Annual Report 2008 to the Chief Executive

by

The Commissioner on
Interception of Communications
and Surveillance

June 2009

截取通訊及監察事務專員辦公室
Office of the Commissioner on Interception of Communications and Surveillance

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30 June 2009

The Honourable Donald Tsang, GBM
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Government House
Hong Kong

CONFIDENTIAL

Dear Sir,

Annual Report for the Year 2008

I have the pleasure, pursuant to section 49(1) and (6) of the Interception of Communications and Surveillance Ordinance, in submitting to you the annual report for the year 2008, together with its Chinese translation.

As referred to in paragraphs 7.27 and 11.7 of the annual report, I separately submit a further report of even date pursuant to section 50 of the Ordinance.

Yours sincerely,

(K H Woo)
Commissioner on Interception of
Communications and Surveillance

Encl: Annual Report for 2008
and its Chinese translation

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ABBREVIATIONS

Unless the context otherwise requires:

affidavit / affirmation/ statement	affidavit or affirmation in support of an application to a panel judge for a prescribed authorization / statement in writing in support of an application to an authorizing officer for executive authorization
ATR	audit trail report
C, ICAC	Commissioner, Independent Commission Against Corruption
Cap	chapter in the Laws of Hong Kong
Code, Code of Practice	the Code of Practice issued by the Secretary for Security under section 63 of the Ordinance
Commissioner	Commissioner on Interception of Communications and Surveillance
COP	the Code of Practice issued by the Secretary for Security under section 63 of the Ordinance
CSP	communications services provider
dedicated unit	a unit in an LEA dedicated to the handling of ICSO matters, separate from the investigative arm of the LEA
discontinuance report	report on discontinuance of interception or covert surveillance submitted pursuant to section 57 of the Ordinance
DoJ	Department of Justice
fresh application	application for a prescribed authorization which is not a renewal

ICAC	Independent Commission Against Corruption
ICSO	Interception of Communications and Surveillance Ordinance
ICSO device register	device register of devices withdrawn based on loan requests with a prescribed authorization in support and of such devices returned
interception	interception of communications
internal form	the form produced under the coordination of the Secretary for Security to facilitate LEA officers' tasks under the Ordinance
JM	journalistic material
LEA	law enforcement agency
LegCo	Legislative Council
LPP	legal professional privilege
LPP information	information protected by legal professional privilege
non-ICSO device register	device register of devices withdrawn based on loan requests for surveillance devices for purposes in respect of which no prescribed authorization is required and of such devices returned
Ordinance	Interception of Communications and Surveillance Ordinance
panel judge	the panel judge appointed under section 6 of the Ordinance

PIPEDA	Personal Information Protection and Electronic Documents Act
PJO	panel judges' office
renewal application	application for renewal of a prescribed authorization
REP-11 report	report on material change of circumstances or initial material inaccuracies under a prescribed authorization made on internal form REP-11
revised Code	the revised Code of Practice issued by the Secretary for Security on 9 February 2009
section	section of the Ordinance
statutory activity	interception of communications and covert surveillance activity called collectively
surveillance	covert surveillance
the report period	the period from 1 January to 31 December 2008
the Team	a dedicated team comprising officers from the LEAs that operates independently of their investigative arms
weekly report form	the form designed for the LEAs and panel judges to provide information to the Commissioner once every week

CHAPTER 1

INTRODUCTION

Furthering the experience gathering

1.1 When I first put my fingers on the keyboard to write this annual report for the year 2008, the Interception of Communications and Surveillance Ordinance, Cap 589 ('Ordinance' or 'ICSO') has been in operation for almost three years. A number of the provisions of the Ordinance in various facets have been put into practice by the law enforcement agencies ('LEAs') under the Ordinance[Note 1], from which experience and ways and means of how to deal with many hitherto unexpected situations have evolved, at the same time allowing more ambiguous and incomprehensive provisions of the Ordinance to be identified.

1.2 As with 2007, nothing in 2008 turned out to be the vexing situations that I previously considered as could possibly be caused by the inadequacies of the provisions of the Ordinance. However, there is no room for complacency and such inadequacies must be remedied timeously.

1.3 I have continued to make recommendations and suggestions on various procedural matters in the course of discharging my duties in overseeing and supervising the performance of the LEAs over their compliance with the requirements of the Ordinance. I am happy to report that most of them have been given effect to by the Security Bureau and the

Note 1 There are four LEAs under the Ordinance, namely Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption.

LEAs, and all of them have taken steps in apparent earnest in tackling the adverse effect of the defects or deficiencies intended to be addressed by such recommendations and suggestions through practical means.

Thoughts to enhance review

1.4 Although this report deals with the factual matters happening in 2008 and their ramifications, I have included some thoughts for improvement of the review procedure that have occurred to me only recently. Such thoughts were mainly inspired by the concern on the need to ensure that LEAs operate in full compliance with the law that was expressed by members of the public, the media and the Legislative Council ('LegCo') after the publication of my 2007 Annual Report, and their reposing the trust of buttressing such compliance on me as the oversight authority. This review initiative will be explained in Chapter 9 of this report.

Transparency

1.5 I also appreciate the importance that members of the public have placed on transparency in the handling of matters under the Ordinance, through which they can assess the degree of possible intrusion into their right to privacy as against the need to fight serious crimes and protect public security. Nonetheless, as I said in my 2007 Annual Report, in performing my functions under the Ordinance, I must be extremely careful not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security. Facets of this non-prejudice principle are manifested in various provisions of the Ordinance, such as sections 44(6), 46(4), 48(3), 48(4) and 49(5). This is

the reason why some matters in this report may not be described in as much detail as to the reader's content. However, considering the significance of transparency, not only required by public demand but also essential for fairness to all concerned, I have attempted to include as much information as the non-prejudice principle can possibly permit.

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CHAPTER 2

INTERCEPTION

Prescribed authorizations

2.1 Pursuant to section 29(1) of the Ordinance, a prescribed authorization for interception may –

(a) in the case of a postal interception, authorize one or both of the following –

(i) the interception of communications made to or from any premises or address specified in the prescribed authorization;

(ii) the interception of communications made to or by any person specified in the prescribed authorization (whether by name or by description); or

(b) in the case of a telecommunications interception, authorize one or both of the following –

(i) the interception of communications made to or from any telecommunications service specified in the prescribed authorization;

(ii) the interception of communications made to or from any telecommunications service that any person specified in the prescribed authorization (whether by name or by description) is using, or is reasonably expected to use.

2.2 The last category requires special mention. That kind of authorization allows interception of a telecommunications facility (such as a telephone line) that the targeted person is 'reasonably expected to use'. It gives the LEA concerned the power to intercept a facility that the targeted subject is later found to be using without the necessity of going back to the panel judge to obtain specific authorization regarding this facility, which was not made known to the panel judge in his granting of the prescribed authorization.

2.3 In view of the apparent latitude given to the LEAs and to minimize the extent of intrusion into personal privacy, I paid special attention to this type of authorizations during my inspection visits to the LEAs and noted that the panel judges were very cautious and stringent in considering applications involving such a clause. If there were insufficient grounds in support, the panel judges simply issued the authorizations for interception without granting the 'reasonably expected to use' clause sought. As a result, if the LEA concerned intended to intercept any other communication facilities being used by the targeted subject apart from the one(s) specified in the prescribed authorization, they must go back to the panel judges to apply afresh for another prescribed authorization.

2.4 Throughout this report period, I have not found a case where the panel judge had granted any such authorization improperly or a case where the LEA concerned had subsequently added a facility without justification.

Written applications

2.5 During this report period, there were a total of 1,745 written applications for interception made by the LEAs, of which 1,719 were granted and 26 were refused by the panel judges. Among the successful applications, 801 were for authorizations for the first time ('fresh applications') and 918 were for renewals of authorizations that had been granted earlier ('renewal applications').

Reasons for refusal

2.6 Of the refused applications, 13 were fresh applications and the rest were renewal applications. The refusals were mainly due to the following reasons:

(a) insufficient/inadequate materials to support the allegations put forth;

(b) no useful/relevant information had been obtained pursuant to the preceding authorization;

(c) useful information would likely be obtained from the interception of the subject's accomplices under another authorization;

(d) a completely different offence was being probed and therefore it would not be proper to renew the original authorization but instead a new application should be made; and

(e) the subject had been under interception for a long period of time and the evidence and information gathered was insufficient to support the arrest of the subject.

2.7 It is worthy of note the last category where the application for renewal was refused because the prolonged interception had not produced sufficient evidence and information for the arrest of the subject. The panel judge specifically pointed out on one occasion that the interception regarding the subject had to be balanced with the public policy of investigating serious criminal offences. If during the period covered by the authorization and subsequent renewals the interception had not produced the information sought or necessary evidence for the arrest of the subject, the chances of it doing so by further renewals must diminish considerably. Therefore the intrusiveness of any further renewal could not be justified. It was never the intention of the ICSO to allow for indefinite interception for intelligence gathering generally. This shows that the panel judges were inclined to refuse prolonged renewal applications unless fresh information of substance could be provided to justify.

Oral applications

2.8 An application for the issue or renewal of a prescribed authorization may be made orally if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make the application in accordance with the relevant written application provisions under the Ordinance. This practicability condition must be satisfied for the grant of authorization upon an oral application [section 25(2)]. The Code of Practice ('the Code') issued by the Secretary for Security advises LEA officers that oral application procedure should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedure cannot be followed. An oral application and the authorization granted as a result of such an application

are regarded as having the same effect as a written application and authorization. The officer concerned should also apply for confirmation of the prescribed authorization within 48 hours beginning with the time when the authorization is granted, failing which the prescribed authorization is to be regarded as revoked upon the expiration of the 48 hours. See sections 25 to 27 of the Ordinance.

2.9 During the report period, no oral application for interception was ever made by any of the LEAs.

Emergency authorizations

2.10 An LEA officer may apply to the head of the department for the issue of an emergency authorization for any interception, if he considers that there is immediate need for the interception to be carried out due to an imminent risk of death or serious bodily harm, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances of the case that it is not reasonably practicable to apply for the issue of a judge's authorization [section 20(1)]. An emergency authorization shall not last for more than 48 hours and may not be renewed [section 22(1)(b) and (2)]. Where any interception is carried out pursuant to the emergency authorization, the officer should apply to a panel judge for confirmation of the emergency authorization within 48 hours, beginning with the time when the emergency authorization is issued [section 23(1)].

2.11 During the report period, no application for emergency authorization for interception was ever made by any of the LEAs.

Duration of authorizations

2.12 For the majority (over 92%) of the cases (fresh authorizations as well as renewals) granted by the panel judges during the report period, the duration of the prescribed authorizations was for a period of one month or less, a duration that was relatively short as compared to the maximum of three months allowed by the Ordinance [sections 10 and 13]. The longest approved duration was about 62 days while the shortest one was for a few days only. Overall, the average duration for each authorization was about 29 days. This indicates that the panel judges had adopted a cautious approach in controlling the duration of the authorizations.

Offences

2.13 A list of the major categories of offences for the investigation of which prescribed authorizations for interception had been issued or renewed during the report period is shown in Table 2(a) in Chapter 10.

Revocation of authorizations

2.14 Under section 57(1), an officer of an LEA, who conducts any regular review pursuant to the arrangements made under section 56 by his head of department, should cause an interception (and also surveillance) to be discontinued if he is of the opinion that the ground for discontinuance of the prescribed authorization exists. A similar obligation also attaches to the officer who is for the time being in charge of the operation after he becomes aware that such a ground exists [section 57(2)]. The officer concerned shall then report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned [section 57(3) and (4)].

2.15 The number of authorizations for interception revoked 'fully' pursuant to section 57 during the report period was 596. In addition, another 99 cases involved the cessation of interception in respect of some but not all of the communications facilities approved under a prescribed authorization, so that interception of the other facilities remained in force. The grounds for discontinuance were mainly that the subject was arrested, the interception operation was not productive, or the subject had stopped using the telephone number concerned for his criminal activities. This reflects that the LEAs acted in a responsible manner and complied strictly with the aim and spirit of the Ordinance to ensure that the intrusion into the privacy of the subject of the prescribed authorization, albeit a suspected offender, will not be continued unless it is necessary and reasonable.

2.16 Moreover, during an inspection visit to an LEA, I noticed that the reason 'overt action would be taken against the subject', which indicated that sufficient evidence had been gathered to make arrest and lay charges, was also used as the ground for discontinuance in a case. Discontinuance at this stage instead of after arrest demonstrated that insofar as the operation was not necessary, it would be stopped to minimize unnecessary intrusion into the privacy of the subject. This further illustrates the LEA's vigilance in compliance with the requirements and spirit of the Ordinance.

2.17 Revocation of authorizations is also expressly provided for in section 58 of the Ordinance. Where the relevant authority receives a report from an LEA that the subject of an interception has been arrested, with an assessment of the effect of the arrest on the likelihood that any information which may be subject to legal professional privilege ('LPP') will be

obtained by continuing the interception, he shall revoke the prescribed authorization if he considers that the conditions for the continuance of the prescribed authorization under the Ordinance are not met. During this report period, there were seven revocations made pursuant to section 58.

2.18 As pointed out in my previous annual reports, where the relevant authority to whom a section 58 arrest report is made decides to revoke the prescribed authorization, there would be an interim period during which the interception (or surveillance) would remain in operation after the prescribed authorization (which is sought to be continued) is revoked but before the revocation (with immediate effect) is conveyed to officers carrying out the operation. The interception (or surveillance) carried out during the interim period would in the circumstances become in theory an unauthorized activity.

2.19 To address the problem, the LEAs have implemented enhanced arrangements for handling these cases so that the operations in question were discontinued within a short period of time after the revocation of prescribed authorizations by the relevant authority, thus reducing the length of the unauthorized activity to the minimum. Nevertheless, I remain of the view that a solution would be to amend the relevant provisions of the Ordinance to allow the relevant authority flexibility to defer the time of revocation of prescribed authorizations to some time that is justified as the relevant authority will state in the revocation. More details on issues related to revocations under section 58 can be found in Reports 5 to 8 in Chapter 7.

Authorizations with five or more previous renewals

2.20 There were 50 authorizations for interception with five or more previous renewals within the report period. As the cases had lasted for quite a long period of time, I paid particular attention to see whether the renewals were granted properly and whether useful information had been obtained through the interceptions. All the cases were checked and found in order during my inspection visits to the LEAs.

Legal professional privilege

2.21 During this report period, there was one case in which information that might be subject to LPP had been obtained in consequence of interception carried out pursuant to a prescribed authorization. Details of the case can be found in Chapter 5.

2.22 Besides, of the applications for interception which were assessed to have the likelihood of LPP information being obtained, a handful were refused by the panel judges. Having examined the relevant files of a great majority of these cases assessed to have the likelihood of obtaining LPP information during my inspection visits at the LEAs' premises, I found that the panel judges had handled the cases carefully and had fairly assessed the likelihood of LPP information being obtained, amongst other factors concerned in respect of the cases, in reaching the decision that the interception applied for should or should not be authorized. If an authorization which was assessed to have the likelihood of LPP information being obtained was issued or renewed, further conditions would be imposed by the panel judges to restrict the powers of the LEA

and to protect the right of the subject in the event of LPP information likely to be involved.

Journalistic material

2.23 There were a few cases where the LEA concerned had assessed to likely involve journalistic material ('JM'), but the panel judge who granted the requested authorizations for interception considered otherwise. However, one application was refused having regard to the LEA's assessment on the likelihood that JM might be obtained in the consideration of the conditions for issue of a prescribed authorization provided for in section 3 of the Ordinance.

2.24 During this report period, there was no reported case where JM had been obtained in consequence of interception carried out pursuant to a prescribed authorization.

Effectiveness of interception

2.25 It is the common view of the LEAs that interception is and continues to be an effective and valuable investigation tool in the prevention and detection of serious crimes and the protection of public security. Information obtained from interception can lead to a fruitful and successful conclusion of an investigation. During the report period, a total of 199 persons, who were subjects of authorized interception operations, were arrested as a result of or further to interceptions carried out pursuant to prescribed authorizations. In addition to the arrests of subjects of the interceptions, a total of 329 non-subjects were arrested as a result of or further to interceptions carried out pursuant to prescribed authorizations.

The relevant arrest figures are shown in Table 3(a) in Chapter 10. The benefit of interception as an investigation tool can therefore be appreciated.

Cases of irregularities

2.26 For this report period, there were four reports of non-compliance with the requirements of the Ordinance concerning 11 cases of interception operations. In addition, seven reports of incidents were made to me by the LEAs not under section 54 because they were not treated as non-compliance with the requirements of the Ordinance by the LEAs. Details of these cases can be found in Chapter 7.

Procedure of oversight for interception

2.27 There were three standard ways in which compliance with the requirements of the Ordinance in respect of interception by the LEAs was reviewed:

(a) checking of the weekly reports submitted by the LEAs and the panel judges' office ('PJO');

(b) periodical examination of the contents of the LEA files and documents during inspection visits to the LEAs; and

(c) counter-checking the facilities intercepted with non-LEA parties such as communications services providers ('CSPs').

Details of the reviews are set out below.

Checking of weekly reports

2.28 LEAs were required to submit weekly reports to me on applications, successful or otherwise, and other relevant reports made to the

panel judges/departmental authorizing officers by way of filling in forms designed for the purpose ('weekly report forms'). Such weekly reports deal with all statutory activities, ie interception and covert surveillance. At the same time, the PJO was also requested to submit weekly report forms to me on the applications, approved or rejected, and the revocations of prescribed authorizations. A weekly report covers the statutory activities with related authorizations and refused applications in the entire week that has elapsed a week prior to the week of its submission to my Secretariat.

2.29 The information to be provided in the weekly report forms is only general information relating to cases of that particular week such as whether the application was successful or rejected, the offences involved, the duration approved for the authorization concerned, whether the 'reasonably expected to use' clause (referred to in paragraph 2.2 above) has been granted, the assessment on the likelihood of obtaining LPP information and JM from the proposed operation, etc. Sensitive information such as the case background, progress of the investigation, and identity and particulars of the subject and others, etc is not required, so that such information will always be kept confidential with minimal risk of leakage.

2.30 Upon receipt of the weekly report forms from the LEAs, my Secretariat would study the details of each weekly report form and, except those relating to Type 2 surveillance, counter-check against the PJO's returns. In case of discrepancies or doubts, clarifications and explanations were sought from the LEAs and/or the PJO as and when necessary. Should I perceive a need, I would seek clarification and explanation regarding any discrepancies or doubts as identified from weekly reports in my periodical

inspection visits at premises of the LEAs. Such inspection visits were carried out so that secret or sensitive information contained in documents or copies that would otherwise be required to be sent to my Secretariat for checking would always remain in the safety of the LEAs' premises to avoid any possible leakage.

Checking of cases during inspection visits

2.31 As explained in preceding paragraphs, the LEAs and the PJO only provide general case information in their weekly returns. When I consider a need to further examine any case for the purpose of clarifying any doubts, periodical inspection visits were arranged for me to check the original of the applications and other relevant documents, such as reports on discontinuance, reports on material change of circumstances, reports on initial material inaccuracies etc, at the premises of the LEAs. In these inspection visits, I would also select, on a random basis, some other cases for examination apart from those requiring clarification.

2.32 If my questions or doubts still could not be resolved after the examination of such documents, I would request the LEAs to answer my queries or to explain the cases in greater detail. Whenever necessary, relevant case officers would be interviewed to answer my questions.

2.33 Besides the clarification of matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 516 applications for interception, including the granted authorizations and refused applications, and 134 related documents/matters had been checked during my periodical inspection visits to the LEAs in this report period.

Counter-checking with non-LEA parties

2.34 Apart from examining the weekly returns from LEAs against those from the PJO, and conducting periodical checks of the relevant files and documents at the LEAs' offices, I have also adopted measures for further checking the interceptions conducted by the LEAs.

2.35 Wherever necessary, counter-checks were conducted with non-LEA parties such as CSPs who have played a part in the interception process but are independent from the LEAs. The interception of telecommunications facilities by an LEA is made through a dedicated team ('the Team') that, whilst being part of the LEAs, operates independently of their investigative arms. Apart from requiring the CSPs to furnish me with a four-weekly return to ensure that the facilities intercepted tally with those as reported by the respective LEAs and to notify me at once upon discovery of any unauthorized interception, I have asked the Team to archive the status of all interceptions in a confidential electronic record whenever any interception is effected, cancelled or discontinued. After making necessary arrangements, these records can be used for checking the status of interceptions at various points of time so as to ensure that no unauthorized interception has taken place.

2.36 To further help expose any unauthorized interception should it occur, there would also be archiving of the status of all interceptions being conducted at a particular moment as designated by me from time to time. Only the designated staff of my office and myself can access the confidentially archived information for the purpose of checking the intercepted facilities as at any reference point of time, ensuring that no unauthorized interception had taken place.

Results of the various forms of checking

2.37 Apart from the cases of irregularity and incidents referred to in Chapters 5 and 7, there was no other case of wrong or unauthorized interception revealed by the various forms of checking described in this chapter.

2.38 The checking of the archived material referred to in paragraphs 2.35 and 2.36 above was useful, as not only the numbers of the facilities subject to duly authorized interception but also each of the numbers of the wrongly intercepted facilities mentioned in paragraphs 7.9, 7.124 and 7.125 of Chapter 7 were found to have been recorded.

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CHAPTER 3

TYPE 1 SURVEILLANCE

Covert surveillance

3.1 The respective scopes of the two types of covert surveillance under the ICSO: Type 1 surveillance and Type 2 surveillance and their common and distinguishing features can be found dealt with in my previous annual reports. Since there is a higher degree of intrusiveness into the privacy of the subject of a Type 1 surveillance operation, it requires a panel judge's authorization whereas Type 2 surveillance can be permitted by an executive authorization issued by an authorizing officer of the department to which the applicant belongs.

Written applications

3.2 During this report period, there were a total of 98 written applications for Type 1 surveillance made by the LEAs. All these applications were granted, including 83 fresh applications and 15 renewal applications. No application for Type 1 surveillance was refused.

Emergency authorizations

3.3 An officer of an LEA may apply in writing to the head of his department for issue of an emergency authorization for Type 1 surveillance, if he considers that there is immediate need for the surveillance to be carried out due to an imminent risk of death or serious bodily harm, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances that it is not

reasonably practicable to apply to a panel judge [section 20(1)]. An emergency authorization shall not last longer than 48 hours and may not be renewed [section 22(1)(b) and (2)]. Within the period of 48 hours from the issue of the emergency authorization, the officer is required to apply to a panel judge for its confirmation where any Type 1 surveillance is carried out pursuant to the emergency authorization [section 23(1)].

3.4 During the report period, no application for emergency authorization for Type 1 surveillance was ever made by the LEAs.

Oral applications

3.5 Basically, all applications for Type 1 surveillance, including applications for emergency authorization, should be made in writing. Notwithstanding this, an application for the issue or renewal of a prescribed authorization may be made orally, if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written application [section 25]. The relevant authority (a panel judge for Type 1 surveillance) may deliver his determination orally to issue the prescribed authorization or to refuse the application.

3.6 The Code issued by the Secretary for Security advises LEA officers that oral application procedure should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedure cannot be followed. Similar to emergency authorizations, officers should apply in writing to the relevant authority for confirmation of the orally-granted prescribed authorization within 48 hours from the issue of the authorization [section 26(1)]. Failing to do so will cause that prescribed authorization to be regarded as revoked upon the expiration of the 48 hours.

3.7 There was no oral application for Type 1 surveillance made during the report period.

Duration of authorizations

3.8 While the maximum duration authorized for Type 1 surveillance allowed under the Ordinance is three months [sections 10(b) and 13(b)], the longest approved duration of Type 1 surveillance granted in this report period was about 35 days while the shortest one was less than a day. Overall, the average duration for such authorizations was about 5 days. When compared with authorizations for interception of communications and Type 2 surveillance, the average duration approved for authorizations for Type 1 surveillance was the shortest.

3.9 The short duration sought or granted for Type 1 surveillance is probably due to the nature of such operations. For instance, a Type 1 surveillance operation may be aimed at observing and recording a particular meeting among the target(s) and/or associate(s). Moreover, the panel judges have applied the requirements of the Ordinance in a stringent manner in their consideration of the applications and granting of authorizations. The duration sought by the LEAs would be shortened by the panel judges if the information provided in affirmations did not sufficiently justify the surveillance to last that long.

Authorizations with five or more previous renewals

3.10 There was no case of any authorization for Type 1 surveillance which had been renewed for more than five times during the report period.

Offences

3.11 Table 2(b) in Chapter 10 sets out the major categories of offences for the investigation of which prescribed authorizations were issued or renewed for covert surveillance during the report period.

Revocation of authorizations

3.12 For this report period, a total of 33 Type 1 surveillance operations were discontinued under section 57 before their natural expiration. The grounds for discontinuance were mainly that the surveillance had been carried out, the subject was arrested, or the expected meeting/activity to be monitored was postponed or cancelled. Section 57(3) requires the LEA to report, as soon as reasonably practicable after the discontinuance, the discontinuance and the ground for discontinuance to the relevant authority, who shall under section 57(4) revoke the prescribed authorization concerned upon receipt of the report on discontinuance. Of the 33 discontinuance cases reported in relation to Type 1 surveillance, 31 prescribed authorizations concerned were subsequently revoked by the relevant authority, ie a panel judge. For the remaining two discontinuance cases, the prescribed authorizations concerned had already expired by the time the relevant authority received the discontinuance reports submitted by the LEAs. In the circumstances, the panel judge could only note the discontinuance reported by the LEAs instead.

3.13 There was, however, no report made to the relevant authority under section 58 of the Ordinance for Type 1 surveillance.

Legal professional privilege

3.14 There was no report from the LEAs of any case where LPP information was obtained in consequence of Type 1 surveillance carried out pursuant to prescribed authorizations during the report period.

Application for device retrieval warrant

3.15 During the report period, there was no application for any device retrieval warrant for retrieving the devices used for Type 1 surveillance, the reported reason being that the devices were removed upon the completion of the surveillance, successful or otherwise.

Effectiveness of surveillance

3.16 As a result of or further to surveillance operations, be it Type 1 or Type 2, a total of 139 persons who were subjects of the prescribed authorizations were arrested. In addition to the arrests of subjects of the prescribed authorizations, 68 non-subjects were also arrested in consequence of such operations. The relevant arrest figures can be found in Table 3(b) in Chapter 10.

Procedure of oversight

3.17 The compliance with the requirements of the Ordinance in respect of Type 1 surveillance by the LEAs was reviewed in three different ways:

(a) checking of the weekly reports submitted by the LEAs and the PJO;

(b) periodical examination of the contents of the LEA files and documents during inspection visits to the LEAs; and

(c) checking of the records kept by the surveillance device recording system of the LEAs.

Further explanations as to how the above reviews were carried out are set out below.

