commissioner carried out examination on these 25 applications and found 24 of these cases not in the applicant's favour and notified each of them in writing accordingly. Under the Ordinance, the Commissioner was not allowed to provide reasons for his determination. The handling of the remaining case still continued at the time of the writing of the report.

10. In 2007, the Commissioner gave a notice to a relevant person pursuant to section 48 of the Ordinance for interception conducted without the authority of a prescribed authorization. The unauthorized interception was caused by an error in the execution of interception resulting in a facility being intercepted in addition to the facility authorized by a prescribed authorization. Up to the time when the report was prepared, the case had still not finalized. Please refer to Chapter 6 and paragraphs 7.63 to 7.81 of Chapter 7 of the report for details.

11. During the report period, the Commissioner received reports from heads of LEAs made under section 54 of the Ordinance involving five incidents of irregularities. They related to four Type 2 surveillance and one interception cases. In three of these cases, disciplinary actions had

been taken against six LEA officers in the form of verbal advice and warning. Please see paragraphs 7.1 to 7.81 of Chapter 7 and Table 12 in Chapter 11 of the report for details.

12. Upon his request, the Commissioner also received two reports of irregularities from LEAs not made under section 54 of the Ordinance as the LEAs concerned did not consider them to be irregularities. One report concerned revocation of four interception cases under section 58 of the Ordinance and the other report concerned the time gap in the renewal of 15 executive authorizations for Type 2 surveillance. Please see paragraphs 7.82 to 7.93 of Chapter 7 for details.

13. In addition, the LEAs also reported to the Commissioner two incidents that were not treated as irregularities. The first concerned reactivation of a discontinued interception and the other concerned initial material inaccuracies under a prescribed authorization for interception. Please see paragraphs 7.94 and 7.95 of Chapter 7.

14. During his inspection visits to LEAs, the Commissioner also identified two Type 2 surveillance authorizations which he considered had not been granted entirely properly. For the first case, please refer to paragraphs 4.20(e) and 4.21 to 4.24 of Chapter 4 of the report. For the second case, please refer to paragraphs 4.20(f) and 4.25 to 4.27 of Chapter 4.

15. To better carry out the objects of the Ordinance, the Commissioner made a number of recommendations to the Secretary for Security and the heads of LEAs under sections 51 and 52 of the Ordinance during the report period. Please see Chapters 8 and 9 of the report for details.

16. In the course of performing his functions in 2007, the Commissioner discovered certain provisions of the Ordinance that are subject to different interpretations or difficult to comply with fully. There are also matters that are not expressly covered by the provisions of the Ordinance, which have given rise to different ways of understanding what is to be done. Such issues are set out in Chapter 10 of the report and the Security Bureau will take them into consideration when conducting a comprehensive review of the Ordinance in 2009.

17. In Chapter 12 of the report, the Commissioner concluded that the panel judges continued to apply very stringent standards in the consideration of applications and the granting of authorizations. Although there were some instances of non-compliance with the ICSO requirements by some officers of the LEAs as shown in Chapter 7, such non-compliance was mainly due to inadvertence or lack of thorough understanding or familiarity with the Ordinance. There was no or no sufficient evidence of any wilful or deliberate flouting of such requirements.

18. The Commissioner found the leadership of the LEAs

co-operative and constructive in assisting him in the performance of his oversight functions. The leadership of the LEAs was as concerned as the Commissioner has been that their officers would not carry out any of the statutory activities without a prescribed authorization, and such activities were carried out in a manner within the confines of the law. However, the Commissioner also found some officers of certain LEAs not as frank and forthcoming as he would have liked and their attitude also gave rise to concern, as revealed in LPP Cases 2 and 3 in Chapter 5 and the review of the two Type 2 surveillance cases in paragraphs 4.20(e), 4.20(f) and 4.22 to 4.27 of Chapter 4 of the report.

19. The Commissioner expresses his gratitude to the panel judges, the Security Bureau, the LEAs, the communications services providers and other parties concerned for their co-operation and assistance in the performance of his functions as the Commissioner. He promises that as the Commissioner, whenever any problem arises it will be taken up as a challenge and an opportunity to make improvements with the aim of better protecting the right of Hong Kong people to privacy.

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