Checking of weekly reports

3.18 Weekly reports submitted to me by the LEAs and PJO cover all statutory activities, including Type 1 surveillance. This way of checking that has been described in paragraphs 2.28 to 2.30 of Chapter 2 for interception equally applies to surveillance and will not be repeated here.

Checking of cases during inspection visits

3.19 The mechanism of checking cases during inspection visits to LEAs is described in paragraphs 2.31 and 2.32 of Chapter 2.

3.20 In addition to matters relating to minor discrepancies in the weekly reports having been clarified, a total of 75 applications for Type 1 surveillance, all resulting in granted authorizations (see paragraph 3.2 above), and 19 related documents/matters had been checked during my periodical inspection visits to the LEAs in this report period. Some examples are given below to show how the examination was conducted.

3.21 It was noted from the weekly reports that there were some cases in which surveillance devices were withdrawn under a prescribed authorization but no surveillance operation was carried out. In these cases, I considered the following matters required my enquiry:

(a) whether the prescribed authorization should have been sought in the first place;

(b) the reason for not carrying out any surveillance operation pursuant to the prescribed authorization;

(c) whether the devices drawn were used during the period concerned for any purposes other than those specified in the prescribed authorization; and

(d) the way in which the devices drawn were kept by officers before they were returned to the device store/registry.

All such cases were included for examination in my inspection visits, at which I examined the relevant case documents and requested the LEA concerned to answer my queries. The LEA provided me with satisfactory explanations for all such cases and there was no sign of abuse of surveillance devices in these cases for any unauthorized purposes.

3.22 There were cases in which devices were drawn a few hours before the effective time of the authorization. This called into question as to whether the devices were used for surveillance before the authorization started to take effect. In response to my query on this issue, the LEA explained that the devices were drawn before the effective time of the authorization for checking their serviceability before handing over to the drawing officers. I considered that for the effective control of their movement, surveillance devices should better be issued within the period authorized by a prescribed authorization. To cater for the need for the device storekeeper to check the devices before handing them over to the drawing officer, I advised that the effective time for a prescribed

authorization sought should include a 'lead time' for testing the serviceability of the devices to be drawn and that the duration of the 'lead time' must be reasonable. Apart from the testing of serviceability, 'lead time' might also be required for the devices to be brought to the place where surveillance is to be conducted or for early installation of devices in the targeted premises. To facilitate the relevant authority's consideration of the effective starting time for a prescribed authorization sought, applicants for prescribed authorizations should explain clearly in their applications why a 'lead time' was required. The relevant authority could approve an early start of the authorization if justified.

3.23 Section 57 requires officers to cause the operation concerned to be discontinued as soon as reasonably practicable when the ground for discontinuance of a prescribed authorization exists. Covert surveillance operations require the use of surveillance devices for the purpose of investigation and therefore the return of all surveillance devices could mean that the ground for discontinuance exists. There were, however, some cases in which all surveillance devices drawn were returned well before the expiration of the authorization concerned but no discontinuance was effected, causing me to query.

3.24 The LEA explained that, in the cases concerned, regardless of whether the surveillance operations that had already been carried out were successful or otherwise, there was information that the target(s) and/or their associates might meet with each other again for further discussion of their criminal activities within the authorized period, and if that happened, there would still be a need to carry out surveillance again. In such cases, the relevant prescribed authorizations were then allowed to remain in force to

wait for an opportune moment to come. However, the anticipated meetings might be postponed or did not materialize at all in some of the cases. In view of such uncertainty, the LEA advised officers to return the relevant surveillance devices during the interim period before the targets' next meeting was confirmed. Such arrangement was to minimize the chance of possible abuse of the devices by frontline officers for unauthorized purposes. Only in justified circumstances officers would be allowed to keep the surveillance devices in hand. For the cases referred to in the preceding paragraph, the anticipated meetings among the targets and/or their associates did not materialize upon the expiry of the authorizations concerned. Consequently, such prescribed authorizations lapsed upon natural expiration without any further surveillance operation being carried out. Having examined the relevant case documents and heard the explanations from the LEA concerned, I considered the answers given for all such cases acceptable and the decisions not to discontinue the operations before expiry of the prescribed authorizations concerned justified.

3.25 Return of devices after the expiry time of the prescribed authorization concerned as shown on the device registers or weekly reports would also be questioned to clarify if anything untoward might have occurred. The explanations given by the LEAs were satisfactory.

3.26 In respect of a prescribed authorization for Type 1 surveillance, it was stated in the discontinuance report submitted by the relevant LEA to the panel judge and in its weekly report to me that no surveillance operation took place because of circumstantial limitation - the place where the subjects met was not feasible for carrying out the surveillance operation. Having examined the relevant case documents, I considered that the place

in question was outside the ambit of the prescribed authorization. As such, the surveillance operation should not be carried out, even if the circumstantial limitation was overcome; or otherwise, it would be an unauthorized surveillance. The reason for not conducting the surveillance should more correctly be described as 'beyond the ambit of the authorization'. I advised the LEA that its officers should be reminded of the importance to distinguish the difference between 'circumstantial limitation' and 'beyond the ambit of the authorization' and to report precisely the reason for discontinuance in the discontinuance report to the relevant authority and the weekly report to me.

Checking of surveillance devices

3.27 Based on the fact that covert surveillance, including Type 1 and Type 2 surveillance, as defined by the Ordinance, is surveillance carried out with the use of one or more surveillance devices I had required the LEAs to develop a comprehensive recording system of surveillance devices, including maintaining a device register of devices withdrawn based on loan requests with a prescribed authorization in support ('ICSO device register') and a separate device register of devices withdrawn based on loan requests for surveillance devices in respect of which no prescribed authorization is required, for administrative or other purposes ('non-ICSO device register'). Both types of register will also record the return of the devices so withdrawn. An inventory list of surveillance devices for each device registry was also maintained with a unique serial number assigned to each single surveillance device item for identification as well as for my checking purpose.

3.28 The LEAs were also required to establish a control mechanism for issuing and collecting surveillance devices. All records of issue and return of surveillance devices should be properly documented in the device register. Copies of both the inventory list and device registers, as updated from time to time, were submitted to me on a regular periodical basis for my checking purpose. In case of discrepancies or doubts identified as a result of checking the contents of these copies and comparing with the information provided in the weekly report forms and other relevant documents, the LEA concerned would be asked to provide clarification and explanation.

3.29 Apart from those stated in my 2007 Annual Report, the following are some of my major observations after checking the inventory lists and device registers submitted by the LEAs:

(a) I observed from an ICSO device register of a particular LEA that a device was returned and reissued after ten minutes for the same surveillance operation. I requested the LEA to explain why the device was reissued within such a short period of time. The LEA explained that it was common for officers to return devices to the device registry when they were found not functioning properly and the devices were reissued immediately after the problem was fixed. In this case, the device might have only run out of battery and was, therefore, reissued after replacement of battery. However, the LEA was unable to tell the actual reason for this particular case because of the lack of a written record of the reason. I advised that in the event the devices were returned and reissued within a short period of time, an explanatory note should be made

contemporaneously at the respective 'remark' field of the device register to facilitate my checking.

(b) I did not find any record in the non-ICSO device registers of an LEA recording issue of devices for repairing purpose. This caused my query as to whether such device movements, if existed, were not recorded properly in the device registers. In response to my query, the LEA told me that no surveillance device had been taken for repair since the implementation of the surveillance device recording system. I reminded the LEA concerned that any movements of devices for repairing purpose should be recorded properly in the non-ICSO device registers.

(c) I spotted a number of errors relating to the entries made in the device registers of a particular LEA, which included wrong starting time of prescribed authorization and wrong time of revocation. While the wrong starting time of prescribed authorization was a clerical mistake, the LEA concerned explained that the wrong time of revocation was probably due to the lack of knowledge of the terms concerned by the officers who drew and returned the devices. The officers filled out the time of discontinuance of surveillance operation as the time of revocation. The LEA undertook to examine measures to improve officers' awareness.

(d) The item-numbering of the devices in the inventory list for some device registries in a particular LEA was constantly changing due to obliteration of entries that previously

contained devices deleted or removed. This made my oversight very difficult. The LEA concerned took heed of my advice that the re-numbering of the devices as a result of deletion or removal of devices should only be made as an annual exercise and before that, deleted or removed devices and the corresponding item numbers would only be crossed-out but remain on the relevant inventory list.

(e) In some non-ICSO device registers, the purposes of usage stated by the officers were found to be too general and simple, such as 'training' and 'operational'. I requested the LEA to specify the type of training and explain what the description 'operational' referred to, and more importantly, their exact usage.

3.30 To better control the issuing and collecting of surveillance devices, the ICSO device recording system of an LEA was computerized in 2008. It is a computer system operating in parallel with a bar coding system. It can greatly alleviate the problem of wrong data entry by handwriting in the device registers. More importantly, the computer system can perform the following functions, which help prevent early withdrawal and late return of surveillance devices for ICSO purpose:

(a) it bars device registry staff from issuing surveillance devices prior to the effective time of the prescribed authorization concerned;

(b) an alert e-mail will be sent automatically to the responsible officer and his supervisor one day before expiry of the prescribed authorization if the devices drawn have yet to be

returned, with further reminders issued on the day of the expiry; and

(c) a list of outstanding devices will be generated each week for directorate officers to know which devices have not yet been returned.

I found the computer system very effective in keeping track of device movements and requested the LEA to extend the system to cover the device registers for non-ICSO purpose. I also advised that the same computer system should be used by other LEAs where appropriate to better control the issue and collection of their surveillance devices.

3.31 In addition to checking of inventory lists and device registers of surveillance devices managed by the LEAs, I arranged inspection visits to the device stores of the LEAs for the following purposes, namely,

(a) to check the entries in the original register(s) against the entries in the copy of register(s) submitted to me, with the aim to ensure that no alteration had been made to the copy sent to me;

(b) to check the procedures for the issue and return of surveillance devices for purposes under the Ordinance and for non-ICSO related usage;

(c) to check whether any issue of device was appropriately supported by a request form;

(d) to check the physical existence of items on the copy inventory entries provided to me periodically;

(e) to check the items of device shown in the copy registers to have been recently returned if they were being kept in the stores;

(f) to make stock-check of items evidenced by the copy registers to be in the stores;

(g) for the above purposes, to compare the unique number on each item as shown on the copy registers against the number assigned to the item as marked on it or attached to it; and

(h) to see the items that were outside my knowledge and seek explanation as to how they might be used for conducting covert surveillance operations.

3.32 During the report period, a total of three such visits were made to LEAs. The results of the checking were satisfactory.

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CHAPTER 4

TYPE 2 SURVEILLANCE

Executive authorizations

4.1 Since Type 2 surveillance is less intrusive than Type 1 surveillance, an application for the issue of fresh or renewed prescribed authorization to carry out Type 2 surveillance may be made to an authorizing officer of the department concerned. The authorizing officer is an officer not below the rank equivalent to that of senior superintendent of police designated by the head of department [section 7]. Such an authorization when granted is called an 'executive authorization' [sections 2 and 14].

Written applications

4.2 During this report period, there were a total of 102 written applications for Type 2 surveillance made by the LEAs, of which 100 were granted and two were refused by the authorizing officer. Among the successful applications, 84 were fresh applications and 16 were renewal applications.

4.3 The two refused applications were fresh applications. Both applications failed to provide sufficient information in support of the application and were hence refused by the authorizing officer.

Oral applications

4.4 An application for the issue or renewal of a prescribed authorization for Type 2 surveillance may be made orally to the authorizing

officer if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written application [section 25]. The authorizing officer may deliver his determination orally to issue the executive authorization or to refuse the application. In the report period, seven authorizations for Type 2 surveillance were granted pursuant to oral application. No oral application was refused.

Emergency authorizations

4.5 There is no provision under the Ordinance for application for emergency authorization for Type 2 surveillance.

Duration of authorizations

4.6 Same as judge's authorizations for interception or Type 1 surveillance, the maximum duration authorized by an executive authorization for Type 2 surveillance is three months [sections 16(b) and 19(b)]. In this report period, the longest approved duration of Type 2 surveillance granted was about 29 days while the shortest one was less than a day. The overall average duration for such authorizations, both written and oral applications counted, was about 6 days.

Authorizations with five or more previous renewals

4.7 During the report period, there was one case in which authorization for Type 2 surveillance had been renewed for more than five times. The case was checked and found in order during my inspection visit to the LEA concerned.

Offences

4.8 Table 2(b) in Chapter 10 sets out the major categories of offences for the investigation of which prescribed authorizations were issued or renewed for surveillance during the report period.

Revocation of authorizations

4.9 For this report period, a total of 66 Type 2 surveillance operations were discontinued under section 57 before their natural expiration. The reasons for discontinuance were mainly that the surveillance had been carried out, the subject was arrested, or the expected meeting/activity to be monitored was postponed or cancelled. Of the 66 discontinuance cases reported to the authorizing officer in relation to Type 2 surveillance, 61 prescribed authorizations concerned were subsequently revoked by the authorizing officer under section 57(4). For the remaining five discontinuance cases, the prescribed authorizations concerned had already expired by the time the authorizing officer received the discontinuance reports. In the circumstances, the authorizing officer could only note the discontinuance reported instead.

4.10 During the report period, there was no revocation made pursuant to section 58 in respect of Type 2 surveillance.

Legal professional privilege

4.11 There was no report from the LEAs of any case where LPP information was obtained in consequence of Type 2 surveillance carried out pursuant to prescribed authorizations during this report period.

Application for device retrieval warrant

4.12 During the report period, there was no application for any device retrieval warrant for retrieving the devices used for Type 2 surveillance.

Effectiveness of surveillance

4.13 As a result of or further to surveillance operations, including both Type 1 and Type 2, a total of 139 persons who were subjects of the prescribed authorizations were arrested. In addition to the arrests of subjects of the prescribed authorizations, 68 non-subjects were also arrested in consequence of such operations. The arrest figures can be found in Table 3(b) in Chapter 10.

Procedure of oversight

4.14 Paragraph 3.17 of Chapter 3 sets out the procedure of oversight of compliance with the requirements of the Ordinance in respect of Type 1 surveillance by the LEAs, which equally applies to Type 2 surveillance.

Checking of weekly reports

4.15 Weekly reports submitted to me by the PJO and LEAs cover all statutory activities, including Type 2 surveillance. This way of checking has been described in paragraphs 2.28 to 2.30 of Chapter 2 and will not be repeated here.

Checking of surveillance devices

4.16 Please refer to paragraphs 3.27 to 3.32 of Chapter 3 regarding the checking of surveillance devices.

Checking of cases during inspection visits

4.17 Please refer to paragraphs 2.31 to 2.32 of Chapter 2 for details of how my checking of cases was carried out during inspection visits to LEAs.

4.18 Under the Ordinance, an application for Type 2 surveillance is submitted to and determined by a designated authorizing officer of the department concerned. Since the entirety of the application procedure for Type 2 surveillance is completed internally within the department without the scrutiny of a panel judge, I have been paying particular attention to examine each and every application for Type 2 surveillance to ensure that all such applications correctly fall within the category of Type 2 surveillance and all executive authorizations granted are sufficiently justified.

Observations

4.19 In addition to matters relating to minor discrepancies in the weekly reports having been clarified, a total of 110 applications[Note 2], both written and oral, for Type 2 surveillance, including granted authorizations and refused applications, and 28 related documents/matters had been checked during my periodical inspection visits to the LEAs in this report period.

Note 2 Some of the cases occurring in 2007 were checked in early 2008 and similarly some of the cases occurring in 2008 were only checked in early 2009.

4.20 In respect of the seven oral applications made during this report period, I found that the executive authorizations were granted properly and the use of oral application procedures in these cases was in order. Indeed, most of the cases that I had checked were found to be in order, though with some areas for improvement. I set out my major observations arising from the inspection visits in the following paragraphs.

Application without sufficient explanation of the purpose of surveillance sought

4.21 There was an executive authorization granted for optical surveillance over the common area of a building. Having examined the application file during my inspection visit, I found that the statement in writing in support of the application did not precisely express the purpose of the surveillance. In response to my enquiry, the LEA explained that the surveillance was to ascertain if the subject was inside the specified premises so that a raid on the premises could be carried out. The authorizing officer made assumption of the purpose of the surveillance on the basis of his experience and approved the application without raising any query on the matter.

4.22 I advised that applicants should provide sufficient explanation in their written statement in support to justify an application when submitted. Authorizing officers should not approve an application based on their personal experience. They should take a critical approach when considering each application and, when necessary, seek clarification and explanation from the applicant before they come to any determination. The LEA undertook to convey my advice to the officers concerned.

Stating of the starting time and issuing time of an authorization in records of determination

4.23 Section 16 of the Ordinance stipulates that an executive authorization takes effect at the time specified by the authorizing officer when issuing the executive authorization, which in any case is not to be earlier than the time when it is issued. During my inspection visit to an LEA, I examined the application file of an executive authorization granted as a result of an oral application. I noted that the form REC-7 (record of determination made upon an oral application for an executive authorization for Type 2 surveillance) was worded in such a way that the executive authorization must take effect from the time of issue of the authorization. This was improper as it did not cater for a situation where an authorizing officer might grant an executive authorization taking effect from a time later than the time of its issue. I made my recommendation to the LEA that REC-7 should be amended to the effect that the starting time of the executive authorization as a result of an oral application, which might be later than the time of issue, should be stated in the record of determination.

4.24 Subsequent to my recommendation, the LEA conducted a search and found that apart from REC-7, similar amendment should also be made to the following records of determination in relation to oral applications:

(a) REC-3 (record of determination made upon an oral application for an authorization for interception or Type 1 surveillance);

(b) REC-4 (record of determination made upon an oral application for the renewal of an authorization for interception or Type 1 surveillance);

(c) REC-8 (record of determination made upon an oral application for the renewal of an executive authorization for Type 2 surveillance); and

(d) REC-10 (record of determination made upon an oral application for an emergency authorization for interception or Type 1 surveillance).

4.25 Based on my recommendation, the LEA requested the Secretary for Security to amend the above records of determination. I checked the records of determination revised by the Security Bureau and considered that further amendment should be made. There was no entry in the records of determination for recording the time of the issue of the orally-granted authorization. Section 26(1) requires that an application for confirmation of an orally-granted authorization should be made within 48 hours beginning with the time when the authorization is issued. Given that the 48 hours for making application for confirmation counts from the time of the issue of the authorization, there should be a proper written record of the time of the issue of the authorization so that the applicant can check and pay attention to the deadline for such application. It will also facilitate my examination for the compliance with this requirement by the LEAs. I recommended to the Secretary for Security that the records of determination should also state the date and time of the issue of the authorization. My recommendation was taken by the Secretary for Security. The revised REC-3, REC-4, REC-7, REC-8 and REC-10 have been adopted for use by all LEAs since 8 May 2009.

Incomplete information provided to authorizing officer

4.26 A Type 2 surveillance was discontinued under section 57 for the reason that the task had been accomplished. The executive authorization concerned was revoked by the authorizing officer upon receipt of the discontinuance report. Subsequently, a new authorization for Type 2 surveillance was granted in a case which was connected with the authorization revoked. In examining the relevant documents of these two cases, I found that there was no mention of the revocation in the statement in support of the application for the new Type 2 surveillance. The ground for revocation of the previous authorization and the reason for carrying out a further surveillance were relevant information the authorizing officer should take into account in the consideration of the application for the new Type 2 surveillance. While I considered that the applicant might not have any intention to mislead the authorizing officer, I advised the LEA that improvement should be made to ensure that all relevant facts of a case are disclosed to the relevant authority in an application for a prescribed authorization. The LEA undertook to bring my advice to the attention of the officers concerned.

Deficiencies in preparation of revocation documents

4.27 During an inspection visit to an LEA, I reviewed a case on revocation of Type 2 surveillance authorization and found that there was room for improvement in the preparation of the documents. The ground for discontinuance provided in the discontinuance report submitted to the authorizing officer was not clear and was difficult to follow. Even the authorizing officer was unable to understand and had to seek clarification

from the applicant. This reflected adversely on the quality of the officer preparing the discontinuance report.

4.28 The authorizing officer used a supplementary sheet to ask a question as to the ground for discontinuance and the answer was also provided on the sheet. However, the name of the officer asking the question and the name of the officer providing the answer were not shown. Although one could probably guess that the question was asked by the authorizing officer and the answer was provided by the officer who submitted the discontinuance report, no signature was appended any where. Moreover, there was no date and time to indicate when the question was asked and answered. The supplementary sheet was not prepared properly.

4.29 The executive authorization was subsequently revoked by the authorizing officer. However, in the form REV-1 (revocation of an executive authorization upon a report on the discontinuance of an authorized operation of Type 2 surveillance), the time of discontinuance was wrongly stated by the authorizing officer. The wording was also not clear as to whether the time stated referred to the time of the discontinuance of the operation or the time of the revocation of the authorization.

4.30 With respect to the above deficiencies, I recommended that:

(a) training should be provided to officers on how to state the grounds for discontinuance precisely and concisely;

(b) the supplementary sheet should be prepared in a more formal and self-explanatory manner. It should bear, among other things, the name, rank and signature of the officer providing clarification in the supplementary sheet, with date and time.

The authorizing officer should also signify the question he asks with date and time. He should also indicate that he has noted the supplementary sheet submitted and sign it with date and time; and

(c) the authorizing officer should exercise care in entering the time of discontinuance in form REV-1.

4.31 The LEA accepted my recommendations and the authorizing officer concerned was reminded of the need to exercise care in processing revocation documents.

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CHAPTER 5

LEGAL PROFESSIONAL PRIVILEGE AND JOURNALISTIC MATERIAL

Introduction

5.1 The importance that the ICSO places on legal professional privilege ('LPP') and journalistic material ('JM') and their protection has been dwelled upon in some detail in my previous two annual reports to the Chief Executive. This chapter deals with cases relating to these rights and problems arising from them.

Reporting requirement

5.2 The ICSO requires an applicant seeking authorization for interception or covert surveillance to state in the affidavit or statement in writing in support of the application the likelihood that any information which may be subject to LPP, or may be the contents of any JM, will be obtained by carrying out the interception or covert surveillance [Part 1(b)(ix), Part 2(b)(x) and Part 3(b)(x) of Schedule 3 to the Ordinance]. This allows the relevant authority to take these factors into account when assessing whether the conditions for issue of the prescribed authorization set out in section 3 of the Ordinance are met.

5.3 In addition, the Code issued by the Secretary for Security under section 63 of the ICSO requires LEAs to notify me of interception / covert surveillance operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently

[paragraph 120 of the Code]. However, there is no similar reporting requirement in the Code regarding the obtaining of information which may be the contents of any JM.

5.4 In the report period, I received one report of inadvertent obtaining of information subject to LPP. There was no reported case of obtaining information which may be the contents of any JM.

The LPP case in this report period

5.5 On a day in late January 2008 ('Day 1'), the Independent Commission Against Corruption ('ICAC') intercepted a call pursuant to a prescribed authorization. After listening to the call or part of its content, the listener formed the view that the call might contain LPP information and verbally reported the case to his supervisor (Supervisor A) who was the head of the unit. Supervisor A then reported it to Supervisor B (Supervisor A's senior) and an Assistant Director (who was Supervisor B's senior). The Assistant Director listened to the call personally and was satisfied that the call did contain LPP information. He instructed that an REP-11 report on material change of circumstances be compiled and submitted to the panel judge to report this inadvertent obtaining of LPP information. On Day 2, an REP-11 report was submitted to the panel judge who revoked the authorization at 1107 hours after considering the report. The facility was disconnected 12 minutes later at 1119 hours. On Day 4, ICAC notified me of this incident pursuant to paragraph 120 of the Code. It stated that all the relevant records had been preserved for my inspection.

5.6 In this case, I considered that three matters required my enquiry, namely,

(a) whether there was full and frank disclosure in the REP-11 report to the panel judge;

(b) whether the LPP information was screened out and was not disseminated to investigators; and

(c) whether the listening to the LPP call by the Assistant Director was in compliance with paragraph 120 of the Code.

After conducting a review, I made the following findings.

(a) REP-11 report

5.7 During an inspection visit to ICAC on 18 March 2008, I listened to the recording of the LPP call to ascertain if what had been reported in the REP-11 report to the panel judge was true and correct and if the report amounted to a full and frank disclosure. I found that the REP-11 report had truthfully reported the gist of the conversation of the LPP call to the panel judge and there was no material non-disclosure.

(b) Summaries

5.8 I also inspected the summaries. They did not contain any information about the LPP call. In fact, no information relevant to the investigation was recorded in the six days before the occurrence of the LPP call. While this might show that no LPP information had been passed to the investigators through these summaries, it might spawn the query as to the correctness of the statement made in the REP-11 report that since the commencement of the interception on the subject in October 2007, intelligence obtained through interception had proved to be productive. What was reported in the REP-11 report about the usefulness of the

interception seemed to be inconsistent with the fact that no information relevant to the investigation was recorded in the summaries in the week before the LPP call.

5.9 Upon my enquiry, ICAC explained that interception of the facility had started since October 2007 and was productive until the week before the interception of the LPP call. There was no summary of information relevant to the investigation made for that week but ICAC was not in a position to determine at that time that the interception had ceased to be productive. It considered necessary to continue the interception with a view to obtaining further intelligence of value. Hence, in submitting the REP-11 report to the panel judge, it sought the continuation of the prescribed authorization.

(c) Propriety of the Assistant Director listening to the LPP call

5.10 According to the departmental procedures prevailing at the time of this case, if it appeared to a listener that information which might contain LPP material was intercepted, the listener should immediately make a verbal report to the head of the unit (ie Supervisor A). Supervisor A should then bring the matter to the attention of his senior (ie Supervisor B) and Supervisor B's senior (ie the Assistant Director). Where necessary, enquiry would be made by the Assistant Director which might include directing Supervisor A or Supervisor B to listen to the recording to determine whether the intercept product did contain material that might be subject to LPP.

5.11 In the present case, the Assistant Director did not direct Supervisor A or Supervisor B to listen to the recorded LPP call to confirm

the belief of the listener but instead listened to it himself. I enquired with the Commissioner, ICAC ('C, ICAC') whether the listening by this Assistant Director amounted to non-compliance with the departmental procedures prevailing at the time of this incident. C, ICAC confirmed that the departmental procedures did not preclude the Assistant Director from listening to the LPP call himself.

5.12 Apart from requiring notification of LPP matters to me, paragraph 120 of the Code also provides that any information that is subject to LPP will remain privileged notwithstanding that it has been inadvertently obtained pursuant to a prescribed authorization. Dedicated units separate from the investigation team shall screen out information protected by LPP and to withhold such information from the investigators.

5.13 I enquired with C, ICAC whether the Assistant Director was part of the dedicated unit referred to in paragraph 120 of the Code and whether he had any investigation team under his charge at the material time. C, ICAC replied that the Assistant Director was the directorate officer supervising the operation of the dedicated unit referred to in paragraph 120 of the Code. The only investigation team previously under this Assistant Director had been transferred to another Assistant Director a couple of weeks before the interception of the LPP call.

5.14 The ICSO and the Code are silent on some practical aspects of dealing with LPP information such as who should be allowed to listen. For example, should a supervising officer be allowed to listen to the recorded product so as to confirm or rebut the belief or understanding of the listener that a call contains LPP information? Should any officer senior to the supervising officer, in charge of ICSO matters, be allowed to listen to the

recorded product thereafter to confirm or rebut the belief or understanding of the listener and the supervising officer? The legal advice I have received from Department of Justice ('DoJ') is that the effect of LPP is that it is protected from disclosure to third parties and in particular, in criminal cases, to the prosecution. Once a view is formed that a recorded product is subject to LPP it should not be disclosed further than is necessary. However, the screening is carried out by 'dedicated units'. There must be supervision within these units, to ensure that the correct tests are being applied consistently and properly and that proper records are kept. Within those parameters there is scope for a supervisor to listen to recorded product. The critical issue is that information subject to LPP must not go beyond the dedicated unit. More senior officers who are not part of the dedicated unit should not be given access to recorded product which has been determined to be subject to LPP.

5.15 It appears from this legal advice that there is scope for Supervisor A who is the head of the dedicated unit, or even Supervisor B who is the senior of Supervisor A, to listen to the recorded product to confirm or rebut the belief or understanding of the listener. But it seems to be less clear about the propriety of the listening by the Assistant Director who is not part of the dedicated unit but who is in charge of ICSO matters and indirectly supervises the operation of the dedicated unit through Supervisor B and Supervisor A. In paragraphs 5.84 and 5.85 of my 2007 Annual Report, I flagged up the issue of supervision of listening so that attention be drawn to the matter to be addressed in the next review of the Ordinance or the Code.

5.16 I also enquired with C, ICAC about the reason for not reporting the listening to the LPP call by the Assistant Director in the REP-11 report to the panel judge. C, ICAC explained that since the implementation of the ICSO regime, there was no on-going requirement to state in the REP-11 report regarding who had listened to the call containing information that might be subject to LPP and the number of occasions of listening to the call.

(d) Unauthorized interception

5.17 There was unauthorized interception of 12 minutes in the interim between the revocation of the prescribed authorization by the panel judge at 1107 hours and the disconnection of the interception at 1119 hours. During this interim period, there was only one call intercepted but not listened to.

(e) Conclusion

5.18 In this LPP case, ICAC acted swiftly in effecting the disconnection of the interception after it was notified of the panel judge's revocation. Although there was unauthorized interception of 12 minutes, I decided not to notify the relevant person under section 48(1) of the ICSO because: (a) the intrusiveness of the interception on the relevant person was negligible given the short period of time of unauthorized interception and the fact that the only call intercepted during the period was not listened to; and (b) prejudice to the prevention or detection of serious crime would likely be caused since the relevant person was the subject of the revoked prescribed authorization.

5.19 I notified C, ICAC of my findings and recommended that in all future cases, ICAC should provide a full and frank disclosure to the panel judge on who had listened to the LPP call, the number of occasions and the duration of listening. This recommendation was accepted by ICAC.

Commissioner's entitlement to listen to intercept product doubted

5.20 In Chapter 5 of my 2007 Annual Report, I reported that I had listened to the intercept product in two of the four cases reported by an LEA that information which might be subject to LPP had been obtained. In the light of the experience gained in the handling of the four LPP cases in 2007 and the fifth one in January 2008 mentioned above, I proposed in paragraph 5.90 of my 2007 Annual Report submitted to the Chief Executive in June 2008 to adopt a practice of only checking the intercept product when an authorization is allowed to continue despite the obtaining or likely obtaining of LPP information or when it is necessary to do so in the hope of resolving doubts.

5.21 After the compilation of my 2007 Annual Report, I was apprised of doubts regarding the legitimacy or propriety of my listening to products derived from the interception of communications over telecommunications facilities in order to ascertain whether the REP-11 report made by LEAs to the panel judge on the realization of the existence of information that is or may be subject to LPP do or do not contain misrepresentations so as to induce or cause the panel judge to allow the prescribed authorization under which the interception was carried out to continue, instead of revoking it.

5.22 In particular, I was specifically referred to a decision of the Supreme Court of Canada, *Privacy Commissioner of Canada v Blood Tribe Department of Health & Ors*, 2008 SCC 44 (17 July 2008), where it was held that the Privacy Commissioner was not entitled to issue an order to the defendant (the employer of a female who had complained to the Privacy Commissioner) for the disclosure of material on which the defendant claimed solicitor-client privilege, for the purpose of enabling the Privacy Commissioner to consider the employee's complaint of failure to access her personal employment information because she suspected that the defendant had improperly collected inaccurate information about her and used that information to discredit her before the defendant's board, resulting in her dismissal.

5.23 The Canadian Supreme Court unanimously held that section 12 of the *Personal Information Protection and Electronic Documents Act* ('PIPEDA') which conferred powers on the Privacy Commissioner to compel the production of any records 'in the same manner and to the same extent as a superior court of record' and to 'receive and accept any evidence and other information … whether or not it is or would be admissible in a court of law' did not entitle the Privacy Commissioner to compel production of documents over which solicitor-client privilege was claimed, even for the limited purpose of determining whether the privilege was properly claimed. That examining and determining role is reserved for the courts. Express words are necessary to permit a statutory official to 'pierce' the privilege. Such clear and explicit language does not appear in PIPEDA. It was also held that client confidence was the underlying basis for the solicitor-client privilege, and infringement must be assessed through the eyes of the client. To a client, compelled disclosure to an

administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality. The Privacy Commissioner did not claim any necessity arising from the circumstances of this particular inquiry, and was merely demanding routine access to such documents in any case she investigated where solicitor-client privilege was invoked. She had not made out a case that it was necessary to achieve the ends sought by PIPEDA, and there were other less intrusive remedies.

5.24 In the light of the doubts and the Canadian case, it was considered that my act of listening to intercept product could invite questions as to whether this conduct amounts to an unlawful and/or arbitrary interference with privacy and an infringement of the right to confidential legal advice. The propriety or legitimacy of the practice that I proposed in paragraph 5.90 of my 2007 Annual Report was questioned on the bases and arguments set out below:

(a) The Commissioner's function is to oversee the compliance by the LEAs and their officers with the 'relevant requirements'. The term 'relevant requirement' means any applicable requirement under any provision of the ICSO, the Code or any prescribed authorization concerned.

(b) It is not apparent that the Commissioner has a duty to verify the statements made by the LEAs in their REP-11 reports which have been submitted to the panel judges in compliance with the conditions of the prescribed authorizations.

(c) The Commissioner did not listen to the intercept product in order to meet the needs of public security or of investigation into criminal offences.

(d) It is not apparent that it is necessary for the Commissioner to listen to the intercept product which had been lawfully obtained by the LEA.

(e) The prohibition of interception without a prescribed authorization under section 4 of the ICSO applies to all public officers.

(f) There is absence of express unambiguous words in the Ordinance empowering the Commissioner to listen to intercept product. It is doubtful whether section 53(1)(a) regarding the power of the Commissioner to require any person to provide information for the purpose of performing his functions could be construed as having the effect of empowering the Commissioner to listen to the intercept product.

(g) LEAs have a general duty to minimize the intrusion arising from their covert operations. In particular, section 59(1)(a) requires LEAs to ensure that the extent to which, and the number of persons to whom, intercept products are disclosed be limited to the minimum that is necessary for the 'relevant purpose', ie prevention or detection of serious crime or protection of public security.

5.25 There was a suggestion that if the Commissioner wished to deter the making of false statements in REP-11 reports, the LEAs could make the statements in the REP-11 reports on oath or in a statutory declaration, thus rendering an officer who wilfully makes a statement that is false in a material particular liable to be prosecuted for the offence under section 32 or 36 of the Crimes Ordinance (Cap 200), as the case may be.

Differences

5.26 The cases that I was required to deal with are very different and much distinguishable from the Canadian case.

5.27 In our case, which was LPP Case 2 referred to in my 2007 Annual Report, an LEA reported to me as the Commissioner that there was a case where a conversation over the telecommunications facility intercepted pursuant to a prescribed authorization was discovered to contain possible LPP information, that the matter was reported by virtue of an REP-11 report to a panel judge who allowed the prescribed authorization to continue, and that the matter was then reported to me in accordance with the Code, being its present paragraph 120. In that case, the recording was not preserved for my listening, not that the LEA opposed to my listening but because, I was told, the LEA had misunderstood my requirements of preservation of evidence. That case was particularly dubious because of a number of alleged misunderstandings, co-incidence and mistakes: that the recording was not preserved, that the summaries had all been destroyed in spite of my express requirement for their preservation, that the listener failed to realize that the call he listened to was an LPP call until he listened to it the second time some seven hours later after having listened to 20 odd calls in the interim, that the REP-11 report failed to mention this conduct of the listener, and so on. Had the intercept product been preserved for my listening, I could have verified whether there was full and frank disclosure in the REP-11 report regarding the content of the LPP call, whether the panel judge was in any way misled so as to allow the prescribed authorization to continue instead of revoking it, and whether the

failure of the listener in realizing that it was an LPP call the first time he listened to it was credible or excusable.

5.28 In another case, ie LPP Case 3 referred to in my 2007 Annual Report, I listened to the recording of the LPP call but did not find that it contained any LPP information as such. In that case, the LEA preserved one single call for my listening only, ie the alleged LPP call. I had no way to rule out the possibility that the listener might have continued to listen to the intercepted communications after discovering likely LPP information earlier and only reported to a panel judge on a later likely LPP conversation (in fact not involving LPP information) in spite of the earlier one. Although I had not specifically so requested, had the intercept product of the calls before and after the alleged LPP call been preserved for my listening, I could have checked if the LEA's report of the LPP call was genuine and if there was anything behind in reporting a call which in fact was not qualified as an LPP call, and whether the ground for discontinuing the interception based on 'no further intelligence value' was genuine but not an attempt to discontinue the prescribed authorization soonest possible so that the protected product such as written summaries could be destroyed as soon as possible after the revocation of the prescribed authorization in order to debilitate my scrutiny of the records that might uncover anything untoward.

5.29 In my 2007 Annual Report, I described at length my probe into the discontinuance of the interception operation in LPP Case 3. I felt necessary to probe in detail the discontinuance because the prescribed authorization concerned authorized the interception of two facilities, ie the facility in LPP Case 2 and the facility in LPP Case 3. As long as this

prescribed authorization had not expired or was not revoked, according to the departmental policy, the written summaries on the facilities in LPP Cases 2 and 3 could not be destroyed. But if the department (or an officer of the department) made a decision to discontinue the interception and submitted a discontinuance report to the panel judge under section 57(3), the panel judge was bound by section 57(4) to revoke the prescribed authorization because this section provides that the panel judge **shall,** as soon as reasonably practicable after receiving the discontinuance report, revoke the prescribed authorization concerned. So if the written summaries on the intercept product from the two facilities in LPP Case 2 and Case 3 were to be destroyed before the natural expiry of the prescribed authorization, the first necessary step would be to cause the revocation of the prescribed authorization by discontinuing the interception operation. The decision to discontinue the interception was made on the Monday following my inspection visit on the preceding Friday requesting the preservation of the relevant records including, inter alia, the recording and the summaries, for my review. The decision to discontinue was made on the ground of 'no further intelligence value to continue with the interception' because it was alleged that interception on the two facilities in the week before the discontinuance was unproductive and no further intelligence of value was expected. However, I found that the assessment of 'no further intelligence value' was an assessment made up to a certain call only and did not take into account calls which had been intercepted but not yet listened to, contrary to the department's normal practice of listening to all the calls that had been intercepted before forming a view of 'no further intelligence value' as a ground to discontinue the interception. I also found that the documents in the case contradicted each other as to who made the decision to discontinue and as to the time of the day when it was

made, and the discontinuance did not seem to entirely follow the procedure stated in the department's Operational Manual. All these, coupled with the alleged misunderstanding of my requirement of preservation of records, made me feel suspicious about the discontinuance as to whether it was an attempt to have the prescribed authorization revoked immediately so as to allow the destruction of the written summaries, etc on the two facilities in LPP Cases 2 and 3 soonest possible to avoid my scrutiny.

5.30 In a paper issued by ICAC to the Legislative Council Panel on Security on 3 April 2009 (LC Paper No. CB(2)1260/08-09(01)), it was represented that there was no indication of bad faith in the destruction of the written summaries regarding LPP Cases 2 and 3 because on as early as 5 December 2007, the responsible Chief Investigator had already issued written notifications to require the destruction of the written summaries in respect of LPP Cases 2 and 3, and at that time the Chief Investigator could not have known that my letters of 10 December 2007 and 11 December 2007 requiring the preservation of records would be forthcoming. I think the paper issued by ICAC had missed the important point that my request for preserving the relevant records was made known to the officers concerned (including the above Chief Investigator) in my inspection visit on 23 November 2007, and that my letters of 10 December 2007 and 11 December 2007 only repeated my request made in the inspection visit. All in all, had the recording with calls before and after the alleged LPP call been preserved in addition to the call itself, and had I been given a chance to listen to them, I could have easily discerned if my suspicion of ulterior motive was unwarranted. It was for this reason that I proposed in paragraph 5.90 of my 2007 Annual Report to adopt the practice of checking the intercept product, not only in cases where the

prescribed authorization is allowed to continue despite the obtaining or likely obtaining of LPP information (such as LPP Case 2) but also in cases where it is necessary to do so in the hope of resolving doubts (such as the discontinuance case in LPP Case 3).

5.31 Regarding the LPP case in this report period, it is plain that there are the following distinguishing features from the Canadian case, namely:

(a) There has been no claim for LPP protection, nor is there a claimant.

(b) The LEA is not entitled to make a claim for LPP since the only person entitled to make such a claim is the subject who shall, for the purpose of the non-prejudice principle, remain nameless and who will not realise that an interception had been conducted against the facility that he/she was using. Indeed, the Commissioner's listening to LPP information or possible LPP information is to review the LEA's conduct in strictly complying with the requirements of the ICSO to better protect the subject's rights to privacy and LPP.

(c) The Commissioner has not compelled any disclosure from the person entitled to claim LPP.

(d) The Commissioner's listening to the conversation arose out of necessity, without which he cannot effectively perform the part of his oversight functions over LEAs to verify if they had been frank and candid with the panel judge in seeking the continuation of prescribed authorizations. Since the panel

judge is, according to legal advice, not entitled to listen to the conversation, the Commissioner's listening is the only means of verification, and is thus necessary.

Proper view and avenue to pursue

5.32 The proper view of this case is not whether the Commissioner is infringing the right to LPP as claimed by a proper claimant since LPP is not invoked, but rather whether, as a matter of general applicability, he is entitled to access intercept products, which access is the only means by which he can exercise his oversight function over the matter as handled by an LEA in their operation of interception that is only allowed by full compliance with the requirements of the Ordinance. The product containing the LPP information is already available and had been listened to by the LEA. Admittedly, my listening to the conversation is a further intrusion into the privacy of the subject over and above that already made by the LEA's listener. My listening is, however, to ensure that the LEA had acted properly in complying with the Ordinance's requirements. The Commissioner's oversight and review functions are part and parcel of the overall scheme of the Ordinance to allow intrusion only upon the tests of necessity and proportionality being satisfied and to restrict such proper and legitimate intrusion to the minimum. Disallowing the Commissioner from listening to the intercept product in such circumstances will adversely affect the integrity and proper functioning of the legislative scheme protecting fundamental privacy rights.

5.33 The product that the Commissioner listened to had already been listened to by the LEA. Any further intrusion into the privacy of the subject was only limited to listening by the Commissioner, who would not

make use of the contents save for verifying or challenging the contents of the REP-11 report made by the LEA to the panel judge. The product will not be used for investigation or any other purpose. The intrusion is therefore well restricted and no further harm will be caused to the subject. The Commissioner's listening is both necessary and proportionate in the incursion into the subject's right to privacy and even LPP, and indeed such incursion is necessary and proportionate for the incontrovertible and indisputable purpose of protecting those rights of the subject by ensuring compliance with the requirements of the Ordinance by the LEA.

5.34 What seems to be the greatest obstacle to the Commissioner's listening to intercept product is posed by the holding of the Canadian Supreme Court that the provisions conferring general power on the statutory authority to order production of documents do not amount to clear and explicit language to allow compelled production of LPP documents. By the same token, it may be argued that the powers conferred on the Commissioner by section 53 of the Ordinance to require production of documents or information by any person and to determine the procedure to be adopted in performing any of his functions under the Ordinance are not wide enough to entitle him to access LPP information. This argument casts doubt on the propriety and legitimacy of the Commissioner's listening to intercept products subject to LPP, notwithstanding the features alluded to above that distinguish our cases from the Canadian decision. This matter, one way or another, should be seriously considered and resolved by the Legislature in its review of the provisions of the Ordinance.

5.35 A possible alternative way to resolve the difficulty is for the legislation to provide expressly that the panel judges have the power to

examine intercept products, including those subject to LPP or might be subject to LPP. This would render it unnecessary for the Commissioner to check the content of the REP-11 report by which the LEA reports LPP matters to the panel judge. However, the oversight and review functions that should be the task of the Commissioner should not be confusingly assigned to the panel judges, and the benefits that can be acquired from the Commissioner's examination of the intercept product for purposes in addition to checking it against the REP-11 report, as explained in detail in Chapter 9 hereof, cannot be achieved by merely restricting the power and right to the panel judges.

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CHAPTER 6

APPLICATION FOR EXAMINATION AND NOTIFICATION TO RELEVANT PERSON

The law

6.1 Under section 43 of the Ordinance, a person may apply in writing to the Commissioner for an examination if he suspects that he is the subject of any interception or surveillance activity that has been carried out by officers of the LEAs. Pursuant to section 44, upon receiving an application, the Commissioner shall, save where the circumstances set out in section 45 apply, carry out an examination to determine:

(a) whether or not the suspected or alleged interception or surveillance has taken place; and

(b) if so, whether or not such interception or surveillance has been carried out by an officer of a department without the authority of a prescribed authorization.

If the Commissioner finds the case in the applicant's favour, he shall notify the applicant and initiate the procedure for awarding payment of compensation to him by the Government.

6.2 The circumstances provided in section 45(1) that justify the Commissioner not carrying out an examination are that, in the opinion of the Commissioner, the application is received by him more than one year after the last occasion on which the suspected interception or surveillance is alleged to have taken place, that the application is made anonymously, that

the applicant cannot be identified or traced after the use of reasonable efforts, and that the application is frivolous or vexatious or is not made in good faith. Section 45(2) mandates the Commissioner not to carry out an examination or proceed with the examination where before or in the course of the examination, he is satisfied that any relevant criminal proceedings are pending or are likely to be instituted, until the criminal proceedings have been finally determined or finally disposed of or until they are no longer likely to be instituted. Relevant criminal proceedings are those where the interception or covert surveillance alleged in the application for examination is or may be relevant to the determination of any question concerning any evidence which has been or may be adduced in those proceedings [section 45(3)].

The applications under section 43

6.3 During the report period, a total of 16 applications for examination were received. Five of these applications were subsequently not pursued by the applicant. Of the remaining 11 applications, two concerned alleged cases of interception and one suspected surveillance. The other eight claimed a combination of both. As the Commissioner, I did not consider that any of the 11 applications came within the ambit of the exceptions covered by section 45(1), and except for two cases that are covered by section 45(2), I had carried out an examination provided for in section 44 in respect of each case.

The procedure

6.4 The procedure involved for such examination can be briefly described below. The Commissioner's office will make enquiries with the

particular LEA who, as the applicant alleges, has carried out either interception or surveillance against him as to whether any such statutory activity had taken place, and if so the reason why. Enquiries will also be made with the PJO as to whether any authorization had been granted by any panel judge for the LEA to carry out any such activity, and if so the grounds for so doing. Further enquiries with other parties will be pursued if that may help obtain evidence regarding the existence or otherwise of any such alleged statutory activity. The results obtained from the enquiries will be compared and counterchecked to ensure correctness. Apart from the above, it is undesirable to disclose more details about the methods used for the examination of applications or about the examinations undertaken, because that would probably divulge information relating to the prevention or detection of crime or to the protection of public security, which would put LEAs in a disadvantageous position as against criminals or possible criminals.

6.5 For the 11 applications for examination, after making enquiries with the necessary parties, I found eight of these cases not in the applicants' favour. I accordingly notified each of the applicants in writing of my finding relating to him/her, with five of such notices issued during the report period and three thereafter. The remaining three cases are still being processed at the time of the writing of this report. By dint of section 46(4) of the Ordinance, I was not allowed to provide reasons for my determination or to inform the applicant whether or not the alleged or suspected interception or surveillance had indeed occurred.

Notification to relevant person under section 48

6.6 Under section 48, I am obliged to give the notice whenever, during the performance of my functions under the Ordinance, I discover any interception or surveillance that is not authorized by a prescribed authorization carried out by an officer of one of the four LEAs under the Ordinance. However, section 48(3) provides that I should only give the notice when I consider that doing so would not be prejudicial to the prevention or detection of crime or the protection of public security. Moreover, section 48(6) exempts me from my obligation if the relevant person cannot, after the use of reasonable efforts, be identified or traced, or where I consider that the intrusiveness of the interception or surveillance on him is negligible.

6.7 For example, the interception of a telephone number other than that permitted by a prescribed authorization issued by a panel judge, however that error is made, constitutes in my opinion an unauthorized interception. It gives rise to the necessity of considering whether I should, as obliged by section 48 of the Ordinance, give a notice to the relevant person of the wrong interception and invite him to make written submissions to me in relation to my assessment of reasonable compensation to be paid to him by the Government.

6.8 In considering and assessing the amount of compensation that the Government ought to pay to the relevant person, a number of matters have to be taken into account, including:

(a) the duration of the interception;

(b) the number of the communications that had been intercepted;

(c) the total duration of the communications that had been intercepted;

(d) the sensitivity of the communications;

(e) injury of feelings such as feelings of insult and embarrassment, mental distress, etc;

(f) whether the unauthorized act was done deliberately, with ill will or ulterior motive, or done unintentionally and resulted from negligence, oversight or inadvertence; and

(g) the degree of the intrusion into privacy in the context of the number of persons outside the communications having knowledge of their contents, whether such persons would remember or likely remember the contents of such communications, and whether such persons know the relevant person and the other participants to the communications.

6.9 Account has to be taken of the contents of the written submissions made by the relevant person, which may involve any or all of the above factors. It may be necessary to listen to/read the intercepted materials, but extreme care must be exercised if that step is to be taken because anyone from my office or I listening to/reading the intercepted materials would certainly increase the extent of the intrusion into the relevant person's privacy.

Notice issued under section 48 in the report period

6.10 During the report period, I gave a notice to a relevant person pursuant to section 48(1) of the Ordinance for interception conducted

without the authority of a prescribed authorization. Upon receipt of the notice, the relevant person applied to me for an examination in respect of the unauthorized interception. Having examined the claim made by the relevant person and his written submissions and taking into account the matters referred to in paragraphs 6.8 and 6.9 above, I made an order under section 44(3) of the Ordinance for the payment of compensation in the sum of $10,000 by the Government to the relevant person.

CHAPTER 7

REPORTS OF NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS AND FINDINGS

Reports received

7.1 Section 54 of the ICSO provides that where the head of any of the LEAs considers that there may have been any case of failure by the department or any of its officers to comply with any relevant requirement, he shall submit to the Commissioner a report with details of the case (including any disciplinary action taken in respect of any officer). Relevant requirement is defined in the Ordinance to mean any applicable requirement under: (i) any provision of the ICSO, (ii) the Code, or (iii) any prescribed authorization or device retrieval warrant concerned.

7.2 Where the head of an LEA considers that there is an irregularity but does not consider that the irregularity is due to any such non-compliance by the department or any of its officers, the existing practice is that the department would submit an incident report to the Secretary to the Commission. Such reports are **not** made under section 54 of the Ordinance.

7.3 My office and I had received altogether 11 reports from LEAs in respect of irregularities and incidents that occurred or discovered in 2008. All of them related to interception, as follows:

Reports on non-compliance submitted under section 54

Report 1	:	Interception of a wrong facility.
Report 2	:	Non-compliance with supervisor's instructions and breach of a condition of the prescribed authorization.
Report 3	:	Interception discontinued six to 18 minutes after the expiry of the prescribed authorizations (involving five prescribed authorizations).
Report 4	:	Interception discontinued 18 minutes after the expiry of the prescribed authorizations (involving four prescribed authorizations).

Reports on irregularities and incidents submitted not under section 54

Reports 5 to 8	:	Interception conducted after the revocation of prescribed authorization under section 58 (involving seven prescribed authorizations).
Report 9	:	Interception discontinued three minutes after the expiry of the prescribed authorization.
Report 10	:	Interception of a facility number not authorized by any prescribed authorization.
Report 11	:	Reactivation of discontinued interception (involving four prescribed authorizations).

Description of the irregularities and incidents

7.4 Before describing my reviews of the irregularities and incidents, it is relevant to bring out the dilemma which I have mentioned in my 2007 Annual Report. Section 48(1) requires me to notify the relevant person if I consider there is any case in which any interception or covert surveillance has been carried out by an officer of a department without the authority of a prescribed authorization, unless the giving of a notice would be prejudicial to the prevention or detection of crime or the protection of public security or the intrusiveness of the operation on the relevant person is negligible or the relevant person cannot be identified or traced [section 48(3) and (6)]. When notifying the relevant person, the only information that I am permitted to disclose is: whether the case is one of interception or covert surveillance and the duration of the interception or covert surveillance [section 48(1)(a)]. I am not permitted to give reasons for my findings or any other details of the unauthorized operation concerned [section 48(4)] such as whether the unauthorized activity is caused by mistake. For unauthorized interception, I am not even permitted to state whether it is one of telecommunications interception or postal interception.

7.5 In Chapter 7 of my 2007 Annual Report (paragraphs 7.70 to 7.79 thereof), I pointed out how a relevant person could, by reading the chapter on irregularities in my annual report, learn of all the details of the unauthorized interception (or covert surveillance) that I am not allowed by the Ordinance to disclose when giving a notice to him under section 48. This is particularly so if there is only one notice issued during the report period concerned. One way to avoid this is to restrict the information to be

disclosed in this chapter of the annual report to only the information allowed to be disclosed under section 48. This would mean that my description of the irregularity case in the chapter would be as brief as follows:

> ' There has been a case of interception (or covert surveillance) carried out by an officer of a department without the authority of a prescribed authorization for ___ days and I have [have not] given a notice to the relevant person under section 48. '

If I were to give full effect to the provisions of section 48(1) and (4), I could not say in my annual report whether the unauthorized activity was caused by careless mistake or with wilful intent, nor name the LEA concerned even if I considered that there was good ground to do so, or otherwise the relevant person would know all these which are regarded as undisclosable details under section 48(4).

7.6 On the other hand, section 49(2)(e) requires me to provide an assessment on the overall compliance with the relevant requirements during the report period. How could I make any assessment without stating facts in support if I were not allowed to disclose the facts of the irregularities in the annual report? Without facts, how could the public understand why I criticize a particular LEA and whether my criticism is justified? Without facts, how could the public know whether the disciplinary action taken by the department in respect of any officer is fair and appropriate? It should be borne in mind that for cases where I decided to notify a relevant person, it must be that the intrusiveness of the unauthorized activity is not negligible [section 48(6)(b)]. Ironically, for such cases, I am not allowed to state the facts in my annual report so as not to defeat the legislative intent or purpose of section 48. If so, my assessment on compliance of LEAs

with relevant requirements could only be a sweeping generalization or skeletal statement.

7.7 The conflicting requirements of section 48 and section 49(2)(e) and the predicament that I am in should be tackled in the next review of the Ordinance. At the very least, I should be given the discretion to disclose relevant facts of the irregularities in support of my assessment on compliance or observations in the annual report without any fear of criticism that I do not comply with the spirit and intent of section 48.

7.8 Against this backdrop and pending a review of the Ordinance, I shall describe irregularity cases in this chapter without indicating whether I have decided to give, or have given, a notice to the relevant person in respect of the unauthorized interception concerned. However, information on the number of notices that I gave under section 48 during the report period can be found in Chapter 6 and Chapter 10.

Non-compliance reported under section 54

Report 1: Interception of a wrong facility

7.9 This irregularity was due to the inclusion of a wrong facility number in the application for and the obtaining of a prescribed authorization for interception, resulting in the interception of a facility of a person who was not the subject under investigation or in anyway connected with the investigation, for a few days.

7.10 The LEA in this case was ICAC. Three sections and six officers were involved, as follows:

Section A : Head of Section A

Senior Investigator (A) ('SI(A)')

Section B : Chief Investigator (B) ('CI(B)')

Senior Investigator (B) ('SI(B)')

Section C : Supervisor (C) (equivalent to the rank of Senior Investigator)

Officer (C) (broadly equivalent to the rank of Investigator)

7.11 There were five key documents in this case, namely:

(1) an initial report prepared by the head of Section A,

(2) a detailed report prepared by SI(A),

(3) a written request prepared by CI(B),

(4) a handwritten note by SI(B), and

(5) a verification form prepared by CI(B).

7.12 On Day 1, the head of Section A prepared a short **initial report** on a complaint received. On Day 2, after considering the initial report which contained the facility number of the subject (Facility X), the management of ICAC decided that the complaint in the initial report was pursuable and assigned the investigation to Section B under the command of CI(B). A copy of the initial report was passed to CI(B). On Day 2 afternoon, SI(A) of Section A prepared a more **detailed report** about the complaint and passed it to CI(B) to facilitate the investigation. In the

detailed report, SI(A) mistakenly transposed two of the digits of the facility number of the subject resulting in a wrong facility number being stated (Facility Y). On Day 3, CI(B) made a **written request** to Supervisor (C) of Section C to ascertain whether the subject was using the facility intended to be intercepted. The facility stated in this written request was Facility Y.

7.13 On Day 7, SI(B) of Section B was assigned as the case officer of the investigation. On that morning, he accompanied his supervisor CI(B) to attend the office of an organization during which SI(B) copied on a **handwritten note** the particulars of the subject including Facility X from the records kept by that organization, without realizing that it was different from the facility number stated in the detailed report. On that afternoon, CI(B) gave a copy of the handwritten note to Supervisor (C), who subsequently instructed his subordinate Officer (C) to check whether the subject was using the facility as recorded in the handwritten note. In the late afternoon, SI(B) discovered that the facility number (Facility X) obtained from the organization was different from that stated in the detailed report (Facility Y). He reported the discrepancy to his supervisor CI(B) who then asked him to double check with the organization the next day to ascertain if Facility X was actually recorded in the organization's documents.

7.14 On Day 8, Officer (C) confirmed the use of the facility stated in the handwritten note (Facility X) by the subject. He reported his findings to CI(B) over the phone without spelling out the facility number checked. Despite the discrepancy reported earlier by SI(B), CI(B) did not seek clarification with Officer (C) and thought that Facility Y, as stated in the written request, was confirmed as being used by the subject.

7.15 Later on the afternoon of Day 8, SI(B) re-confirmed from the organization's records that Facility X was the number reported to be used by the subject. He reported his findings to CI(B), who did not cause any further clarification to be made to resolve the discrepancy.

7.16 On Day 10, CI(B) submitted a draft affirmation and a **verification form** through his supervisors with a request for carrying out an interception operation on Facility Y. In the verification form, CI(B) confirmed that Facility Y had been verified to be used by the subject. On Day 11, a directorate officer approved the making of an application for a prescribed authorization for interception in respect of Facility Y.

7.17 On Day 16, a panel judge issued an authorization for the interception of Facility Y for a period of about one month.

7.18 On Day 18, interception commenced.

7.19 On Day 21, the listener to the intercept product reported that the user of the facility appeared to be a male, instead of the subject who was a female. After being informed of this at 1045 hours, CI(B) reported the matter to his supervisor, a Principal Investigator, who decided that the operation should continue and asked CI(B) to check whether the subject was in Hong Kong. At the time, CI(B) did not report to the Principal Investigator the discrepancy between the facility number recorded in the organization's records and that in the detailed report. CI(B) then caused a check on the movement of the subject as instructed (but the result was not immediately available). He also asked SI(B) to check whether the subject was at her place of work. At 1735 hours, SI(B) reported that the subject was not found at her workplace. At about the same time, CI(B) was

informed by the supervisor of the listener that the user of the facility remained to be the male and listening had been suspended pending further instructions. On that evening, CI(B) caused a check on Facility X and Facility Y and the result showed that the subject was actually using Facility X instead of Facility Y. He reported the wrong interception to the directorate officer who instructed to discontinue the interception operation. On the morning of Day 22, the facility was disconnected. A discontinuance report was then submitted to the panel judge who revoked the authorization on the same day. On Day 23, the department notified me of this irregularity pursuant to section 54 of the ICSO.

7.20 A few months later after conducting detailed investigation, the department submitted a full investigation report to me with details of the case, including disciplinary action taken in respect of individual officers, in accordance with the requirement of section 54, as follows:

(a) CI(B) was given a warning.

(b) SI(B) who discovered the discrepancy was given a warning.

(c) SI(A) who created the mistake was given an advice.

(d) Supervisor (C) was given an advice.

(e) No disciplinary action was taken against Officer (C).

7.21 I was concerned with the following matters:

(a) the interception not authorized;

(b) the severity of the disciplinary action taken against SI(B) in comparison with the punishment on other officers concerned, particularly his superior officer, CI(B);

(c) competency or suitability of CI(B) in performing functions under the ICSO;

(d) the effectiveness of the procedures for verification of the number of the facility to be intercepted to prevent wrong interception in future; and

(e) incorrect information contained in the discontinuance report submitted to the panel judge.

My review of the case and my findings and recommendations are stated below.

(a) Unauthorized interception

7.22 Notwithstanding the interception of Facility Y being carried out pursuant to a purported prescribed authorization, the interception was unauthorized by virtue of section 48(5) of ICSO. This unauthorized interception originated from a clerical mistake in stating the subject's facility number in the detailed report. The checking and verification procedures practised by ICAC at the time failed to work effectively and several officers committed mistakes one way or another along the line in the processes. As a result, the wrong facility number was made the subject facility to be intercepted in the prescribed authorization instead of the correct number used by the subject of the authorization intended to be

intercepted. There is no indication of any ulterior motive in this irregularity.

(b) *Disparate disciplinary actions*

7.23 While no disciplinary action was taken against Officer (C), the department had taken different disciplinary measures against the following officers:

(a) CI(B) was warned because of his lack of due diligence and vigilance in having the facility number for interception verified and his ineffective response to the discrepancy discovered between the facility number obtained from the organization's records and that stated in the detailed report;

(b) SI(B) was warned because of his lack of due diligence and vigilance in identifying the discrepancy between the facility number appearing in the initial report and that stated in the detailed report and in seeking to resolve it;

(c) SI(A) was advised because of his lack of due diligence and vigilance in ensuring the inclusion of correct information in the detailed report; and

(d) Supervisor (C) was advised because of his lack of due diligence and vigilance in dealing with the request to verify the facility number used by the subject.

7.24 Since it appeared to me that the disciplinary treatments of the various offending officers were unequal and disparate, I made inquiries with ICAC and sought the reasoning for its decisions. I considered that the

more lenient treatment of the other offending officers, as compared with the severe action meted out against SI(B), who was the only person to discover the discrepancy, might probably have the effect of encouraging officers not to be diligent and vigilant or discouraging officers from being diligent and vigilant. Those treated too lightly might not feel the need to be diligent and vigilant, while those treated too severely might lose heart in performing well in ICSO-related matters. The difference in treatments also seemed to magnify the culpability of SI(B) while playing down the mistakes committed by CI(B) and others who similarly lacked diligence and vigilance in checking the documents to which they had access and which they were duty bound to check.

7.25 Despite my making known to ICAC my analyses of the blameworthiness of each of the officers concerned, ICAC did not consider that there was unfair treatment. In short, having reviewed the level of punishment or the decision of no punishment on the officers concerned with regard to my comments, ICAC remained of the view that the disciplinary actions taken against the officers were not inappropriate or unfair. However, ICAC assured me that my comments would be taken into consideration in the performance review of each and every officer concerned together with other aspects of their performance.

7.26 Notwithstanding the above response from ICAC, I still found the disciplinary actions taken against the related officers disparate. I notified ICAC that I considered that the warning given to SI(B) was too severe and was incommensurate with his fault. It appeared to me that SI(B) had performed his duties satisfactorily as the circumstances and CI(B)'s instructions required of him.

7.27 Despite the assurance from ICAC that my comments would be taken into consideration in the performance review of each and every of the officers concerned, I consider it incumbent upon me to record my feeling that the disciplinary treatment towards SI(B) was unfairly severe. I well appreciate that disciplinary actions and their appropriateness are entirely within the ambit of the department concerned and I have no right or power to interfere. But with all the facts in this case as revealed to and reviewed by me, I am left with a strong feeling of unfairness that must be recorded: if the warning given to SI(B) was not too severe according to ICAC's standards, the warning given to CI(B) and the advices given to SI(A) and Supervisor (C) were unduly lenient. After all, as alluded to in paragraph 7.24 above, in the context of the ICSO scheme, the importance of the appropriateness of disciplinary treatments meted out by the LEAs under the Ordinance should not be underestimated. It may probably affect the quality of performance of their officers in handling ICSO-related matters, upon which the increase or decrease of the quantity of cases of non-compliance with the relevant requirements of the Ordinance may depend, which is my responsibility to detect, to investigate, to review and to report. However, since disciplinary matters are squarely within the autonomy of the department concerned and the Administration, and in order to avoid any semblance of my interfering in these matters by dwelling on my reasoning in this report, I am separately writing to the Chief Executive to provide him with the details of the facts of the case and of my reasoning, pursuant to section 50 of the Ordinance.

(c) *Competency of Chief Investigator (B)*

7.28 Having reviewed the circumstances of the case provided in ICAC's full investigation report and identified the fault of each of the individual officers involved in the incident, I considered CI(B) as the main culprit and chiefly (if not solely) accountable for the unauthorized interception. His failures at different stages in the event are summarized below:

(a) He failed to note the two different facility numbers contained in the initial report and the detailed report.

(b) He failed to note the two different facility numbers stated in the written request and the handwritten note.

(c) On Day 7, upon being informed of the discrepancy by SI(B), he did not see fit to seek clarification with SI(A) who prepared the detailed report but instead instructed SI(B) to clarify with the organization.

(d) On Day 8, when Officer (C) telephoned to confirm the facility number, CI(B) did not ask him to specify the confirmed number as there was an apparent need to do so in view of the discrepancy earlier discovered.

(e) Later on the afternoon of Day 8, when informed by SI(B) of the result of the confirmation with the organization, he did not seek clarification with Officer (C) regarding the facility number earlier confirmed by Officer (C).

(f) On Day 10, when submitting his draft affirmation in support of the interception operation, he completed a verification form to confirm that Facility Y (the wrong number) was verified to be correct.

(g) On the morning of Day 21, when reporting to his senior, the Principal Investigator, about the findings made by the listener that the user of the facility was a male instead of a female (the subject), he did not inform the Principal Investigator of the discrepancy spotted earlier. Had he brought the matter to the attention of the Principal Investigator at that juncture, the latter would have given instructions requiring immediate attention and probably discontinuance that might well shorten the period of wrong interception on an innocent person.

7.29 Owing to the mistakes committed by CI(B) in this case, effectively defeating ICAC's safeguard verification procedures, involving in my view a measure of fault exceeding simple negligence, I doubted CI(B)'s competency or suitability in performing functions under the ICSO. In response, ICAC informed me that it had reviewed CI(B)'s applications for prescribed authorization since the occurrence of this case and found no irregularity. Both CI(B)'s Principal Investigator and Assistant Director were satisfied with his performance concerning ICSO-related applications.

7.30 Unless CI(B) has entirely transformed himself to take a most careful approach towards his duties under the ICSO, I remain unsure if CI(B) can be relied upon in discharging functions under the ICSO. I posed this as a fair warning to ICAC.

(d) *Effectiveness of the verification procedures and other improvements*

7.31 In view of the apparently tight verification procedures still being beaten by the combined mistakes made by more than one officer, I made some recommendations in improving and strengthening such procedures and they were accepted by ICAC.

7.32 In the present case, the decision to discontinue was made on Day 21 but it was not until the morning of Day 22 that the facility was disconnected. ICAC assured me that it would effect disconnection of any facility wrongly intercepted at the earliest possible opportunity in future cases.

(e) *Information given in the discontinuance report*

7.33 The information stated in the discontinuance report submitted to the panel judge regarding which officer decided to discontinue the interception operation after discovery of the unauthorized interception was wrong. The decision was made by a directorate officer instead of the reporting officer of the discontinuance report as asserted in the report. This was not the first time that I found incorrect facts being reported by this reporting officer to the panel judge. I recommended and ICAC accepted that there should be a checker to check the accuracy of the content of the discontinuance report before submission to the panel judge. ICAC advised that appropriate advice (non-disciplinary in nature) had been given to the officer who made the incorrect statement in the discontinuance report submitted to the panel judge.

Report 2: Non-compliance with supervisor's instructions and breach of a condition of the prescribed authorization

7.34 This irregularity related to LPP Case 2 in Chapter 5 of my 2007 Annual Report. The LEA concerned was ICAC. My 2007 Annual Report dealt with the first portion of this case. The following is the latest development that took place in the latter half of 2008 with my finding on the review of the non-compliance of the listener. In the description below, I also make reference to the information provided in LC Paper No. CB(2)1260/08-09(01) of 3 April 2009 submitted by ICAC to the Legislative Council Panel on Security ('the LC Paper').

Facts of the case and latest development

7.35 The panel judge granted a prescribed authorization to intercept two facilities (Facility A and Facility B). When granting the authorization, it was assessed that there was the likelihood of obtaining information subject to LPP. The panel judge thus imposed further conditions on the prescribed authorization, the effect of which was that the case would need to be brought back to a panel judge for re-assessment as soon as any LPP information was likely to be obtained. Before the listener took up the listening duty in this case, he had been briefed by his supervisor of the conditions imposed by the panel judge.

7.36 On the afternoon of 13 November 2007, the listener listened to a call intercepted on Facility B and reported to his supervisor ('Supervisor X') that the call contained information that might be subject to LPP ('the First LPP Call'). Supervisor X instructed him to put on hold the monitoring exercise pending re-assessment by the panel judge. On

14 November 2007, the Chief Investigator responsible for ICSO matters submitted an REP-11 report to the panel judge to report this incident as a material change of circumstances. The REP-11 report summarized the content of the First LPP Call. It also stated that interception had been productive since commencement of the prescribed authorization and sought continuation of the prescribed authorization. On the basis of the information in the REP-11 report, the panel judge allowed the authorization to continue with the same conditions imposed. On 15 November 2007, the department by letter reported this incident to me pursuant to paragraph 120 of the Code. The letter informed me only of the date of the First LPP Call, the date of submitting an REP-11 report, the decision of the panel judge and the date of decision. The letter contained no other detail and did not enclose any documents.

7.37 On **23 November 2007 (Friday)** during my inspection visit to the department, I inspected the REP-11 report. At the visit, I made a request to the Responsible Officer to provide a chronology of events from the time when anyone was first alerted to the LPP information up to the time of making of the notification to me and a copy of the departmental procedures in handling LPP cases prevailing at the time of this case for my review back in my office. I also requested the department to preserve the recording and relevant records in this and future cases to facilitate my review function. The Chief Investigator making the REP-11 report was also present at this inspection visit. The Responsible Officer stated that they needed time to prepare the chronology of events and to put in writing the departmental procedures in handling LPP cases. He would provide such information to me sometime after the visit.

7.38 On the following **Monday, 26 November 2007**, the recording of the First LPP Call was destroyed in accordance with the department's established practice of destruction. The written summaries on the intercept product of Facilities A and B of the prescribed authorization were not destroyed at that time because the department's destruction policy was that the written summaries could only be destroyed after the prescribed authorization ceased to have effect. On the same day (26 November 2007), the Responsible Officer decided to discontinue the interception on both Facilities A and B on ground of 'no further intelligence value to continue with the interception'. At the time of making this decision, there were still a number of intercepted calls which had not yet been listened to. The Responsible Officer caused the Chief Investigator (who was the same Chief Investigator mentioned in paragraphs 7.36 and 7.37 above) to submit a discontinuance report to the panel judge under section 57 for the purpose of revoking the prescribed authorization. On 27 November 2007, the Chief Investigator submitted a discontinuance report to the panel judge who revoked the prescribed authorization pursuant to section 57(4).

7.39 Also on 26 November 2007, another listener (a female) who listened to a call intercepted on Facility A found that the call might involve information subject to LPP ('the Second LPP Call'). She tried but failed to immediately report the matter to Supervisor X who was then not in the office. It was not until 1015 hours that she reported it to Supervisor X. Supervisor X then tried to report it to her superior officer, Supervisor Y, but could not find him. It was not until 1145 hours that she was able to report the matter to Supervisor Y. Supervisor Y then tried to report it to the Responsible Officer but could not reach him until 1200 hours when the departmental meeting chaired by the Responsible Officer was convened

during which it was decided to discontinue the interception on Facilities A and B which would lead to the revocation of the prescribed authorization. Supervisor X and Supervisor Y both attended this departmental meeting but they did not disclose the existence of the Second LPP Call to the Responsible Officer during the meeting because they considered that it was inappropriate to disclose it in the meeting as there were other participants. It was only after the departmental meeting ended at 1305 hours that Supervisor X and Supervisor Y informed the Responsible Officer at 1310 hours of the existence of the Second LPP Call. The department reported this Second LPP Call to the panel judge on 27 November 2007 and to me on 28 November 2007. This was the LPP Case 3 referred to in Chapter 5 of my 2007 Annual Report.

7.40 The department's normal practice was that all the calls intercepted would be listened to before forming an assessment of 'no further intelligence value' as a ground to discontinue an interception. Supervisor X was the one who formed the assessment of no further intelligence value to continue with the interception on Facilities A and B. She knew that this assessment was based on the calls intercepted up to a certain date only and had not taken into account subsequent calls that had been intercepted but not yet listened to. She did not feel the need to tell those present at the departmental meeting the fact that the assessment was valid up to a certain date only but had not included subsequent calls not yet listened to. Nor did she feel the need to tell the Responsible Officer this fact when she reported the Second LPP Call to the Responsible Officer after the departmental meeting. Her explanation was that she did not know whether there were calls which had not yet been listened to and was not alert to the need to make such check. On the other hand, the Responsible

Officer, after being informed by Supervisor X and Supervisor Y of the Second LPP Call after the departmental meeting, should also realize that the 'no further intelligence value' assessment was formed on the basis of calls up to the time before the Second LPP Call was intercepted. He did not care to check whether there were subsequent calls or whether there were calls not yet listened to. If there were calls which had not been listened to and which might contain intelligence value, then the ground for discontinuing the prescribed authorization due to 'no further intelligence value' would be shaky, to say the least. Instead of clarifying this important fact, the Responsible Officer simply instructed the Chief Investigator to prepare a discontinuance report on ground of 'no further intelligence value' for the purpose of having the prescribed authorization revoked. In the reports to the panel judge and me, it was emphasized that before the Second LPP Call was reported to the Responsible Officer, a decision had already been made in the morning to discontinue the interception on both facilities on ground of no further intelligence value.

7.41 While the panel judge may decide whether to allow a prescribed authorization to continue upon receipt of an REP-11 report on material change of circumstances, the panel judge has no such option upon receipt of a discontinuance report submitted under section 57. He must revoke the prescribed authorization [section 57(4)].

7.42 The retention period of the written summaries was set by the department, not by the Ordinance or the Code. The department's destruction policy was that the written summaries would not be destroyed as long as the prescribed authorization was still in force. In the present case, if the prescribed authorization was not discontinued and revoked, the

deadline for destroying the written summaries would be in about mid-January 2008 according to the department's destruction policy. With the revocation of the prescribed authorization, the deadline for destroying the written summaries was in late December 2007.

7.43 On 5 December 2007, as disclosed in the LC Paper, the Chief Investigator mentioned above (who was present at my inspection visit of 23 November 2007) issued a written Notification of destruction requiring that the written summaries of Facilities A and B authorized by the same prescribed authorization be passed to the Central Registry on or before 12 December 2007 for destruction.

7.44 Two weeks after my inspection visit I still had not received the chronology of events and departmental procedures referred to in paragraph 7.37 above. I followed this up by a letter of **10 December 2007** addressed to C, ICAC. In that letter, apart from asking for the chronology and departmental procedures, I also referred to the request I made at the inspection visit on preservation of records in this and future cases to facilitate my review function. I asked C, ICAC what records the department had preserved and whether the department had destroyed any records in relation to this case and if so, what they were and the time of destruction. (The relevant paragraphs of my letter of 10 December 2007 can be found in paragraph 5.34 of Chapter 5 of my 2007 Annual Report.)

7.45 In the LC Paper, ICAC stated that my letter of 10 December 2007 reached the Responsible Officer at about 1800 hours on 11 December 2007 and that the soft copy of the written summaries on Facility B was destroyed by 1723 hours on 11 December 2007. The exact time of the destruction of the hard copy is not known but the department

believed that it should be around the same time as the destruction of the soft copy.

7.46 On 11 December 2007, I wrote to C, ICAC on Facility A of the same prescribed authorization (related to LPP Case 3) and required ICAC to preserve the recorded intercept product and relevant records for me to check. (Details can be found in paragraph 5.51 of Chapter 5 of my 2007 Annual Report.)

7.47 According to the LC Paper, my letter of 11 December 2007 reached the reception counter of the ICAC Building at 1030 hours on 12 December 2007. The soft copy of the written summaries on Facility A was destroyed half an hour later at 1059 hours that morning. The hard copy of the written summaries was also destroyed on 12 December 2007 but the exact time was not known. My letter of 11 December 2007 subsequently reached the office of C, ICAC at 1105 hours. The envelope of the letter was opened by the Personal Assistant to C, ICAC. The letter was passed to the Responsible Officer on the evening of 13 December 2007 after routing through two senior directorate officers. In my view, at what time the Responsible Officer received my letter of 11 December 2007 was not that important. It did not require the letter of 11 December 2007 to remind him of the need to preserve the written summaries because my letter of 10 December 2007 which, according to ICAC, reached him at 1800 hours on 11 December 2007 already gave a reminder in paragraph 7 thereof:

> '7. In future when you notify me of incidents of obtaining information subject to or might be subject to LPP, I would appreciate it if you could also attach copies of the relevant prescribed authorization(s)

> and REP-11 report to your notification letter. The copies so attached should be sanitized. Please also ensure that all relevant records such as tape or disc records, … **summaries**, etc. should all be preserved to facilitate my investigation.' (Emphasis added.)

7.48 On 13 December 2007, the abridged version of the summaries in respect of Facility A and Facility B covering the period from a date before the occurrence of the First LPP Call up to 14 November 2007 was destroyed. This destruction was after the Responsible Officer's receipt on 11 December 2007 of my letter of 10 December 2007 requiring the preservation of records.

7.49 The LC Paper stated that on the evening of 13 December 2007 between 1800 and 2000 hours, the Responsible Officer consulted his immediate supervisor, the Director of Investigation (Government Sector) ('D/GS'). Upon discovery that the Responsible Officer had misunderstood my requirements for preservation of records, D/GS immediately instructed the Responsible Officer to preserve, with immediate effect, all forms of records relevant to LPP information for my examination in future.

7.50 During that consultation on 13 December 2007, the Responsible Officer did inform D/GS of the destruction of the written summaries and the abridged version of the written summaries. C, ICAC and Head/Operations subsequently became aware of the destruction in the course of preparing replies to me on or before 29 February 2008. [Information provided in C, ICAC's letter of 21 May 2009 to me.]

7.51 On 21 December 2007, the abridged version of the written summaries on Facilities A and B covering the period from 15 to 21 November 2007 was also destroyed. The Responsible Officer did not

consult the senior management before destruction as he considered that there was no discovery of suspected LPP calls during the period in question and the destruction was in accordance with the prevailing destruction policy. [Information provided in C, ICAC's letters of 20 April 2009 and 21 May 2009 to me.] However, if the abridged version was not destroyed, I could have examined it to see if there was any obtaining of LPP information subsequent to the LPP Call discovered on 13 November 2007 and whether the interception on both Facilities A and B was really unproductive in the week before 26 November 2007 as claimed by the Responsible Officer leading to the discontinuance of the interception on 26 November 2007.

7.52 In other words, by 21 December 2007, the destruction process was completed:

(a) the written summaries on Facility B were destroyed on 11 December 2007;

(b) the written summaries on Facility A were destroyed on 12 December 2007;

(c) the abridged version of the written summaries on Facilities A and B covering the period from a date before the occurrence of the First LPP Call up to 14 November 2007 was destroyed on 13 December 2007; and

(d) the abridged version of the written summaries on Facilities A and B covering the period from 15 to 21 November 2007 was destroyed on 21 December 2007.

These summaries were relevant records to ascertaining: (i) whether LPP information had been passed to investigators in breach of the requirement of paragraph 120 of the Code; (ii) whether there were calls containing LPP information which were not reported to the panel judge in breach of the further conditions imposed by the panel judge on the prescribed authorization; and (iii) whether the ground for discontinuing the interception on Facilities A and B due to no further intelligence value was a genuine reason without any ulterior motive behind.

7.53 By a letter dated **8 January 2008,** C, ICAC replied to my letter of 10 December 2007. Regarding what records had been preserved and what records had been destroyed, C, ICAC replied as follows in paragraphs 6 and 7 of his letter of 8 January 2008:

> ' Other than the REP-11 report, there is an 'Audit Log' … **recording the duration of access made by individual listeners to their assigned facilities for internal audit purpose** … The relevant 'Audit Log' is preserved for your examination.
>
> As shown in paragraph 18 of the Chronology of Events at Annex B, the relevant recording had been … destroyed on 26 November 2007. [The Responsible Officer] explained that during the visit, it did not occur to him that you required the preservation of all records relating to the inadvertent obtaining of the LPP information to facilitate your investigation and, at the time, he was under the impression that you were satisfied with the way the matter was handled.' (Emphasis added.)

7.54 Paragraph 17 of the Chronology of Events (attached to C, ICAC's letter of 8 January 2008 as Annex B) stated:

> 'During the course of compiling this Chronology of Events, reference was made to the … 'Audit Log' recording the access made by the

listener to the subject facilities. It was revealed that [the listener] had accessed … the [LPP] Call on the following two occasions:-

i. at 0928 hours on 13 November 2007 for a duration of [T minutes, ie less than four minutes]; and

ii. at 1645 hours on 13 November 2007 for a duration of [T minutes].'

This was the first time I was informed by ICAC that the listener had listened to the First LPP Call twice, the first in the morning and the second in the afternoon. ICAC also stated that the listener was strongly advised by the department on 7 January 2008 of the need to be vigilant in carrying out his duties. This advice was disciplinary in nature.

7.55 By a letter dated **23 January 2008** to C, ICAC, I asked specifically in paragraph 9 thereof in relation to the First LPP Call:

'(a) Are the REP-11 report and the Audit Log the only records that have been preserved? Please provide me with a copy of the Audit Log.

(b) Are the tape records the only records that have been destroyed?'

7.56 By a letter dated **29 February 2008**, C, ICAC replied in Annex B thereto that:

'2. The REP-11 Report and the Audit Log were the only records that have been preserved. A copy of the Audit Log is enclosed as Annex C.

3. The tape records are the only records that have been destroyed.'

ICAC also provided, together with the Audit Log, an explanatory note to explain the headings and abbreviations used in the Audit Log. The explanatory note provides a meaning to the following headings of the columns appearing in the Audit Log:

'FROM' means start date and time of the user who listened to the session.

'TO' means end date and time of access to the session by the user.

'LEN(s)' means the duration of access to the session in seconds.

As Audit Log is more appropriately called audit trail report ('ATR'), I shall use the latter term hereafter.

7.57 I observed from the ATR two matters which were not mentioned by ICAC in its REP-11 report to the panel judge nor in C, ICAC's letters of 8 January 2008 and 29 February 2008 to me:

(a) the listener had listened to 20 odd calls between his first time and second time of listening to the First LPP Call; and

(b) after the listener had re-listened at 1645 hours to the First LPP Call and reported the Call to his supervisor, his supervisor instructed him to put on hold the monitoring exercise pending re-assessment by the panel judge, but the listener continued to listen at 1716 hours to another recorded call, ignoring the instructions of his supervisor and apparently breaching the condition imposed by the panel judge on the authorization.

7.58 On 18 March 2008, I listened to the recording of the Second LPP Call (LPP Case 3) at ICAC premises. Only one call had been preserved for my listening, ie the alleged Second LPP Call. Other calls before and after it were not preserved. I found that this call did not contain

LPP information at all. I also asked to inspect the written summaries on Facilities A and B but to no avail.

7.59 By a letter of 8 April 2008 to C, ICAC, I raised a number of queries on LPP Cases 2 and 3. In particular, I questioned the continued listening at 1716 hours on 13 November 2007.

7.60 By a letter of 14 May 2008, C, ICAC responded that the department would conduct an investigation into the matter.

7.61 On **20 June 2008**, C, ICAC provided a full investigation report to me.

(i) Twice listening to the LPP Call

7.62 On the twice listening to the LPP Call on 13 November 2007, ICAC's investigation report stated that on the morning of that day, the listener listened to the LPP Call. According to the listener, he did not realize that the call might be subject to LPP as his focus was on checking whether any prompt operational response was required. After listening to this call, he formed the assessment that there was no information which required his immediate action. He then listened to other calls. At 1645 hours the same day, he listened to the LPP Call again for the purpose of preparing his written summary. It was only then that he realized that it contained information which might be subject to LPP and he reported the matter to his supervisor. When reporting, he did not mention to his supervisor that he had first listened to the LPP Call in the morning. Upon my subsequent enquiry, the listener explained that at the time, he did not realize the need to mention it to his supervisor. On the disciplinary action taken, the ICAC investigation report stated that on 7 January 2008, the

listener was **strongly advised** by the department that he should exercise vigilance in carrying out his duties and should be mindful of any information which might be subject to LPP or of a journalistic nature.

(ii) Listening at 1716 hours to another call

7.63 According to ICAC's investigation report, the listener confirmed that he had been briefed of the panel judge's further conditions on the prescribed authorization concerned before he took up the listening duty and that his supervisor had asked him to put on hold the monitoring after he reported the LPP Call. He explained that he continued to listen at 1716 hours to another call despite the supervisor's instructions as he was trying to clarify some facts and he wrongly believed that he was permitted to re-listen to this call which he had previously listened to and which contained no LPP information. The ICAC investigation concluded that there was no ulterior motive on the part of the listener but his act amounted to a 'non-compliance' under section 54 of the ICSO. On 20 June 2008, the listener was issued a **warning** by the department.

(iii) Non-disclosure to the panel judge in the REP-11 report

7.64 The ICAC investigation report stated that there was no evidence to suggest that the reporting officer of the REP-11 report was aware of the non-compliance of the listener before he prepared the REP-11 report to the panel judge. In future, officers would check the relevant ATR to ensure that the full circumstances were reported to the panel judge.

My review

7.65 I examined the timing when the listener listened to all the calls on 13 November 2007 as recorded in the ATR provided by ICAC. I found that all the calls were listened to almost consecutively without any substantial time gap in between except on two occasions where there was large interval of 24 minutes and 21 minutes respectively. Strangely, both these two large intervals revolved around the LPP Call, as follows:

(a) After the listener's listening to the LPP Call in the morning, there was a break of 24 minutes before he listened to another call at 0957 hours.

(b) Before the listener re-listened to the LPP Call at 1645 hours in the afternoon, there was a break of 21 minutes preceding this listening.

7.66 By a letter dated **28 August 2008** to C, ICAC, I enquired what the listener did during the above two breaks and why he re-listened to this LPP Call as late as 1645 hours for preparing the written summary. On 26 September 2008, C, ICAC replied that the listener stated that he was unable to recall on both these matters.

7.67 By the said letter of **28 August 2008**, I also sought clarification of the length of listening by the listener as shown in the ATR.

7.68 By a letter dated **18 December 2008**, C, ICAC replied that it was unsafe to rely on the ATR for ascertaining the exact duration of listening by a listener to any call under interception and that he had a review conducted on his answers previously given to me referencing such

duration. He stated that as the exact duration of listening to the LPP Call for the first time on the morning of 13 November 2007 was uncertain, the listener might not have accessed the information that might be subject to LPP.

7.69 On **19 December 2008**, I wrote to C, ICAC seeking further clarification, in particular whether the listener had changed his story provided to me previously and whether ICAC was changing its stance on the disciplinary actions that had been taken against the listener.

7.70 On **24 December 2008**, ICAC replied that the listener had not changed his version. ICAC stated that there was no conclusive evidence that during the first listening to the LPP Call in the morning, the listener had accessed the information that might be subject to LPP. The department would consider the necessity to review the actions that had been taken against the listener after I concluded my investigation into the alleged uncertainty of the duration of listening.

7.71 On **29 December 2008**, I started my investigation into the uncertainty. That investigation had not yet been completed at the time of compiling this report.

7.72 My findings on the non-compliance of the listener and related matters are provided below.

(a) Non-compliance of the listener

7.73 ICAC considered that since there was uncertainty over the duration of the listener's first listening to the LPP Call, it could have been that he did not actually access the LPP information, hence the disciplinary

advice given to him on 7 January 2008 might have to be reviewed. I took a different view.

7.74 The listener was aware of the further conditions imposed by the panel judge on the prescribed authorization. The listener did not dispute the fact that he listened to the LPP Call on the morning of 13 November 2007. He stated that he listened to the LPP Call in the morning to ascertain if there was information which might require prompt investigative / operational actions. He listened to the call and formed the assessment that there was no information which required his immediate action. When he reported the LPP Call to his supervisor in the afternoon, he did not mention to his supervisor that he had listened to this Call in the morning. There was a break of 24 minutes after he listened to the LPP Call in the morning and he was unable to recall what he did during the break. There was similarly a break of 21 minutes before he re-listened to the LPP Call in the afternoon and he similarly could not recall what he did during that period. The reason for re-listening to the LPP Call in the afternoon was, according to the listener, for the purpose of preparing the written summary. The department's practice has been that no written record needs to be produced if no information relevant to the investigation has been captured. In other words, the listener must be of the view that useful information relating to the investigation had been obtained which required his preparation of the summary. Knowing that calls intercepted under this prescribed authorization had the likelihood of obtaining information subject to LPP, the listener should be vigilant in carrying out his duties. It is unbelievable that the listener, after listening to the LPP Call in the morning, knew that no prompt operational action was required and knew that the Call contained useful information relevant to the investigation, but did not

know that the Call contained information which might be subject to LPP. Either he was telling lies or he lacked vigilance at the least.

7.75 In C, ICAC's letter of 20 April 2009, it was represented to me that though the listener had formed the initial assessment that there was no information in the LPP Call that would require prompt investigative / operational actions, the listener was not sure that the part he had skipped, if any, or the content of the call did not contain any information that might be relevant to the investigation. The listener therefore considered it necessary to re-listen to the call and in case information relevant to the investigation was found, he would have to prepare a written summary of the information.

7.76 However, in response to my earlier enquiry made on 28 August 2008, C, ICAC had given the following reply in his letter of 26 September 2008, setting out my question first:

> '**Why was the [LPP] Call re-listened to as late as 1645 hours for preparing the written summary? Was this in accordance with any planned schedule or instructions?**
>
> [The listener] is unable to recall why the [LPP] Call was re-listened to at 1645 hours for preparing the written summary. There was no planned schedule or instruction requiring [the listener] to conduct re-listening and produce written summary for the [LPP] Call at that time.'

7.77 In view of the different answers given in C, ICAC's letters of 26 September 2008 and 20 April 2009, it appeared to me that either the listener had changed his story or his memory had dramatically improved after the lapse of half a year.

7.78 The strong advice given to the listener on 7 January 2008 was that 'he should exercise vigilance in carrying out his duties and should be mindful of any information which might be subject to LPP or of a journalistic nature'. In the present case, all the evidence points contrary to the suggestion that the listener had been vigilant in carrying out his duties or had been mindful of any information which might be subject to LPP. His failure to report the twice listening was, in my view, particularly dubious. The giving of a strong advice as recorded above was not unfair to him, if not too lenient.

7.79 Regarding the listening to another call at 1716 hours, it was a breach of the supervisor's instructions and a breach of one of the further conditions imposed by the panel judge on the prescribed authorization referred to in paragraph 7.35 above, amounting to a non-compliance with the requirements of the Ordinance. The warning given to the listener was appropriate.

(b) Handling of LPP Case 2 by ICAC officers

7.80 I was disappointed with the way individual ICAC officers handled this LPP case.

7.81 First, there was the non-preservation of the recording on the First LPP Call. The tape records were important records to verify whether the REP-11 report to the panel judge had not misrepresented the contents of the conversation that had been listened to so that the panel judge had not been misled into allowing the interception to continue. The Responsible Officer allowed the recording to be destroyed on 26 November 2007 despite my request in the inspection visit of 23 November 2007 to preserve

it. The explanation given by the Responsible Officer was that after I finished examining the REP-11 report, he got the impression that I was satisfied with the REP-11 report and no further action was required. If no further action was required, why did I request in the inspection visit a chronology of events to be provided for my review back in my office? The inspection of the REP-11 report was the first step. The examination of the report by itself could not tell whether the officers concerned had performed properly. My request for the chronology of events and the departmental procedures signalled that the review had just begun. The explanation from the Responsible Officer was unconvincing.

7.82 Second, the Responsible Officer did not preserve the written summaries for my examination. His explanation was that he had the misunderstanding that I only required records which contained LPP-related information. Since the summaries would not contain any LPP information, he was under the impression that the summaries needed not be preserved. If the summaries were not preserved for my examination, how could I know that the summaries really did not contain LPP information that should have been screened out? Should I rely solely on the claim of the Responsible Officer that such information had been screened out without the need to have evidence in support? How could I know that the Responsible Officer or any officer was telling the truth? Paragraph 120 of the Code provides that:

> '120. Any information that is subject to LPP will remain privileged notwithstanding that it has been inadvertently obtained pursuant to a prescribed authorization. Dedicated units separate from the investigation team shall screen out information protected by LPP, and to withhold such information from the investigators. … The Commissioner should

> be notified of interception / covert surveillance operation that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. On the basis of the department's notification, the **Commissioner may**, inter alia, **review the information passed on** by the dedicated units **to the investigators to check that it does not contain any information subject to LPP** that should have been screened out.' (Emphasis added.)

If the summaries were not preserved for my examination, how could I fulfil the requirement in the Code to review the information passed on by the dedicated unit to the investigators to check that it did not contain any LPP information that should have been screened out? It should be noted that the Code requires me to review **the information** passed on by the dedicated unit to the investigators, it does not say reviewing the LPP information passed on by the dedicated unit to the investigators. I could not understand the logic of the Responsible Officer that since the summaries would not have contained LPP information that they needed not be preserved for my examination. I could not believe that the Responsible Officer, being a directorate officer, would have misunderstood the requirement of paragraph 120 of the Code.

7.83 Third, immediately following my visit on Friday, 23 November 2007, the Responsible Officer decided on Monday, 26 November 2007 to discontinue the prescribed authorization. The ground for discontinuance was 'no further intelligence value to continue'. This assessment was made by Supervisor X. She knew that this assessment was based on calls intercepted up to a certain date only but did not feel the need to inform those present in the meeting this fact, misleading those present to believe that this assessment was formed after listening to all available calls. Supervisor X explained that she did not know whether

there were calls subsequent to that date as she had not checked. This explanation was unacceptable since the decision to discontinue the interception or not was based on her assessment and it was irresponsible of her not to check whether there were calls not yet listened to before giving an assessment of no further intelligence value on the basis of which the interception would be ceased.

7.84 It was equally inconceivable for the Responsible Officer not to clarify whether there were calls not yet listened to. After being informed of the Second LPP Call, he should have known that the assessment was based on calls occurring before the Second LPP Call. He should have asked whether there were calls intercepted after this call and if so, whether they had been listened to. If there were calls not yet listened to, it would only be normal for the Responsible Officer to re-consider the earlier decision of discontinuance as the 'no further intelligence value' assessment might have been wrong. It was strange that the Responsible Officer did not take this normal course of action but still instructed the Chief Investigator to cite 'no further intelligence value' as the ground for discontinuance as if he was not aware that the assessment might have been wrong because there were calls not yet listened to. Indeed, my enquiry with the CSP disclosed that there were a number of calls intercepted after the Second LPP Call.

7.85 Fourth, even accepting that the Responsible Officer had misunderstood my requirement made in the inspection visit of 23 November 2007 for retention of records, he should have known my requirement by the time he received my letter of 10 December 2007, which according to ICAC was at 1800 hours on 11 December 2007, half an hour after the destruction of the written summaries on Facility B. I mentioned

specifically in that letter the need to preserve summaries. His misunderstanding could not be applied to explain why he still allowed the written summaries on Facility A to be destroyed the next day (12 December 2007) and the abridged version of the written summaries on both Facilities A and B covering the period of the First LPP Call to be destroyed on 13 December 2007. C, ICAC attributed this to the Responsible Officer's lack of vigilance.

7.86 Fifth, ICAC could only tell the destruction time of the soft copy of the written summaries of Facility B which was 1723 hours on 11 December 2007 to prove that the destruction was before my letter of 10 December 2007 reached the Responsible Officer. But it could not tell the destruction time of the hard copy. It was also strange that the written summaries of Facility B (which was the subject facility of my letter of 10 December 2007) were taken out for destruction first, instead of the written summaries of Facility A (which was the subject facility of my letter of 11 December 2007) while both facilities were intercepted pursuant to the same authorization. The destruction of the written summaries of Facility B followed the receipt by ICAC of my letter of 10 December 2007 on 11 December 2007. The destruction of the written summaries of Facility A followed the receipt of my letter of 11 December 2007 on 12 December 2007.

7.87 Sixth, according to ICAC, by the evening of 13 December 2007, the Responsible Officer realized that he had misunderstood my requirement for preservation of records. But he still allowed the abridged version of the summaries covering the period 15 to 21 November 2007 to be destroyed on 21 December 2007 without

consulting the senior management of ICAC or me. His explanation was that there was no LPP call during that period. Had this abridged version been preserved, I could have checked whether there was really no further obtaining of information subject to LPP during this period which the department should otherwise report to the panel judge. I could also check whether the interception during this period was really of no intelligence value as a result of which the interception was discontinued and the prescribed authorization revoked. In view of his previous misunderstanding on my preservation requirement, the Responsible Officer should have consulted me or his supervisor before allowing the abridged version to be destroyed on 21 December 2007.

7.88 Seventh, it was not only that the ICAC officers concerned did not preserve the records for my examination, ICAC also failed to mention that the summaries had been destroyed in its reports to me, until very much later. This may give rise to the suspicion that someone tried to hide the fact that the summaries had been destroyed by not mentioning them.

7.89 In my letter of 23 January 2008, I asked specifically (a) whether the REP-11 report and the ATR were the only records that had been preserved, and (b) whether the tape records were the only records that had been destroyed. See paragraph 7.55 above. The questions were asked in such manner because at the time, I was not informed of and did not know what sort of records (apart from those mentioned above) were prepared and kept by ICAC. Indeed, by my 10 December 2007 letter, I had already requested:

> '… please advise what records you have preserved and whether you have destroyed any records in relation to this case and if so, what they were and the time of destruction.'

7.90 C, ICAC replied by his letter of 29 February 2008. In Annex B to the letter (see paragraph 7.56 above), which was prepared by the Responsible Officer, it was stated that (a) the REP-11 report and the ATR were the only records that had been preserved ('answer (a)'), and (b) the tape records were the only records that had been destroyed ('answer (b)').

7.91 After the publication of the 2007 Annual Report, it transpired that the senior management of ICAC had in fact known of the destruction of the summaries as early as the evening of 13 December 2007. Upon my enquiry on 12 May 2009, C, ICAC confirmed in his letter of 21 May 2009 that at the time of writing the letter of 29 February 2008, the senior management including C, ICAC himself and the Responsible Officer were all aware of the destruction of the summaries. In a report annexed to C, ICAC's said letter of 21 May 2009, it was explained that according to the Responsible Officer, answer (a) was intended to mean that other than the REP-11 report and the ATR, all other records, including tape records and the summaries, were not preserved. Answer (b), as the Responsible Officer subsequently realized, was incomplete and inaccurately put. C, ICAC agreed that the Responsible Officer should have also mentioned in answer (b) the destruction of the summaries and other relevant records but regrettably, the inadequacy in the reply had at the time skipped the attention of both the Responsible Officer and his supervising officers.

7.92 Knowing that the summaries had been destroyed and C, ICAC had indeed advised the Responsible Officer on 29 February 2008 regarding the Responsible Officer's failure to meet my requirement by allowing the recording of the intercept product and the summaries to be destroyed, it was inexplicable why C, ICAC's letter of 29 February 2008 still replied that the tape records were the only records that had been destroyed, particularly as I asked this question for two times and very specifically, the first time in my letter of 10 December 2007 (see paragraphs 7.44 and 7.89 above) (replied by C, ICAC's letter of 8 January 2008 at paragraph 7.53 above) and the second time in my letter of 23 January 2008 (see paragraph 7.55 above) (replied by C, ICAC's letter of 29 February 2008 at paragraph 7.56 above).

7.93 Eighth, there was no voluntary or prompt reporting of irregularities. In the REP-11 report to the panel judge and the notification report to me under paragraph 120 of the Code about this LPP Case, there was no mention that the listener had listened to the LPP Call twice. It was not until I requested a Chronology of Events that C, ICAC informed me in his letter of 8 January 2008 that the listener had listened to the LPP Call twice, but there was still no mention that the listener had listened to 20 odd calls in between. According to the letter, the department had in the course of compiling the Chronology of Events made reference to the ATR (see paragraph 7.54 above). If so, the department should have noted from the ATR that the listener had listened to 20 odd new calls in between but this fact was not mentioned in C, ICAC's letter of 8 January 2008. It was only after I asked for a copy of the ATR which was duly provided under C, ICAC's letter of 29 February 2008 that I discovered this fact. Furthermore, when C, ICAC attached the ATR to his letter of

29 February 2008, he should have easily discovered from the content of the ATR that the listener continued to listen at 1716 hours to another call, which was another irregularity. But C, ICAC did not mention this to me in his letter of 29 February 2008. It was only after I detected this from the ATR and questioned it in my letter of 8 April 2008 that C, ICAC stated that he would conduct an investigation into the non-compliance by the listener. By the time the department submitted an investigation report to me on 20 June 2008, it was already seven months after the occurrence of the events. The delay increased the difficulty of my review because the listener could easily say (save doing the contrary would be for his own benefit, vide paragraphs 7.75 and 7.76 above), as he in fact did, that he was unable to recall due to lapse of time, particularly as the recording, summaries, etc had all been destroyed.

7.94 Last but not the least, the information provided by ICAC was inaccurate or confusing. In his letter of 8 January 2008, C, ICAC informed me that ICAC had preserved record showing the duration of access made by individual listeners to their assigned facilities (see paragraph 7.53 above). In his further letter of 29 February 2008 (paragraph 7.56 above), he provided me with the record together with an explanatory note explaining the meaning of the headings used in the record. Ten months later in his letter of 18 December 2008 (paragraphs 7.67 and 7.68 above), C, ICAC informed me that some information provided in his previous letters of 8 January 2008 and 29 February 2008 and in the investigation report of 20 June 2008 was not entirely correct and that it was unsafe to rely on such information. This was not only frustrating but had wasted much of my time in the performance of my review function.

(c) No disciplinary action against the Responsible Officer and the Chief Investigator

7.95 In the present case, no disciplinary action was taken against the Responsible Officer for failing to preserve the written summaries for my review under paragraph 120 of the Code although the department considered that there was lack of vigilance on his part. The senior management had given him their advice but this advice was not even disciplinary in nature.

7.96 There was also no disciplinary action against the Chief Investigator who submitted the REP-11 report on the First LPP Call to the panel judge. He did not report that the listener had listened to the First LPP Call twice, that the listener had listened to 20 odd calls in between, and that the listener continued to listen to another call at 1716 hours on 13 November 2007 in breach of the supervisor's instructions and a further condition imposed by the panel judge referred to in paragraph 7.35 above. ICAC stated that the Chief Investigator was not aware of the listener's misconduct when submitting the REP-11 report because he did not make reference to the ATR and that there was no such procedure requiring him to do so. Since the Chief Investigator could have easily caused the ATR to be made available for his checking if he wished to do so, I could not understand why he did not do so in order to ensure what he reported to the panel judge contained a full and frank disclosure of all relevant facts. The department did not take any disciplinary action against this officer, not even a disciplinary advice.

(d) Review of records

7.97 In the review of this LPP case, four types of records were involved, namely, the recording of the intercept product, the REP-11 report, the ATR and the written summaries. After the submission of my 2007 Annual Report to the Chief Executive, my power to listen to the intercept product was doubted on the basis that the Ordinance had not specifically and expressly empowered me to do so. Regarding the REP-11 report, there was a suggestion that it was not apparent that I had a duty to verify the statement made by the LEA in the REP-11 report. As for the ATR, I was told by ICAC that it was unsafe to rely on the data of the ATR to ascertain if the listener had accessed the information subject to LPP because the duration recorded in the ATR might not be reliable. As regards the written summaries, they were not preserved for my examination because they did not contain any LPP information. But if they contained LPP information, the head of department should cause them to be destroyed as soon as reasonably practicable in accordance with section 59(2)(b). If so, what would be preserved for my review? Although ICAC had after this LPP case agreed to preserve the written summaries in future cases for my review and not to destroy them until the completion of my review, it would still not amount to non-compliance with the requirement of the Ordinance or the Code if the written summaries were really not preserved for whatever reason. All these are problems that have to be resolved, otherwise there would be very little that I can do in the review of LPP cases.

Report 3: Interception discontinued six to 18 minutes after the expiry of the prescribed authorizations

7.98 This irregularity was due to system failure in effecting discontinuance resulting in the facilities covered by five prescribed authorizations being disconnected six to 18 minutes after the expiry of the authorizations. The LEA reported this irregularity to me under section 54 of the Ordinance (after I ruled that the irregularity in Report 9 below which happened before this one was an unauthorized interception). It stated that arrangements had been made to preserve all relevant records and documents to facilitate my review of the irregularity.

7.99 According to the LEA's full investigation report submitted to me on 31 December 2008, there was no communication in respect of the facilities concerned during the brief periods of unauthorized interception. To help verify this, I asked the LEA to provide me with a copy of the call record and associated data from the last intercepted call before the expiry time of the respective prescribed authorizations up to five minutes after the discontinuation time in respect of the facilities under the five prescribed authorizations.

7.100 The LEA replied in writing that it did not have in its possession any call record. As for the associated data, the LEA replied that it had made enquiries with the officer who had been instructed to preserve all records and documents ('Officer Z') and he confirmed that no such data had been generated from the system during the relevant period; hence the department was unable to produce them. I responded that this could not be the case. At the very least, there should have been one call during the period I requested. I pointed out that I felt imprudent to solely rely on

Officer Z's confirmation that there was no call during the period of unauthorized interception without any documentary evidence to prove it.

7.101 By a subsequent letter, the LEA stated that as it did not occur to Officer Z that the associated data covering the period from the last intercepted call during the authorized period would be relevant for my purpose, such data had been destroyed automatically in accordance with the established destruction practice. Officer Z had based on a system log ('the system log') to confirm that there was no communication on those facilities during the period of unauthorized interception. But the system log had not been preserved because it did not contain any associated data.

7.102 By a letter dated 21 May 2009, I required Officer Z to provide a statement answering what his knowledge or understanding of my purpose was and the basis for his consideration that the associated data covering the period from the last lawfully intercepted call would not be relevant for my purpose for him to take a decision to allow such data to be automatically destroyed. I also required him to explain why he did not feel the need to preserve the system log as evidence of no communication on those facilities during the period concerned.

7.103 By a statement dated 26 May 2009, Officer Z stated that his understanding of one of my purposes was to establish whether the unauthorized interception had resulted in the infringement of the privacy of any individual. He considered that my request for providing the associated data from the last intercepted call before the expiry of the authorization to five minutes after the disconnection of the facilities was immaterial for my purpose because the last intercepted call before the expiry of the authorization was lawfully intercepted. While he apologised for not

preserving the system log as proof of no communication during the period of unauthorized interception, he considered that there were other avenues where I could obtain the best first-hand independent evidence to prove if there was any infringement during the period of unauthorized interception.

7.104 I was disappointed with this attitude of Officer Z. He fully understood that one of my purposes was to establish whether there was any infringement of the privacy of any individual during the period of unauthorized interception. If the LEA had in its possession a call record of the facilities concerned, I could have checked from the last call before the expiry of the authorization to the first call after the disconnection of the facilities concerned to verify that there was no call during the period of unauthorized interception. Alternatively, if the associated data from the last intercepted call before the expiry of the authorization up to a few minutes after the disconnection of the facilities were retained, I could likewise verify from the absence of associated data in between that there was no call during the period of unauthorized interception. On the other hand, if the system log which Officer Z based on was retained, I could have through examining the system log verified that there was truly no call during the period of unauthorized interception as claimed by him. In the present case, the LEA concerned did not have in its possession call records of the facilities concerned. Officer Z, however, did not preserve the associated data or the system log for my examination. He had failed to follow the instructions given to him at the occurrence of the irregularity to preserve all relevant records and documents for my review. I was surprised that Officer Z did not feel the need to preserve evidence to support his claim of no communication. Did he feel that I should rely on his claim or statement which, as an experienced law enforcement officer must

appreciate, is hearsay, instead of relying on first-hand evidence? His argument that I could obtain the best first-hand independent evidence from other avenues reflected badly on his attitude. The fact that there were other avenues for obtaining the evidence or information could not excuse him from ignoring the instructions and not preserving the records or documents. Why did I have to seek evidence from other avenues if the evidence could have been available within the department? What if the other avenues could not provide the evidence for whatever reason? What if I had to compare the evidence from various quarters? While he might be excused for not preserving the associated data because of his failure to understand the need, his lack of intention to preserve the system log was inexcusable. It is utterly wrong if he did not feel that he had a duty to preserve evidence if evidence could be found elsewhere. Not only did he fail to comply with the instructions to preserve all records for my review, his attitude towards my oversight and review functions was arrogant and presumptuous, bordering on recalcitrance!

7.105 Regarding the attitude of Officer Z, I have not yet raised the issue with the LEA pending the completion of this report. As regards the irregularity in this case, I had separately made enquiries with the CSPs concerned. I found no evidence to suggest that the irregularity was not due to system failure. The CSPs also verified that there was no communication in respect of the facilities concerned during the brief periods of unauthorized interception.

7.106 It is not appropriate to disclose further details about this case because that would probably divulge information relating to the prevention or detection of crime or to the protection of public security, which would

put LEAs in a disadvantageous position as against criminals or possible criminals.

Report 4: Interception discontinued 18 minutes after the expiry of the prescribed authorizations

7.107 This irregularity related to the discontinuance of the facilities covered by four prescribed authorizations. Because of the malfunctioning of the interception system, discontinuance of the interception of the facilities concerned failed to take effect until 18 minutes after the time of expiry of the prescribed authorizations resulting in unauthorized interception for 18 minutes on these facilities. The LEA reported this irregularity to me under section 54 of the Ordinance and stated that it had made arrangements to preserve all relevant records and documents to facilitate my examination into the case. It submitted a full investigation report on 31 December 2008.

7.108 According to the LEA, there was no communication during the 18 minutes of unauthorized interception. Same as the handling in Report 3, I requested the LEA to provide me with a copy of the call records and associated data for the period from the last lawfully intercepted call up to five minutes after the disconnection of the facilities. But the LEA could not provide them for the same reason as stated in paragraphs 7.100 and 7.101 above. In my letter of 21 May 2009 referred to in paragraph 7.102 above, I stated that the questions I asked in that letter also applied to this case. Officer Z subsequently provided me with a statement, details of which and my comments have already been described under Report 3 above.

7.109 I had separately checked with the CSP concerned in this case. I was satisfied that this irregularity was caused by a system problem. The problem could be resolved by upgrading the system. No communication was intercepted in respect of the facilities covered by the four prescribed authorizations during the short period of unauthorized interception. By reason of the non-prejudice principle, it is not appropriate to disclose more details about this case.

Irregularities or incidents reported not under section 54

Reports 5 to 8: Interception conducted after the revocation of prescribed authorization under section 58

7.110 Under section 58 of the Ordinance, a panel judge shall revoke a prescribed authorization upon receipt of a report on arrest from an LEA if he considers that the conditions for the continuance of the prescribed authorization under section 3 are not met. The revocation takes immediate effect and unless the interception or covert surveillance operation had already been stopped by the time of the submission of the section 58 report to the panel judge, there is bound to be a time gap between the revocation of the authorization and the discontinuance of the operation that can only take place after the LEA gets to know of the revocation. The operation conducted during the time gap is an unauthorized activity no matter how short the duration is.

7.111 To tackle the problem, the Security Bureau had worked out pragmatic arrangements for handling such cases to minimize possible intrusion into the privacy of individuals concerned. The Security Bureau and LEAs considered that with such arrangements, the on-going operation

between the panel judge's revocation of a prescribed authorization and the actual discontinuance of the operation concerned was not unauthorized.

7.112 As pointed out in my 2007 Annual Report, I considered that the pragmatic arrangements could not have the effect of legitimizing the operation during the time gap between revocation and discontinuance and maintained the view that such operation was unauthorized and amounted to non-compliance under section 54 of the Ordinance. I required the LEAs to report such cases to me. The long term solution is to amend the Ordinance to allow the relevant authority to defer the time of revocation of the prescribed authorization. Although the Security Bureau and the LEAs did not consider such irregularities as non-compliance under section 54, they nonetheless agreed to report such incidents to me. The Security Bureau will examine this issue in its comprehensive review of the ICSO.

7.113 In the report period, only one LEA had encountered such a situation and my office received four reports from it involving seven prescribed authorizations. The time gap between the revocation and disconnection of the facilities in each of these cases was:

Report 5 (two prescribed authorizations)

About one hour

Report 6 (three prescribed authorizations)

About 20 minutes

Report 7 (one prescribed authorization)

28 minutes

Report 8 (one prescribed authorization)

13 minutes

7.114 I had conducted a review of all these cases and examined the relevant documents. In all these cases, the reports of arrests were submitted to the panel judge within one or two days of arrest. In each of them, no communication was intercepted during the unauthorized period.

7.115 In the review of these cases, I made the following recommendations.

(a) Handling of listening subsequent to arrest

7.116 I found that as a matter of practice, the LEA did not cease listening upon the arrest (or upon becoming aware of the arrest) of the subject or upon a decision made to submit a section 58 report. While it does not seem to be illegitimate for the LEA to continue listening prior to the revocation of the prescribed authorization, I advised that the LEA should only adopt this practice with great caution. First, they may be criticized for reporting the arrest late for the questionable purpose of obtaining more information or evidence against the subject, contrary to section 58 which obliges them to so report as soon as reasonably practicable after becoming aware of the arrest. Second, the listening to calls intercepted after the arrest of the subject may well involve a greater risk of obtaining information subject to LPP.

(b) Preservation of records

7.117 I recommended that for section 58 cases where the authorization was revoked by the panel judge, the LEA should preserve the records of the communications intercepted including associated data from the time of arrest to the time of disconnection of the facility to facilitate my review. This was agreed to by the LEA and promulgated by the Security

Bureau as a standard requirement for all LEAs to follow with effect from 7 January 2009.

Report 9: Interception discontinued three minutes after the expiry of the prescribed authorization

7.118 This irregularity was due to the failure of an officer to allow sufficient time for processing the discontinuance of an interception resulting in the disconnection of a facility being completed three minutes after the expiry of the prescribed authorization.

7.119 The LEA submitted an incident report to the Secretary to the Commission to report this irregularity. The LEA did not consider the irregularity as non-compliance reportable under section 54 of the Ordinance. It stated that while the discontinuance of the interception was completed after the expiry of the prescribed authorization, the discontinuation process had actually started at a time when the prescribed authorization was still in force. Once the discontinuance process started, it could not be reversed. No communication was intercepted during the three minutes between the expiry of the prescribed authorization and the completion of the discontinuation process.

7.120 Having examined the discontinuance process in this case, I considered that the interception during the three minutes after the expiry of the prescribed authorization fell within the definition of intercepting act under the Ordinance, as it could still capture data during those few minutes. The fact that there was no communication by the subject of the prescribed authorization during the period concerned was another matter.

7.121 I notified the LEA of my findings, with reference to the definition of 'interception' in the Ordinance, that the interception during the three minutes between the expiry of the prescribed authorization and the completion of the disconnection of the facility was conducted without the authority of a prescribed authorization and was unauthorized. The irregularity was due to the failure of the officer to take into account the lead time required for discontinuing an interception. The intrusion into the privacy of the subject caused by this irregularity was negligible, if not nil, because there was no communication during the 3-minute period in which the unauthorized interception took place.

7.122 The LEA considered that the incident was caused by an inadvertent omission on the part of the officer concerned and considered that a word of advice of a non-disciplinary nature from the officer's supervisor was sufficient and appropriate. As the LEA had advised me that the officer concerned was aware of the lead time required and indeed the need to allow for sufficient time for processing discontinuance was a well-established practice in the office, I found the failure to follow the well-established practice extraordinary. I requested the LEA to inquire into the reason behind. After further enquiries and from the materials available, there was no evidence by which I could disagree with the finding of the LEA that the failure was due to the officer's momentary forgetfulness.

7.123 In giving my findings, I recommended the LEA to take appropriate action to prevent recurrence such as to advance the time for the start of discontinuation process. This was duly followed by the LEA together with other improvement measures.

Report 10: Interception of a facility number not authorized by any prescribed authorization

7.124 An LEA reported to me in 2008, with a full investigation report in February 2009, an incident where a facility number which did not appear in any prescribed authorization in force at that time was intercepted until it was discovered by the Team and disconnected subsequently. I made enquiries with the LEA, the Team and the CSP concerned. According to the records available, interception on this facility lasted 21 hours during which there were a number of calls which had been listened to by the LEA. Having reviewed the circumstances of this case, I was satisfied that this interception was caused by a combination of factors not due to any fault of the aforesaid parties. I do not consider it prudent to divulge further details as this would be prejudicial to the prevention or detection of crime and the protection of public security. Measures have been worked out and put into effect to prevent recurrence.

Report 11: Reactivation of discontinued interception

7.125 The Team reported to me an incident on the reactivation of four discontinued interceptions for a few hours due to technical complications at the CSP's end. It submitted a full investigation report to me recently. My review has not been completed at the time of writing this report.

Reporting pursuant to section 54 or otherwise

7.126 Under paragraph 7.3 above, I set out the 11 reports made pursuant to section 54 and not made under section 54. Section 54 provides:

> 'Without prejudice to other provisions of this Part, **where the head of any department considers** that there may have been any case of **failure** by the department or any of its officers **to comply with any relevant requirement**, he **shall** submit to the Commissioner a report with details of the case (including any disciplinary action taken in respect of any officer).' (Emphasis added.)

7.127 I accept that Reports 1 to 4 were correctly made pursuant to section 54 and Reports 10 and 11 were also correctly made not pursuant to the section. However, I considered that Reports 5 to 9 should have been made pursuant to section 54. The key consideration according to the wording of the section is whether or not the irregularity involved amounted to a non-compliance with the relevant requirements of the Ordinance.

7.128 My reasons are set out in the last column of the table below:

Report 1 :	Interception of a wrong facility.	Non-compliance because the prescribed authorization ('PA' in this table) to intercept this facility should never have been granted and the panel judge would not have granted it on the wrong facility but for the misleading information in the affirmation supporting the application.

Report 2 :	Non-compliance with supervisor's instructions and breach of a condition of the PA.	A condition of a PA is by definition a relevant requirement of the ICSO, and a breach of such condition amounted to a non-compliance.
Report 3 :	Interception discontinued six to 18 minutes after the expiry of the five PAs.	The interception that continued six to 18 minutes after the expiry of the PAs was without any authorization as required by the ICSO, thus non-compliance.
Report 4 :	Interception discontinued 18 minutes after the expiry of the four PAs.	The interception that continued 18 minutes after the expiry of the four PAs was without any authorization as required by the ICSO, thus non-compliance.
Reports 5 to 8 :	Interception conducted after the revocation of seven PAs.	Upon the revocation, the interception had no PA to support and thus amounted to non-compliance.
Report 9 :	Interception discontinued three minutes after the expiry of the PA.	The interception that continued three minutes after the expiry of the PA was without any authorization as required by the ICSO, thus non-compliance.

Report 10 :	Interception of a facility number not authorized by any PA.	Though not authorized by any PA, the interception was not caused by the fault of any LEA or its officers.
Report 11 :	Reactivation of four discontinued interceptions.	The reactivation of interception after discontinuance was not caused by the fault of any LEA or its officers.

7.129 Notwithstanding the difference in opinion, one cannot say that the heads of the LEAs concerned regarding Reports 5 to 9 must be wrong, because section 54 specifically imposes the obligation of reporting thereunder where the head of the LEA considers that there may have been a case of non-compliance by it or by its officers, and not where I or anyone else so consider.

7.130 Indeed, they had taken the stance of reporting these cases and those under Reports 10 to 11 as cases of irregularities or incidents, for which I am grateful, because without their reports, it would be very difficult, if not impossible, for me to discover that these irregularities had ever occurred. It cannot be denied, however, that any irregularity, whether a head of an LEA considers it to qualify as possible non-compliance, should be reported to me for my examination and review, so as to ensure that non-compliance is minimized and the privacy of citizens better protected. I suggest that appropriate amendments be made to the Ordinance to include a duty of the LEA heads to report to me promptly whatever irregularity in the operation of the ICSO scheme instead of

leaving such reporting as a matter of non-statutory goodwill or courtesy or at most gentlemen’s agreement.

CHAPTER 8

RECOMMENDATIONS TO THE SECRETARY FOR SECURITY AND HEADS OF LAW ENFORCEMENT AGENCIES

My function to recommend

8.1 My functions and duties as the Commissioner are clearly defined in section 40 of the Ordinance. Pursuant to section 40(b)(iv), without limiting the generality of my function of overseeing the compliance by the LEAs and their officers with the relevant requirements of the Ordinance, I may make recommendations to the Secretary for Security and heads of the LEAs as and when necessary. Further elaboration on the issue can be found in sections 51 and 52. According to section 51(1), in the course of performing any of my functions under the Ordinance, if I consider that any provision of the Code issued by the Secretary for Security under section 63 should be revised to better carry out the objects of the Ordinance, I may make such recommendations to the Secretary for Security as I think fit. Section 52(1) also provides that if I consider that any arrangements made by any LEA should be changed to better carry out the objects of the Ordinance, I may make such recommendations to the head of the LEA as I think fit.

8.2 Section 52(3) also confers on me the discretion to refer the recommendations and any other matters I consider fit to the Chief Executive, the Secretary for Justice and any panel judge or any one of them. During the report period, there was no occasion on which I considered it

appropriate to have the recommendations referred to the Chief Executive or the Secretary for Justice, although wherever the recommendations concerned the panel judges, they were informed of the same, so that they were fully apprised of my recommended arrangements well in time.

Recommendations to the Secretary for Security

8.3 During the report period, I made a number of recommendations to the Secretary for Security. These are set out below. Recommendations 1 and 2 (except the one stated in paragraph 8.11 which was still being considered by the Secretary for Security) have already been incorporated in the revised code issued on 9 February 2009 ('the revised Code').

(1) Report on the discontinuance of interception / Type 1 surveillance (COP-7)

8.4 Section 57(3) stipulates that where any officer has caused any interception or covert surveillance to be discontinued, he shall, as soon as reasonably practicable after the discontinuance, cause a report on the discontinuance and the ground for the discontinuance to be provided to the relevant authority. To cater for the scenarios of (a) discontinuance of multiple schedules[Note 3] in an authorization for interception; and (b) discontinuance of interception operation before the decision to discontinue the operation was made, an LEA proposed to amend the form COP-7 (report on the discontinuance of interception / Type 1 surveillance carried out under a prescribed authorization). When the Secretary for Security informed me of the proposed amendments, I found that for the statement

Note 3 A prescribed authorization for telecommunications interception sets out the facilities authorized to be intercepted in the schedules to it, each schedule containing one facility.

under the section *[For discontinuance before the decision to discontinue the operation was made]*, the reporting officer was not required to state the time of the decision. I considered that there should be a decision to discontinue the operation even in such a scenario. I therefore advised that the time of the decision should be stated in the form.

8.5 In addition, the Secretary for Security was advised by me that under the section *[If the interception / Type 1 surveillance has not started]*, the second sentence 'The decision **to discontinue** the operation …' should more appropriately be rephrased as 'The decision **not to start** the operation …'. (Emphasis added.)

8.6 My advice was accepted. COP-7 was duly amended and incorporated in the revised Code. It can be found in Vol 13 of Gazette No. 7/2009 (13 February 2009), pp 2375-6.

(2) Statement in writing in support of an application for renewal of an executive authorization for Type 2 surveillance (COP-13)

8.7 As described in paragraph 8.23 of my 2007 Annual Report, when reviewing a case of irregularity with a nine-hour break between the expiry of an original executive authorization for Type 2 surveillance and the commencement of the renewed executive authorization, I pointed out that the wording in paragraph 2(d) of the form 'COP-13: statement in writing in support of an application for renewal of an executive authorization for Type 2 surveillance' was misleading. I recommended to the Secretary for Security that the paragraph should be improved by adding a remark to alert the applicant that the starting time of the renewal should

dovetail with the expiry time of the prescribed authorization to be renewed so as to comply with the requirement in section 19(a) of the Ordinance.

8.8 In the light of my advice, the Secretary for Security had amended the wording of the relevant paragraph of COP-13 with effect from 11 April 2008 to draw attention to the requirement that the renewal should take effect at the time when the executive authorization would have ceased to have effect but for the renewal, as follows:

> ' The proposed duration of the renewal:
>
> *(no more than 3 months.)*
>
> Starting Date*: Time*:
>
> Proposed Operation Period-
>
> ☐ Finishing Date: Time:
>
> ☐ Until the following event takes place or 3 months, whichever is the earlier:
>
> *In accordance with section 19(a) of the ICSO, the renewal should take effect at the time when the executive authorization would have ceased to take effect but for the renewal.'

8.9 Nevertheless, for further improvement of the form, I suggested to the Secretary for Security that:

(a) The sentence denoted by * should be placed immediately under the starting date and time.

(b) The words 'Proposed Operation Period' should be deleted as what follows is the finishing date and time, not a period.

(c) The word 'or' should be added between the box 'Finishing Date and Time' and the box 'Until the following event takes place or 3 months, whichever is the earlier'.

8.10 My recommendations were accepted. The amended form was incorporated in the revised Code. The Secretary for Security has also been advised to make similar amendments to the relevant paragraph of the internal form 'REC-6: record of application for renewal of executive authorization made orally'.

8.11 Apart from the above, I suggest that the wording 'Until the following event takes place or 3 months, whichever is the earlier' be deleted from the form COP-13 as well as other similar forms. Details of my recommendation on the matter can be found in paragraphs 9.14 to 9.20 of Chapter 9.

(3) Revocation of an executive authorization upon a report on the discontinuance of Type 2 surveillance (REV-1)

8.12 Section 57 of the Ordinance provides that if a reviewing officer or an officer in charge of the statutory activity is of the opinion or becomes aware that the ground for discontinuance of the prescribed authorization exists, he shall cause the interception or surveillance to be discontinued and shall, after the discontinuance, cause a report on the discontinuance and the ground for discontinuance to be provided to the relevant authority. The relevant authority shall, after receiving the report, revoke the prescribed authorization concerned. For Type 2 surveillance, the revocation is made by an internal form REV-1 (revocation of an

executive authorization upon a report on the discontinuance of an authorized operation of Type 2 surveillance).

8.13 I noted that under the section *[For an operation that has not started]*, the REV-1 form required the authorizing officer to set out details of discontinuance of an operation that had not started. It appeared, however, that such details should be set out by the reporting officer in the discontinuance report rather than by the authorizing officer in the revocation form. It was also observed that for a similar situation under interception and Type 1 surveillance, there is no similar requirement requiring the panel judge to set out in the revocation form the details of discontinuance of an operation that has not started. I have notified the Secretary for Security of my above observations.

(4) Revocation of an authorization upon a report on the discontinuance of interception / Type 1 surveillance (JF-12)

8.14 As mentioned in paragraph 8.12 above, under section 57, after receiving a report on discontinuance, the relevant authority shall revoke the prescribed authorization concerned. For interception and Type 1 surveillance, the revocation is made by the panel judge through an internal form JF-12 (revocation of an authorization upon a report on the discontinuance of an authorized operation of interception / Type 1 surveillance).

8.15 It had come to my attention that the statement relating to the operation not having started omitted to mention that the operation 'has not started'. The statement simply mentioned under which prescribed authorization the operation was authorized, who issued the authorization

and the time of issue. I therefore recommended to the Secretary for Security that the following italicized part should be added at the end of the statement:

> 'The operation that was authorized to be carried out by or on behalf of any of the officers of the **[name of department]** was under a prescribed authorization, **[ICSO No.]**, that was issued by … the Honourable Mr Justice on the day of at hours *and that it has not started because it has not been possible/necessary to do so*.'

Recommendations to heads of LEAs

8.16 Through the discussions with the LEAs during my inspection visits and the exchange of correspondence with them in my review of their compliance with the relevant requirements of the Ordinance, I have made a number of recommendations to the LEAs to better carry out the objects of the Ordinance. From time to time, the Secretary for Security and his staff have also been actively involved in coordinating the responses from the LEAs and drawing up their implementation proposals. All of my recommendations of substance to the LEAs during the report period are set out in the ensuing paragraphs.

(1) Interpretation of 'if known' under Part 1(b)(xi), Part 2(b)(xii) and Part 3(b)(xii) of Schedule 3 to the ICSO

8.17 Part 1(b)(xi), Part 2(b)(xii) and Part 3(b)(xii) of Schedule 3 to the ICSO require the affidavit or statement supporting an application for the issue of an authorization for interception, Type 1 surveillance or Type 2 surveillance to set out, if known, whether during the preceding two years, there has been any application for the issue or renewal of a prescribed

authorization in which any person set out in the affidavit or statement has also been identified as the subject of the interception or covert ICSO activities concerned. Regarding interception, disclosure of previous applications for interception of telecommunications facilities is also required. As pointed out in my 2007 Annual Report, the knowledge was interpreted by an LEA to be the personal knowledge of the applicant rather than that of the department. The LEA concerned was worried that any deviation from the principle of compartmentalization would seriously undermine their operations.

8.18 Compartmentalization connotes that only officers responsible for a certain matter should know and have access to information to which that matter relates and such knowledge and access are kept within their section or compartment to the exclusion of officers of other sections or compartments. This is sometimes described as the 'need to know' basis. While recognizing the importance of the LEA to maintain the compartmentalization principle, I have little doubt that the panel judge should be apprised of the departmental knowledge of previous applications for both interception and covert surveillance on the subject. To this end, I recommended to the LEA during my inspection visits the need to provide departmental knowledge.

8.19 The LEA accepted my view on departmental knowledge. At the time of writing this report, the LEA is in the process of introducing measures to satisfy the requirement to provide departmental knowledge to the panel judges and authorizing officers while safeguarding their compartmentalization policy.

(2) Supplementary sheet for the application for an authorization for interception and Type 1 surveillance

8.20 During my inspection visit to an LEA, I noted that in considering an application for an authorization for Type 2 surveillance, the departmental authorizing officer would seek clarification from the applicant when necessary by the use of a supplementary sheet. The same procedure was also applicable to an application for interception or Type 1 surveillance where the endorsing officer might seek additional information from the applicant as he deemed necessary. While the use of supplementary sheet in Type 2 surveillance was acceptable as the documents involved were not required to be sworn documents, the use of it in interception or Type 1 surveillance might be problematic because it would not form part of the information required to be on affidavit to be made under oath. I therefore suggested that the supplementary sheet should be revised so as to include it as part of the affidavit. A new form was then devised by the LEA for the purpose.

8.21 While the original purpose of the new form was to record any supplementary information provided by the applicant to the endorsing officer for an application for interception or Type 1 surveillance, the Secretary for Security considered that the form could also be applied to recording the supplementary information (regardless of whether the information is requested by the endorsing officer or the panel judge) provided for all types of applications which need to be supported by an affidavit, as set out below:

(a) all applications for judge's authorization [section 8(1)];

(b) all applications for renewal of judge's authorization [section 11(1)];

(c) all applications for confirmation of an emergency authorization [section 23(1)];

(d) all applications for confirmation of a judge's authorization issued upon an oral application [section 26(1)];

(e) all applications for confirmation of renewal of a judge's authorization granted upon an oral application [section 26(1)]; and

(f) all applications for confirmation of an emergency authorization issued upon an oral application [section 28(1)].

8.22 I agreed with the Secretary for Security's suggestion and subsequently proposed a few amendments to improve the content and wording of the new form.

(3) Report on the discontinuance of interception / Type 1 surveillance (COP-7)

8.23 Under section 49(2)(d)(vii) of the ICSO, I have to report the number of cases in which LPP information has been obtained in consequence of any interception or covert surveillance carried out pursuant to a prescribed authorization. However, there was often discrepancy between the PJO and an LEA on reporting LPP cases. The PJO considered

cases which were initially assessed to have the likelihood of obtaining LPP information at the time of the application to be LPP cases if the LEA did not specify in the COP-7 report form (discontinuance report) that no LPP information had actually been obtained. In order to facilitate my compliance with section 49(2)(d)(vii) and to avoid any discrepancies between a PJO's weekly report and the LEA's weekly report for the same period, the LEA was advised to specify clearly in the COP-7 report form whether LPP information had in fact been obtained for cases originally assessed to have the likelihood of obtaining LPP information. The recommendation was accepted by the LEA and the following text would be included in the COP-7 report where appropriate:

> 'Although in the earlier process of the case it was assessed there was the likelihood of obtaining LPP information, LPP information has not been obtained.'

(4) Submission of discontinuance report shortly before the expiry of prescribed authorization

8.24 During an inspection visit, an LEA sought my advice on a case related to the submission of a discontinuance report shortly before the expiry of the prescribed authorization. In that case, the panel judge refused an application for the renewal of an authorization for interception on the ground that the conditions under section 3 of the Ordinance were not met. In the light of the panel judge's determination, the LEA decided to discontinue the existing interception one day before the expiry of the existing prescribed authorization. By the time the LEA received confirmation from the Team on the discontinuance of the relevant interception, the existing prescribed authorization had already expired. The

LEA then submitted the discontinuance report to the panel judge who then noted the discontinuance. The PJO, however, also notified the LEA that it was unnecessary to submit a discontinuance report in such circumstances.

8.25 I advised the LEA that the submission of a discontinuance report under the circumstances was unnecessary because a refusal of renewal of an existing prescribed authorization should have no bearing on its validity, as long as the section 3 conditions were still met. However, I pointed out that a discontinuance report should be submitted as soon as practicable after the decision of discontinuance was made upon the arrest of the subject of the authorization, regardless of whether the authorization could be revoked by the panel judge before its expiry. This was for maximizing the protection of LPP which would probably arise after arrest. In addition, for the benefit of the panel judge upon receipt of a discontinuance report, the LEA should, in any future similar situation where a discontinuance report would reach the hands of the panel judge after the expiry of the relevant authorization, add an ending note to the discontinuance report to the effect that '…this discontinuance report is submitted in accordance with section 57 of the ICSO although the prescribed authorization is going to expire at (time) on (date)'. The LEA accepted my advice and undertook to adopt the above practice.

(5) Listening to intercept product after revocation of authorization

8.26 Under a standard condition in a judge's authorization, an LEA is under a continuing duty to bring to the attention of any panel judge any material change of the circumstances upon which the authorization was granted or renewed, and changes in LPP risk is one of such circumstances. In addition, as pointed out in paragraph 2.22 of Chapter 2, if an

authorization which was assessed to have the likelihood of LPP information being obtained was issued or renewed, further conditions would be imposed by the panel judges to restrict the powers of the LEA for better protection of the right of the subject to LPP.

8.27 During an inspection visit, it was suggested to me that where an REP-11 report had been made to a panel judge and the panel judge thereupon revoked the authorization, it did not seem to be illegitimate for the LEA:

(a) to listen to any recorded intercept products obtained under a valid authorization which had not yet been listened to; and

(b) to re-listen to intercept products which had been listened to, because the protected products had been obtained under a valid authorization within its validity period and there was nothing in the wording of the authorization to prohibit such listening.

8.28 In respect of the above, I advised that the LEA should ensure full disclosure of its intention in the REP-11 report and expressly seek the panel judge's approval for (a) and (b) above, so that in case the panel judge is minded to revoke the prescribed authorization concerned, he could make an informed decision having regard to what the LEA intends to do.

8.29 The LEA agreed with my recommendation. After seeking my comments, the LEA had devised standard wording in the REP-11 report for authorizations imposed with the LPP further conditions by the panel judge.

(6) Recommendations in connection with covert surveillance

8.30 As mentioned in Chapters 3 and 4, I also made a number of recommendations to the LEAs through my inspection visits to their premises and the checking of their inventory lists and device registers. The recommendations concerned are summed up below:

(a) *Withdrawal of devices before the effective time of the authorization*

The effective time for a prescribed authorization sought should include a 'lead time' for testing the serviceability of the devices to be drawn and that the duration of the 'lead time' must be reasonable [paragraph 3.22].

(b) *Ground for discontinuance of Type 1 surveillance*

LEA officers concerned should be reminded of the importance to distinguish the difference between 'circumstantial limitation' and 'beyond the ambit of the authorization' and to report precisely the reason for discontinuance in the discontinuance report to the relevant authority and the weekly report to me [paragraph 3.26].

(c) *Reissue of devices within a short period of time*

In the event that devices were returned and reissued within a short period of time, an explanatory note should be made contemporaneously at the respective 'remark' field of the device register to facilitate my checking [paragraph 3.29(a)].

(d) *Movements of devices for repairing purpose*

Any movements of devices for repairing purposes should be recorded properly in the non-ICSO device registers [paragraph 3.29(b)].

(e) *Item-numbering of devices in the inventory list*

Re-numbering of the devices as a result of deletion or removal of devices should only be made as an annual exercise and before that, deleted or removed devices and the corresponding item numbers would only be crossed out but remain on the relevant inventory list [paragraph 3.29(d)].

(f) *Computerization of device recording system*

The ICSO device recording system of an LEA should be extended to cover the device registers for non-ICSO purpose. The same computer system should be used by other LEAs where appropriate to better control the issue and collection of its surveillance devices [paragraph 3.30].

(g) *Application without sufficient explanation of the purpose of surveillance sought*

Applicants should provide sufficient explanation in their written statement in support to justify an application when submitted. Authorizing officers should not approve an application based on their personal experience. They should take a critical approach when considering each application

and, when necessary, seek clarification and explanation from the applicant before they come to any determination [paragraph 4.22].

(h) *Starting time and issuing time of an authorization in records of determination*

The records of determination REC-3, REC-4, REC-7, REC-8 and REC-10 should be amended to include the starting time of the authorization as a result of an oral application, which might be later than the time of issue, as well as the date and time of the issue of the authorization [paragraphs 4.23 to 4.25].

(i) *Incomplete information provided to authorizing officer*

Improvement should be made to ensure that all relevant facts of a case are disclosed to the relevant authority in an application for a prescribed authorization [paragraph 4.26].

(j) *Deficiencies in preparation of revocation documents*

(i) Training should be provided to officers on how to state the grounds for discontinuance precisely and concisely [paragraph 4.30(a)];

(ii) the authorizing officer should exercise care in entering the time of discontinuance in form REV-1 [paragraph 4.30(c)]; and

(iii) the supplementary sheet (see paragraphs 8.20 and

8.21 above) should be prepared in a more formal and self-explanatory manner. It should bear, among other things, the name, rank and signature of the officer providing clarification in the supplementary sheet, with date and time. The authorizing officer should also signify the question he asks with date and time. He should also indicate that he has noted the supplementary sheet submitted and sign it with date and time [paragraph 4.30(b)].

(7) Recommendations made upon review of LPP cases referred to in the 2007 Annual Report and in this report

8.31 Following the completion of the review of LPP Case 1 and in the light of experience gained in the reviews of LPP Cases 2 and 3 (all these three cases can be found in Chapter 5 of my 2007 Annual Report), on 29 July 2008, I formally made the following recommendations to C, ICAC pursuant to section 42(1):

(a) In future, when reporting cases of inadvertent obtaining of information which might be subject to LPP, the department should attach to its notification letter to me sanitized copies of the relevant documents as specified in my recommendation.

(b) To facilitate my review of such cases, the department should preserve the records of the communications intercepted from the LPP call up to the time of disconnection. Other relevant records should also be preserved. All these records should not be destroyed without my prior consent.

By a letter dated 28 August 2008, C, ICAC indicated his acceptance of my above recommendations.

8.32 In the said letter of 29 July 2008, I also requested the Secretary for Security to notify other LEAs to comply with the above recommended requirements, and he has done so.

8.33 In my review of the LPP case in Chapter 5 of this report, I recommended that in all future cases, ICAC should provide a full and frank disclosure to the panel judge on who had listened to the LPP call, the number of occasions and the duration of listening [paragraph 5.19]. This recommendation was accepted by ICAC.

(8) Recommendations made upon review of cases of irregularities and incidents

8.34 In the course of my review of the irregularities and incidents mentioned in Chapter 7, I also made a number of recommendations to the Secretary for Security and the LEAs concerned. A summary of those recommendations to the LEAs is shown below:

Report 1: Interception of a wrong facility

(a) In view of the apparently tight verification procedures still being beaten by the combined mistakes made by more than one officer, I made some recommendations in improving and strengthening such procedures and they were accepted by ICAC [paragraph 7.31].

(b) There should be a checker to check the accuracy of the

content of the discontinuance report before submission to the panel judge [paragraph 7.33].

Reports 5 to 8: Interception conducted after the revocation of prescribed authorization under section 58

(c) While it does not seem to be illegitimate for the LEA to continue listening prior to the revocation of the prescribed authorization upon the submission of a section 58 report, the LEA should only adopt this practice with great caution. First, they may be criticized for reporting the arrest late for the questionable purpose of obtaining more information or evidence against the subject, contrary to section 58 which obliges them to so report as soon as reasonably practicable after becoming aware of the arrest. Second, the listening to calls intercepted after the arrest of the subject may well involve a greater risk of obtaining information subject to LPP [paragraph 7.116].

(d) For section 58 cases where the authorization was revoked by the panel judge, the LEA should preserve the records of the communications intercepted including associated data from the time of arrest to the time of disconnection of the facility to facilitate my review [paragraph 7.117]. In addition to preserving those records, I also recommended in the reviews of Cases 6 to 9 referred to in Chapter 7 of the 2007 Annual Report that other relevant records (as specified) should also be preserved, that all the records should not be destroyed without my prior consent, and that

the LEA should attach sanitized copies of the relevant documents when reporting such section 58 cases to me.

Report 9: Interception discontinued three minutes after the expiry of the prescribed authorization

(e) The LEA should take appropriate action to prevent recurrence of disconnection only after the expiration of a prescribed authorization, such as to advance the time for the start of discontinuation process [paragraph 7.123].

(9) Recommendation on sanitization of documents

8.35 To facilitate my review of cases relating to LPP information, irregularities or other matters, LEAs are required to provide a sanitized copy of the relevant documents to me. A document is sanitized by having the names, addresses and similar sensitive or secret particulars of the subject of the prescribed authorization and his associates obliterated, so that not only is privacy better protected but secrecy is continuously maintained. For the better understanding and easier reading of the copies by me and my staff, I recommended to an LEA that the sanitization should be made not only by deleting the names of subjects and persons (including companies or unincorporated organizations) involved in the investigation, but the deleted parts should also be substituted with numbers, [1], [2], [3], etc for the persons and [A], [B], [C], etc for the companies and other organizations. The Secretary for Security was also requested to inform all other LEAs to adopt such practice across the board, which was done.

CHAPTER 9

OTHER RECOMMENDATIONS

Introduction

9.1 With the benefit of the views expressed by LegCo Members after the publication of my 2007 Annual Report and noting that the Security Bureau would conduct a comprehensive review of the ICSO after receipt of my second full year report (ie this 2008 Annual Report), I wish to outline in this chapter a new initiative on checking of intercept product and related records that requires legislative amendments to be put into effect. In addition, I also raise a couple of matters regarding the provisions of the Ordinance and the Code so that these matters can also be looked into when the Ordinance or the Code is reviewed or revised.

Proposed system of checking of intercept products and related records

Genesis

9.2 A member of the public may, justifiably or without any expressed justification, suspect an LEA officer to conduct communications interception or covert surveillance against him without the authority of a prescribed authorization. In such a situation, my enquiry with the LEA concerned may not produce the true answer: the LEA officer himself will certainly keep his unauthorized activity to himself and his senior officers and the head of the LEA will not know it. Depending on how secret the unauthorized activity is, my enquiries with other parties and their constant periodic reports of information to me may not help expose it. Apart from

enquiries with these other parties, I had not been able to design and devise further measures to detect such possible unauthorized activities or to fully ensure that LEAs operate in accordance with the requirements of the ICSO and the Code.

9.3 It was only recently that I came up with ideas for further improving the review measures regarding interception of communications, which are for the content of intercept products and related records to be preserved to enable my staff and me to check cases of special interest or chosen at random.

Benefits

9.4 Through this system of checking, the following benefits are envisaged:

(a) to check the intercept product against the relevant LEA's REP-11 report to see if the content of the report truly represents the intercept product as allegedly heard by the listener, such as in a case where the REP-11 report notifies the panel judge of the obtaining of LPP or likely LPP information, so that any attempt at misrepresentation for reducing the extent of the information to lessen the effect of the continuation of the listening on LPP would be thwarted or exposed;

(b) similar to (a) regarding LPP, to check the intercept product against an REP-11 report on JM, similarly for thwarting any attempt at misrepresentation in the REP-11 report about JM or exposing any such misdeed;

(c) to check the intercept product which contains earlier and later conversations than the reported conversation referred to in the REP-11 report, so as to thwart any attempt by the LEA to choose to mention the reported conversation in the REP-11 report for ulterior motive, such as hiding an earlier clear LPP/JM case and reporting a later apparent but not real LPP/JM case for the wrongful purpose of making use of the earlier LPP/JM information and/or inducing the panel judge to allow the continuation of the operation, or to expose any such misdeed;

(d) to check intercept products by selecting cases at random so as to prevent or expose cases where LPP or JM is involved but no REP-11 report to the panel judge and COP 120 report[Note 4] to the Commissioner have been made; such exposure would help set in train enquiries about the compliance with COP 120 also on the content of the written summaries prepared for investigators;

(e) to check intercept products by selecting cases at random to ensure that the person using the telecommunications under interception as authorized by a prescribed authorization is actually the subject of the prescribed authorization, which will help thwart any attempt by the LEA to use a disguised identity as a subject for intercepting the telecommunications of a

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Note 4 COP 120 refers to paragraph 120 of the Code which states that the Commissioner should be notified of interception / covert surveillance operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. COP 120 report refers to a report submitted by LEAs to the Commissioner pursuant to paragraph 120 of the Code.

person without justification, or expose any such misdeed;

(f) to check intercept products by selecting cases of discontinuance under section 57 of the ICSO at random to ensure that there is no unauthorized interception because a discontinuance could possibly be used to avoid exposure or detection of inadvertent mistakes or acts done without authority; and

(g) to preserve the records, such as intercept products including data produced in association with the communications ('associated data'), audit trail reports, etc so that they will be at my disposal instead of the LEAs or the Team.

What is required to be preserved and how?

9.5 The key material for preservation and checking is the intercept product of each and every interception, with its associated data. To help trace the officer responsible, the audit trail report recording the identity of the officer listening to the intercept product (listener) and the time of his access to it will also need be preserved. The written summary of the intercept product and other records of it in any other format are also required for verifying the contents of the REP-11 report or COP 120 report.

9.6 The intercept products and records should be preserved at the premises of the individual LEA concerned at my request as the Commissioner, but should only be made available to access by me or such staff of mine as I shall designate, as opposed to the LEA's officers or any other person. This has several benefits. All these records will be kept in the safe custody of the LEA's premises and the checking to be conducted

by me and my said staff will be undertaken at those premises with little risk of removal and leakage. Secondly, the danger that may be caused to me and my staff for the possession of such records is eliminated. Thirdly, the expenses involved in such measure as compared with the intercept product and records being kept and made available instead at my office will be drastically reduced.

9.7 The above measures will reinforce the protection of LPP and JM and pose as a deterrence and warning to LEAs from engaging in unauthorized or unlawful acts or practices in wrongfully breaching these rights or abusing interception as authorized by the ICSO, with the consequence of enhancing the public's confidence and trust in the ICSO scheme.

Possible disadvantage v advantage

9.8 The proposed preservation of records does not prolong the time that such records are made available to the LEA. The records are preserved only for my and my staff's access, not to the LEA's officers. We would not use the contents save for verifying or challenging the contents of the REP-11 report and for other legitimate purposes of checking. The intercept product will not be used for investigation of crimes or matters outside the scope of my oversight and review functions under the ICSO. There is no added security risk because the records are kept in the LEA's premises instead of those housing my office, and my staff and I can only access and check them in those premises in the LEA's knowledge. Audit trail reports can also be designed to record the identity of the checkers from my office and the time at which each checker makes access. The only disadvantage that the proposed checking system can be said to bring about

is that there will be added intrusion into the privacy of the person whose telecommunications communications are intercepted under a prescribed authorization, because apart from LEA listeners who will listen to the communications, my designated staff and I may also do the same. However, I do not consider this added intrusion too serious as to disqualify the proposal from being put into effect. It should be emphasised that normally it is only the telecommunications communications of the subject person the interception of which has been expressly authorized by a prescribed authorization that will be put under the scrutiny of the proposed checking scheme. The existence of the prescribed authorization, unless wrongly granted, is an assurance that the subject person's communications are intercepted for the sole and justified purpose of preventing or detecting serious crimes or protecting public security. The checking of those communications by my staff and me does not detract from or dilute that purpose. Secondly, although the added intrusion caused by the proposed checking may increase the extent of the intrusion because more persons than the LEA officers will listen to the communications, the benefit derived from it is to aim at ensuring full compliance with the requirements of the ICSO, which not only operates to the public good but also to the advantage of the subject person under the prescribed authorization such as protecting his LPP right. Moreover, the proposed initiative will help expose unauthorized interception and vindicate its victim.

Certainty of law required

9.9 Before the above ideas can be put into effect, it is necessary to ensure that the preservation of such products and records and their checking by me and my staff will not be in breach of the law. As alluded

to earlier in Chapter 5 'Legal Professional Privilege and Journalistic Material', there have been arguments regarding the legality of my listening to intercept products for the purposes of performing my functions under the Ordinance. The absence of any express provisions in the Ordinance in this respect, either yea or nay, is a recipe for arguments. This legal uncertainty must be settled once and for all to remove the obstacle for the proposed checking measures to be put in place. I suggest that the safest way is to amend the Ordinance to give express power and authority to the Commissioner to request the preservation of intercept products and related records and allow him and his staff as designated by him to check them.

Additional resources required

9.10 It is not envisaged that a large amount of resources will be required to put the proposed system into effect. The main reason for not requiring a large expenditure is that the preservation of the records will be done at the LEA's premises where such records are already kept for the LEA's normal use. What is further required by this proposed checking system is to keep these records available for access by me and my staff in a separate room. The only major expenditure that can be envisaged is the increase of my staff that will be needed to be sent to LEAs' premises for conducting the checking. When anything untoward is discovered, the Secretary to my Commission or I shall be required to double check and retain relevant records. For making the system effective by checking a reasonable representative of cases at random in addition to targeted cases, I consider that a corps of my staff consisting of five to ten officers will be required. The resources needed will therefore be the capital expenditure on the preservation aspect at LEAs' premises and the recurrent staff

expenditure in sustaining meaningful and effective checking. I consider that the possible benefits of the proposed scheme far overweigh the involved expenditure.

9.11 I have informed the Security Bureau of my proposed system of checking of intercept product and related records outlined above. It has not indicated its position pending the completion of this report.

Discrepancy in the English and Chinese versions of section 26(1) of the ICSO

9.12 Section 26 of the ICSO provides for the application for confirmation of a prescribed authorization or renewal issued or granted upon oral application. I observe that there is a discrepancy in the English and Chinese versions of section 26(1) which respectively read as follows:

> ' (1) Where, as a result of an oral application, the prescribed authorization or renewal sought under the application has been issued or granted, the head of the department concerned shall cause an officer of the department to apply to the relevant authority for confirmation of the prescribed authorization or renewal, **as soon as reasonably practicable after**, and in any event within the period of 48 hours beginning with, **the time when the prescribed authorization or renewal is issued or granted**.' (Emphasis added.)

> "(1) 凡因應口頭申請而發出或批予該申請所尋求的訂明授權或續期，有關部門的首長須安排該部門的人員在該授權或續期生效後，於合理地切實可行範圍內，盡快(而無論如何須在自發出該授權或批予該續期之時起計的 48 小時內)向有關當局申請確認該授權或續期。" (Emphasis added.)

9.13 According to the English version, the head of department shall cause an officer to apply to the relevant authority for confirmation of the prescribed authorization or renewal as soon as reasonably practicable after the time when the prescribed authorization or renewal is **issued or granted**. But according to the Chinese version, the head of department shall cause an officer to apply to the relevant authority for confirmation of the prescribed authorization or renewal as soon as reasonably practicable after the time the prescribed authorization or renewal **has taken effect**. It should be noted that a prescribed authorization does not necessarily take effect at the time of its issue. A prescribed authorization takes effect at the time specified by the relevant authority when issuing the authorization which in any case is not to be earlier than the time when it is issued [sections 10 and 16]. In other words, the relevant authority may issue a prescribed authorization orally, say, at 1400 hours for it to take effect from 1600 hours. For renewal, it is all the more unlikely that the time of the grant of the renewal is the time that the renewal takes effect because a renewal of a prescribed authorization takes effect at the time when the authorization would have ceased to have effect but for the renewal [sections 13 and 19]. As the time referred to in the English version (the time the prescribed authorization is issued or the renewal is granted) is different from the time referred to in the Chinese version (the time the prescribed authorization or renewal takes effect), there is a need to amend either the English version or the Chinese version of the Ordinance to remove the difference.

Duration of executive authorization for Type 2 surveillance

9.14 The form COP-9, annexed to the Code, is a template for 'Statement in writing in support of an application for an executive

authorization for Type 2 surveillance'. Paragraph 3(i)(c) of COP-9 reads as follows:

> ' The proposed duration of the Type 2 surveillance:
>
> *(No more than 3 months)*
>
> Anticipated Starting Date: Time:
>
> Anticipated Operation Period –
>
> ☐ Finishing Date: Time:
>
> ☐ Until the following event takes place or 3 months, whichever is the earlier: '

9.15 Paragraph 3(i)(c) of COP-9 tends to suggest that the executive authorization for Type 2 surveillance could be granted without a definite date of expiry but until a certain event takes place, subject to the duration not exceeding three months. This seems to be contradictory to the provision in section 16 of the Ordinance that subject to any renewal, an executive authorization ceases to have effect upon the **expiration of the period specified by the authorizing officer** when issuing the executive authorization, which in any case is not to be longer than the period of three months beginning with the time when it takes effect. The Ordinance requires the authorizing officer to specify a period, not the occurrence of an event, after which the prescribed authorization ceases to have effect.

9.16 It is undesirable to use the taking place of an event, in lieu of an actual date and time, to indicate the moment the executive authorization ceases to have effect. It may lead to unauthorized surveillance in case the event has completed leading to the immediate expiry of the authorization but, for example, the participating agent is unable to turn off the device in the presence of the subject. It is also difficult for me to oversee the

compliance. By way of illustration, if the event referred to is a meeting between the subject and his associates, how do I know which meeting the authorization refers to, bearing in mind that the subject and his associates could have more than one meeting and that the original meeting intended might have been deferred or cancelled? If the expiry of an executive authorization is not date and time specific but indicated by an event instead, how could the starting date and time of the renewed authorization be determined?

9.17 The wording of 'Until the following event takes place or 3 months, whichever is the earlier' also has the undesirable effect of authorizing an authorization to the maximum duration of three months allowed for in the Ordinance.

9.18 As I see it, for better compliance by LEAs and for easy detection of non-compliance by the oversight authority, the duration of an executive authorization should be date and time specific, ie it should have a starting date and time and an ending date and time clearly stated in the authorization itself. If the authorization is required for covert operations to cover a certain event, this should be stated as a justification for requiring the authorization to be valid up to a certain date and time as the event is expected to have occurred. If the event occurs earlier than expected, the LEA can thereafter discontinue the operation and seek revocation of the authorization under section 57. If the occurrence of the event is later than expected, the LEA can apply for renewal of the authorization.

9.19 It would be unclear to state in the authorization that it expires upon the taking place of a certain event without actually stating the expiry date and time. In fact, the affidavit/affirmation in support of application for

authorization for interception and Type 1 surveillance requires the applicant to state the anticipated finishing date and time (not longer than three months) and there is no such option of 'Until the following event takes place or 3 months'.

9.20 I recommend that the wording 'Until the following event takes place or 3 months, whichever is the earlier' be deleted from the form COP-9. Similar wording also appears in the form COP-13 'Statement in writing in support of an application for renewal of an executive authorization for Type 2 surveillance' which should also be deleted.

Reporting requirement on obtaining of information which may be the contents of JM

9.21 The Ordinance requires an applicant to state in the affidavit or statement in writing in support of an application the likelihood of obtaining information which may be subject to LPP or may be contents of any JM. The Code requires LEAs to notify me of interception / covert surveillance operations that are likely to involve LPP information or other cases where LPP information has been obtained. Failure to report LPP cases to me would be treated as non-compliance with the relevant requirements of the Ordinance. But there is no such provision in the Code requiring LEAs to report to me incidents where information which may be the contents of JM has been obtained. The Code is also silent on how to deal with the matter if such material has been obtained. I suggest that these doubts should be clarified when the Ordinance or the Code is reviewed.

Reporting of irregularities

9.22 As stated in paragraphs 7.129 to 7.130 of Chapter 7 above, section 54 of the Ordinance obliges the head of LEAs to submit a report of irregularity to me only if he considers that there has been a case of non-compliance by the department or any of its officers. If the LEA head does not consider that the irregularity is due to the fault of the department or LEA officers, he is not required by the Ordinance to report such incidents to me. But without such reporting, it would be difficult for me to discover that these irregularities had ever occurred. Instead of leaving such reporting to the goodwill of the department as at present, I suggest that appropriate amendments be made to the Ordinance to include a duty of the LEA heads to report to me promptly whatever irregularity in the operation of the ICSO scheme, regardless of whether it is due to the fault of the LEA and its officers, so that I could carry out a review for the purposes of minimizing non-compliance, preventing recurrence and better protecting the privacy of citizens.

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CHAPTER 10

STATUTORY TABLES

10.1 In accordance with section 49(2), this chapter appends separate statistical information in relation to interception and surveillance in the report period. The information is set out in table form and comprises the following tables:

(a) Table 1(a) – interception – number of authorizations issued / renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];

(b) Table 1(b) – surveillance – number of authorizations issued / renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];

(c) Table 2(a) – interception – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];

(d) Table 2(b) – surveillance – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];

(e) Table 3(a) – interception – number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)];

(f) Table 3(b) – surveillance – number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)];

(g) Table 4 – interception and surveillance – number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) and (ii)];

(h) Table 5 – summary of reviews conducted by the Commissioner under section 41 [section 49(2)(d)(i)];

(i) Table 6 – number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)];

(j) Table 7 – number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)];

(k) Table 8 – respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)];

(l) Table 9 – number of cases in which a notice has been given by the Commissioner under section 48 [section 49(2)(d)(v)];

(m) Table 10 – broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)];

(n) Table 11(a) and (b) – number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out

pursuant to a prescribed authorization [section 49(2)(d)(vii)]; and

(o) Table 12 – number 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 action [section 49(2)(d)(viii)].

Interception – Number of authorizations issued / renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)][Note 5]

Table 1(a)

		Judge's Authorization	Emergency Authorization
(i)	Number of authorizations issued	801	0
	Average duration[Note 6]	29 days	-
(ii)	Number of authorizations renewed	918	Not applicable
	Average duration of renewals	30 days	-
(iii)	Number of authorizations issued as a result of an oral application	0	0
	Average duration	-	-
(iv)	Number of authorizations renewed as a result of an oral application	0	Not applicable
	Average duration of renewals	-	-
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	50	Not applicable
(vi)	Number of applications for the issue of authorizations refused	13	0
(vii)	Number of applications for the renewal of authorizations refused	13	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	Not applicable

Note 5 Executive authorization is not applicable to interception.

Note 6 The average duration is arrived at by dividing the sum total of the duration of all cases under a category by the number of cases under the same category. The same formula is also used to work out the 'average duration' in Table 1(b).

Surveillance - Number of authorizations issued / renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]

Table 1(b)

		Judge's Authorization	Executive Authorization	Emergency Authorization
(i)	Number of authorizations issued	83	84	0
	Average duration	5 days	6 days	-
(ii)	Number of authorizations renewed	15	16	Not applicable
	Average duration of renewals	8 days	6 days	-
(iii)	Number of authorizations issued as a result of an oral application	0	7	0
	Average duration	-	3 days	-
(iv)	Number of authorizations renewed as a result of an oral application	0	0	Not applicable
	Average duration of renewals	-	-	-
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	0	1	Not applicable
(vi)	Number of applications for the issue of authorizations refused	0	2	0
(vii)	Number of applications for the renewal of authorizations refused	0	0	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	0	Not applicable

Interception – Major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)]

Table 2(a)[Note 7]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Exporting unmanifested cargo	Cap. 60	Section 18A, Import and Export Ordinance
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Managing a triad society/assisting in the management of a triad society	Cap. 151	Section 19(2), Societies Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Theft	Cap. 210	Section 9, Theft Ordinance
Robbery	Cap. 210	Section 10, Theft Ordinance
Handling stolen property/goods	Cap. 210	Section 24, Theft Ordinance
Conspiracy to inflict grievous bodily harm/shooting with intent/wounding with intent	Cap. 212	Section 17, Offences Against the Person Ordinance
Possession of arms/ammunition without a licence	Cap. 238	Section 13, Firearms and Ammunition Ordinance

Note 7 The offences in this Table are arranged in the order of the respective chapter numbers of the Ordinances prohibiting them.

Surveillance – Major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)]

Table 2(b)[Note 8]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Criminal intimidation	Cap. 200	Section 24, Crimes Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Theft	Cap. 210	Section 9, Theft Ordinance
Handling stolen property/goods	Cap. 210	Section 24, Theft Ordinance
Corrupt conduct to bribe electors and others at elections	Cap. 554	Section 11, Elections (Corrupt and Illegal Conduct) Ordinance
Conspiracy to defraud	--	Common Law

Note 8 The offences in this Table are arranged in the order of the respective chapter numbers of the Ordinances prohibiting them.

Interception – Number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]

Table 3(a)

	Number of persons arrested[Note 9]		
	Subject	**Non-subject**	**Total**
Interception	199	329	528

Surveillance – Number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]

Table 3(b)

	Number of persons arrested[Note 10]		
	Subject	**Non-subject**	**Total**
Surveillance	139	68	207

Note 9 Of the 528 persons arrested, 132 were attributable to both interception and surveillance operations that had been carried out.

Note 10 Of the 207 persons arrested, 132 were attributable to both interception and surveillance operations that had been carried out. The total number of persons arrested under all statutory activities was in fact 603.

Interception and surveillance - Number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) & (ii)]

Table 4

(i)	Number of device retrieval warrants issued	0
	Average duration	-
(ii)	Number of applications for device retrieval warrants refused	0

Summary of reviews conducted by the Commissioner under section 41 [section 49(2)(d)(i)]

Table 5

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
Section 41(1) Reviews on compliance by departments and their officers with relevant requirements, as the Commissioner considers necessary			
(a) Regular reviews on weekly reports	208	Interception & Surveillance	LEAs are required to submit weekly reports to the Commissioner providing relevant information on authorizations obtained, applications refused and operations discontinued in the preceding week, for the Commissioner's checking and review purposes. During the report period, a total of 208 weekly reports were submitted by the LEAs.
(b) Periodical inspection visits to LEAs	31	Interception & Surveillance	In addition to the checking of weekly reports, the Commissioner had paid 31 visits to LEAs during the report period. During the visits, the Commissioner conducted detailed checking on the application files of doubtful cases as identified from the weekly reports. Moreover, random inspection of other cases would also be made. Whenever he considered necessary, the Commissioner would seek clarification or explanation from LEAs directly. From the said inspection visits, a total of 701 applications and 181 related documents / matters had been checked.

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			(See paragraphs 2.33, 3.20, 3.32 and 4.19 of this report.)
(c) LPP case reviewed by the Commissioner	1	Interception	The Commissioner had listened to the recording, inspected the REP-11 report and examined the summaries on the intercept product. The REP-11 report had truthfully reported the gist of the conversation of the LPP call to the panel judge and there was no material non-disclosure. The panel judge revoked the authorization and the facility was disconnected 12 minutes after the revocation of authorization. In other words, there was unauthorized interception of 12 minutes. One call was intercepted during this period but it was not listened to by the LEA. The summaries did not contain any information about the LPP call. (See paragraphs 5.5 – 5.19 of Chapter 5.)
(d) Incidents / irregularities reviewed by the Commissioner	7	Interception (4 reviews)	There were a total of seven cases submitted under four reports where there was a time gap between the revocation of the prescribed authorization by the panel judge under section 58(2) of the ICSO and the actual disconnection of the facilities concerned. The time gap ranged between 13 minutes and about one hour. Having examined these seven cases, the Commissioner concluded that any interception

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			conducted during the time gap was without the authority of a prescribed authorization and was unauthorized. However, as no communication was intercepted during the unauthorized period, the irregularity did not result in any intrusion into the privacy of the subjects of the prescribed authorizations. (See paragraphs 7.110 – 7.117 of Chapter 7, under Reports 5 - 8.)
		Interception	The interception of a facility was discontinued three minutes after the expiry of the prescribed authorization. The belated discontinuance was due to the failure of an officer to allow sufficient time for processing the discontinuance. The irregularity did not result in any intrusion into the privacy of the subject of the prescribed authorization because there was no communication during the 3-minute period in which the unauthorized interception took place. The Commissioner recommended the LEA to take appropriate action to prevent recurrence such as to advance the time for start of discontinuation process. (See paragraphs 7.118 – 7.123 of Chapter 7, under Report 9.)
		Interception	A facility number which did not appear in any prescribed authorization in force at that

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			time was intercepted for 21 hours until it was discovered and disconnected. A number of calls intercepted during this period were listened to by the LEA. Having reviewed the case, the Commissioner was satisfied that this interception was caused by a combination of factors not due to any fault of the LEA. (See paragraph 7.124 of Chapter 7, under Report 10.)
		Interception	The interception of four facilities had been discontinued but subsequently reactivated for a few hours until the matter was discovered and the facilities disconnected. The review has not been completed at the time of writing this report. (See paragraph 7.125 of Chapter 7, under Report 11.)
Section 41(2) The Commissioner shall conduct reviews on cases in respect of which a report has been submitted to him under section 23(3)(b), 26(3)(b)(ii) or 54			
(a) Report submitted under section 23(3)(b) by the head of department to the Commissioner on cases in default of application being made for confirmation of emergency authorization within 48 hours of issue	Nil	Not applicable	For the report period, there was no report submitted under this category.
(b) Report submitted under section 26(3)(b)(ii) by the head of department to the Commissioner on cases in default of application being	Nil	Not applicable	For the report period, there was no report submitted under this category.

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours of issue			
(c) Report submitted under section 54 by the head of department to the Commissioner on any case of failure by the department or any of its officers to comply with any relevant requirement	4	Interception	Report 1 The irregularity originated from a clerical mistake in stating the subject's facility number in a document. Two digits of the number of the facility used by the subject were transposed mistakenly. The checking and verification procedures practised by the LEA concerned at the time failed to work effectively and several officers committed mistakes one way or another along the line in the processes. On the basis of the wrong facility number, an application for a prescribed authorization for interception was made. As a result, the wrong facility number was made the subject facility to be intercepted in the prescribed authorization instead of the correct number used by the subject of the authorization intended to be intercepted. The wrong intercepted facility had been intercepted for a few days before disconnection upon detection of the error. After examining the case, the Commissioner accepted that the mistake was not caused by any ulterior motive. In the course of his review of this irregularity, the Commissioner also made the following recommendations / comments:

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			(i) the disciplinary action taken against the case officer was unfairly severe in comparison with the punishment on other officers concerned, particularly his superior officer; (ii) given the mistakes committed by the superior officer of the case officer, effectively defeating the LEA's safeguard procedures on verification of the number of the facility to be intercepted, the Commissioner doubted the competency or suitability of the superior officer in performing functions under the Ordinance; (iii) in view of the apparently tight verification procedures still being beaten by the combined mistakes made by more than one officer, the Commissioner made some recommendations in improving and strengthening such procedures; and (iv) the information stated in the discontinuance report submitted to the panel judge regarding which officer decided to discontinue the interception operation after discovery of the unauthorized

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			interception was wrong. The Commissioner recommended that there should be a checker to check the accuracy of the content of the discontinuance report before submission to the panel judge. (See paragraphs 7.9 – 7.33 of Chapter 7.)
		Interception	<u>Report 2</u> The panel judge granted a prescribed authorization for interception with further conditions imposed, the effect of which was that the case would need to be brought back to a panel judge for re-assessment as soon as any LPP information was likely to be obtained. The listener listened to a call on the morning of 13 November 2007 but he failed to notice that the information which might be subject to LPP was contained in the call. The listener re-listened to the LPP call on the afternoon of the same day and reported to his supervisor that the call might be subject to LPP. The supervisor instructed him to put on hold the monitoring exercise pending re-assessment by the panel judge. However, the listener continued to listen to another call intercepted after the LPP call as he was trying to clarify some facts and he wrongly believed that he was permitted to re-listen to this

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			call which he had previously listened to and which contained no LPP information. The listening to another call was a breach of the supervisor's instructions and a breach of one of the further conditions of the prescribed authorization imposed by the panel judge, for which the listener was warned. He was given a strong advice for the non-realization of the LPP Call on the morning of 13 November 2007. Apart from the non-compliance of the listener, the Commissioner also looked into the following related matters: (i) non-preservation of the recording on the LPP call discovered on 13 November 2007 for the Commissioner's examination; (ii) non-preservation of the written summaries and the abridged versions of the summaries for the Commissioner's examination; (iii) possible suspicion that someone tried to hide the fact that the written summaries had been destroyed by not mentioning them in the LEA's reply to the Commissioner; (iv) the ground for the decision to discontinue

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			the interception under the prescribed authorization being made without taking into account material possibly available; (v) no voluntary or prompt reporting of irregularities; (vi) inaccurate or confusing information provided to the Commissioner regarding the duration of listening; (vii) no disciplinary action against the Responsible Officer and the Chief Investigator concerned; and (viii) the power of the Commissioner under the Ordinance to review records. (See paragraphs 7.34 – 7.97 of Chapter 7.)
		Interception	<u>Report 3</u> The facilities covered by five prescribed authorizations were disconnected six to 18 minutes after the expiry of the prescribed authorizations. The LEA reported that the belated disconnection was due to system failure in effecting discontinuance. The Commissioner conducted a review and found no evidence to suggest that the irregularity was not due to system failure. However, the officer (who had

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			been instructed to preserve all records and documents for the Commissioner's review) did not preserve the relevant associated data and the system log for the Commissioner's verification on this officer's claim that there was no communication during the period of unauthorized interception. In response to the Commissioner's enquiry as to the reason for non-preservation of the associated data and the system log, the officer argued that the Commissioner could obtain the best first-hand independent evidence from other avenues. It seemed that the officer did not feel that he had a duty to preserve evidence for the Commissioner's examination if evidence could be found elsewhere. This reflected badly on the officer's attitude towards the Commissioner's oversight and review functions. The CSPs concerned verified that there was no communication in respect of the facilities concerned during the brief periods of unauthorized interception. (See paragraphs 7.98 – 7.106 of Chapter 7.)
		Interception	<u>Report 4</u> Because of the malfunctioning of the interception system, discontinuance of the

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			interception of the facilities covered by four prescribed authorizations failed to take effect until 18 minutes after the expiry of the prescribed authorizations. For the same reason mentioned under Report 3 above, the officer did not preserve the relevant associated data and the system log for the Commissioner's verification of no communication during the period of unauthorized interception. Having separately checked with the CSP concerned, the Commissioner was satisfied that the irregularity was caused by a system problem. The problem could be resolved by upgrading the system. The CSP also verified that there was no communication in respect of the facilities concerned during the short period of unauthorized interception. (See paragraphs 7.107 – 7.109 of Chapter 7.)

Number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)]

Table 6

Number of cases of irregularities or errors identified in the reviews under		Interception / Surveillance	Broad nature of irregularities or errors identified
Section 41(1)			
(a) Reviews during the periodical inspection visits to LEAs	1	Surveillance	1 case Deficiencies in preparation of documents in connection with revocation of an authorization for Type 2 surveillance. (See paragraphs 4.27 – 4.31 of Chapter 4.)
(b) Review of an LPP case pursuant to paragraph 120 of the Code	1	Interception	1 case Unauthorized interception of 12 minutes after the panel judge revoked the prescribed authorization following receipt of a report on obtaining of LPP information. (For details, see item (c) under section 41(1) in Table 5 and Chapter 5.)
(c) Other reviews	13	Interception	7 cases Interception conducted after the revocation of prescribed authorization under section 58.
		Interception	1 case Interception disconnected three minutes after the expiry of the prescribed authorization.
		Interception	1 case Interception of a facility number not authorized by any prescribed authorization.

Number of cases of irregularities or errors identified in the reviews under		Interception / Surveillance	Broad nature of irregularities or errors identified
		Interception	4 cases Reactivation of four discontinued interceptions. This review has not yet been completed. (For details, see item (d) under section 41(1) in Table 5 and Chapter 7.)
Section 41(2)			
(a) Reviews on cases in default of application being made for confirmation of emergency authorization within 48 hours as reported by the head of department under section 23(3)(b)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(b) Reviews on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours as reported by the head of department under section 26(3)(b)(ii)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(c) Reviews on non-compliance cases as reported by the head of department under section 54	11	Interception Interception Interception	1 case Interception of a wrong facility. 1 case Non-compliance with supervisor's instructions and a breach of a condition of the prescribed authorization. 5 cases Interception discontinued six to 18 minutes after the expiry of the prescribed authorizations.

Number of cases of irregularities or errors identified in the reviews under		Interception / Surveillance	Broad nature of irregularities or errors identified
		Interception	4 cases Interception discontinued 18 minutes after the expiry of the prescribed authorizations. (For details, see item (c) under section 41(2) in Table 5 and Chapter 7.)

Number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)]

Table 7

Number of applications received	Applications for examination in respect of			
	Interception	Surveillance	Both Interception and Surveillance	Cases that could not be processed [Note 11]
16	2	1	8	5

[Note 11] Of the 16 applications received, five were subsequently not pursued by the applicant.

Respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)]

Table 8

Number of notices to applicants given by the Commissioner [Note 12]		Nature of applications for examination		
		Interception	**Surveillance**	**Both Interception and Surveillance**
Number of cases that the Commissioner had found in the applicant's favour [section 44(2)]	0	-	-	-
Number of cases that the Commissioner had not found in the applicant's favour [section 44(5)]	8	2	1	5

Note 12 As mentioned in Note 11 above, there were five out of the 16 applications for examination that could not be processed. There were also three applications still being processed at the time of compiling this report. As a result, the number of cases that the Commissioner had not found in the applicant's favour was eight. The number of notices given by the Commissioner under section 44(5) was therefore eight, five of which were given during the report period and three of which thereafter.

In addition, the Commissioner had also issued seven notices during the report period under section 44(5) in respect of applications for examination brought forward from 2007 which was reported in the 2007 Annual Report.

Number of cases in which a notice has been given by the Commissioner under section 48 [section 49(2)(d)(v)]

Table 9

	Number of cases in which a notice has been given in relation to	
	Interception	**Surveillance**
Notice to the relevant person by the Commissioner stating that he considers that there has been a case of interception or surveillance carried out by an officer of a department without the authority of a prescribed authorization and informing the relevant person of his right to apply for an examination [section 48(1)]	1 Note 13	0

Note 13 The Commissioner gave a notice to the relevant person pursuant to section 48(1). Upon receipt of the notice, the relevant person applied to the Commissioner for an examination. Having examined the claim, the Commissioner made an order under section 44(3) for the payment of compensation by the Government to the relevant person. (See paragraph 6.10 of Chapter 6.)

Broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)]

Table 10

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
Reports to the Chief Executive on any matter relating to the performance of the Commissioner's functions [section 50]	Nil	Not applicable	Not applicable
Recommendations to the Secretary for Security on the Code of Practice [section 51]	4	Interception & Surveillance	(1) COP-7 should be amended to indicate the time of decision to discontinue the operation and to rephrase the sentence under the section *[If the interception/Type 1 surveillance has not started]*. (See paragraphs 8.4 – 8.6 of Chapter 8.) (2) COP-13 and similar forms should be amended to improve the presentation and wording of the paragraph relating to the proposed duration of the renewal. (See paragraphs 8.7 – 8.11 of Chapter 8.) (3) REV-1 should be amended to require the reporting officer rather than the authorizing officer to set out details of discontinuance of an operation that had not started. (See paragraphs 8.12 – 8.13 of Chapter 8.) (4) JF-12 should be amended to expand the statement to state clearly the situation where an authorized operation of interception / Type 1 surveillance

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			had not started. (See paragraphs 8.14 – 8.15 of Chapter 8.)
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the Code of Practice [section 52]	9	Interception & Surveillance	(1) How to provide departmental knowledge of previous applications under ICSO. (See paragraphs 8.17 – 8.19 of Chapter 8.) (2) Improving the supplementary sheet for the application for an authorization for interception and Type 1 surveillance. (See paragraphs 8.20 – 8.22 of Chapter 8.) (3) Improving the report on the discontinuance of interception / Type 1 surveillance in relation to cases which were initially assessed to have the likelihood of obtaining LPP information. (See paragraph 8.23 of Chapter 8.) (4) Improving the wording of the discontinuance report submitted shortly before the expiry of the prescribed authorization. (See paragraphs 8.24 – 8.25 of Chapter 8.) (5) Advising to disclose intent of listening to intercept product after revocation of authorization. (See paragraphs 8.26 – 8.29 of Chapter 8.)

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			(6) Recommendations in connection with covert surveillance on: (i) withdrawal of devices before the effective time of the authorization; (ii) ground for discontinuance of Type 1 surveillance; (iii) reissue of devices within a short period of time; (iv) movements of devices for repairing purpose; (v) item-numbering of devices in the inventory list; (vi) computerization of device recording system; (vii) application without sufficient explanation of the purpose of surveillance sought; (viii) starting time and issuing time of an authorization in records of determination; (ix) incomplete information provided to authorizing officer; and (x) deficiencies in preparation of revocation documents. (See paragraph 8.30 of Chapter 8.) (7) Recommendations made as a result of review of LPP cases: (i) the report submitted to the Commissioner pursuant to paragraph 120 of the Code should enclose sanitized copies of relevant documents as specified; (ii) the records of the intercept product and other relevant

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			records should be preserved for the Commissioner's review of LPP cases and should not be destroyed without the prior consent of the Commissioner; and (iii) the LEA should make full and frank disclosure to the panel judge in relation to LPP cases. (See paragraphs 8.31 – 8.33 of Chapter 8.) (8) Recommendations made as a result of reviews of irregularities and incidents: (i) improving the procedures on verification of the number of the facility to be intercepted; (ii) assigning an officer to check the accuracy of the content of the discontinuance report before submission to the panel judge; (iii) advising to adopt with great caution the practice regarding non-cessation of listening after making a decision to submit a section 58 report; (iv) preserving the records of the communications intercepted from the time of arrest and other relevant records for the examination by the Commissioner in case an authorization is revoked by the panel judge under section 58; and (v) taking appropriate action to

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			prevent recurrence of belated discontinuance of interception. (See paragraph 8.34 of Chapter 8.) (9) Documents containing sensitive information should be sanitized in the way suggested by the Commissioner so as to facilitate his easier reading and better understanding while maintaining the secrecy of such information. (See paragraph 8.35 of Chapter 8.)

Number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]

Table 11(a)

	Number of cases
Interception	1

Table 11(b)

	Number of cases
Surveillance	0

Number 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 action [section 49(2)(d)(viii)]

Table 12

	Interception / Surveillance	**Broad nature of the disciplinary action**	**Number of cases**
Disciplinary action taken as a result of the findings of the Commissioner in a review on compliance by departments under section 41(3) [section 42]	Not applicable	Not applicable	0
Disciplinary action taken to address any issues arising from the determination on an examination made by the Commissioner referred to in section 44(2) [section 47]	Not applicable	Not applicable	0
Disciplinary action taken as a result of recommendations made by the Commissioner for better carrying out the objects of the Ordinance or the provisions of the Code of Practice [section 52]	Not applicable	Not applicable	0
Disciplinary action taken in case of report on non-compliance [section 54]	Interception	Case 1 (i) An LEA officer wrongly stated the subject's telephone number to be intercepted in a document, resulting in a wrong interception on an innocent party. This officer was given an advice to exercise due diligence and vigilance	Case 1 An advice was given on 23.5.2008.

	Interception / Surveillance	Broad nature of the disciplinary action	Number of cases
		in ensuring inclusion of correct information in any written report compiled by him.	
		(ii) An LEA officer, who was the case officer of the investigation concerned, failed to unearth the reason for the clerical mistake referred to in (i) above. This officer was warned to exercise due diligence and vigilance during the course of performance of his official duties, and in particular, relating to matters concerning the ICSO.	A warning was given on 23.5.2008.
		(iii) An LEA officer, who was the superior officer of the officer mentioned in (ii) above, failed to verify the telephone number for interception and make effective response to the discrepancy discovered in respect of the telephone number to be intercepted. This officer was warned to exercise due diligence and vigilance during the course of performance of his official duties, and in particular, relating to matters concerning the ICSO.	A warning was given on 23.5.2008.
		(iv) An LEA officer failed to verify the facility number being used by the subject under investigation. An advice was given to the officer advising him to exercise due diligence and	An advice was given on 23.5.2008.

	Interception / Surveillance	Broad nature of the disciplinary action	Number of cases
		vigilance in dealing with requests to verify the facility number used by the subject under investigation. (See paragraphs 7.9 – 7.33 of Chapter 7.)	
	Interception	<u>Case 2</u> (i) An LEA officer, who was the listener, failed to notice that information which might be subject to LPP was contained in an intercepted call until re-listening. An advice was given to the officer advising him to exercise due vigilance in carrying out his duties as a listener and be mindful of any information which might be subject to LPP or of a journalistic nature.	<u>Case 2</u> An advice was given on 7.1.2008.
		(ii) The LEA officer mentioned in (i) above, after reporting the LPP call to his supervisor, continued to listen to another call intercepted after the LPP call. It was a breach of the supervisor's instructions and a breach of one of the further conditions of the prescribed authorization imposed by the panel judge, amounting to a non-compliance with the requirements of the Ordinance. The officer was warned to exercise due vigilance during the course of performance of his duties, and in	A warning was given on 20.6.2008.

	Interception / Surveillance	Broad nature of the disciplinary action	Number of cases
		particular, relating to matters concerning the ICSO. (See paragraphs 7.34 – 7.97 of Chapter 7.)	

10.2 In accordance with section 49(2)(e), I am required to give an assessment on the overall compliance with the relevant requirements during the report period. Such assessment and the reasons in support can be found in Chapter 11.

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CHAPTER 11

REVIEW OF COMPLIANCE BY LAW ENFORCEMENT AGENCIES

The statutory scheme

11.1 The ICSO scheme is to allow the LEAs to conduct investigations via the use of the statutory activities of interception and covert surveillance, but only under the authority of prescribed authorizations granted by the panel judges and other relevant authorities within the LEAs after satisfying the exacting conditions imposed by the Ordinance. My role as the Commissioner is to oversee and review the actions of the LEAs' officers to ensure that they comply with the stringent requirements of the Ordinance. Such requirements not only consist of the conditions of section 3 of the Ordinance, namely, necessary for and proportionate to fighting serious crimes and protecting public security, but also include any applicable requirements under the Code and under any prescribed authorization [see section 2: 'relevant requirement'].

11.2 For the purpose of performing and facilitating my oversight and review functions, I have designed and made improvements to various checking schemes and vehemently enforced them, while exercising great care and vigilance in checking any matter that is discrepant or dubious and any conduct that requires clarification and explanation.

LEAs' compliance

11.3 As can be seen from the above description of the statutory scheme, being the main and major authorizing authority, the panel judges play a very important part in ensuring that the privacy and other rights protected by the Ordinance remain intact. As a starting point for having an overall review of the operation of the statutory scheme as a whole, I would say that the panel judges were vigilant and strict in their consideration of applications by the LEAs for interception and Type 1 surveillance. While having no intention to pay particular attention to examining the correctness of the panel judges' performance since that is not part of my functions, I have not found a single case in 2008 in which I entertain any doubt as to the propriety of their determination, be it a grant of a prescribed authorization or a refusal.

11.4 Despite the irregularities described in Chapter 7, I am satisfied with the overall performance of the LEAs and their officers in their compliance with the requirements of the ICSO. While there were a couple of cases of more serious non-compliance that have already been mentioned in some detail in Chapter 7, subject to what I have to say below, I have not found any wilful or deliberate flouting of such requirements.

Non-compliance by ICAC officers

11.5 I have provided my reasons for classifying cases of non-compliance in paragraph 7.128 of Chapter 7. It will be noted that the cases under Reports 3 to 9 involved non-compliance by the officers of the LEAs that may be said to be reasonably excusable. The two cases of more serious non-compliance are summarised below:

(a) the listening to the product of a telecommunications interception by an ICAC listener in breach of the supervisor's instructions and one of the further conditions imposed by the panel judge in the prescribed authorization concerned as referred to in paragraph 7.35 of Chapter 7; and

(b) the interception of an incorrect telecommunications facility caused by the mistake made by the officer transcribing the facility number and the negligent conduct of the Chief Investigator and other officers in the processes of verification of the number, resulting in a prescribed authorization being sought and granted on the wrong number.

11.6 The first case includes a non-compliance with a condition of a prescribed authorization, which by definition is a requirement of the Ordinance. The second case is the obtaining of a prescribed authorization for intercepting a wrong facility and actually intercepting that facility. Though not intended, the mistakes committed by the ICAC officers resulted in the interception of a facility that would never have been allowed under the stringent requirements of the Ordinance. The fact that that occurred, without any justification and as a direct consequence of the ICAC officers' acts, constitutes a non-compliance by them with the statutory requirements.

Fairness of an ICAC disciplinary action

11.7 In connection with the second case mentioned under paragraph 11.5 above, there was a big question mark about the appropriateness of the disciplinary action taken by ICAC against the case officer (SI(B)) who, in

my view, was amongst the officers concerned the least culpable or blameworthy for what had happened. The description of this case can be found under Report 1 of Chapter 7 and I am detailing the facts and reasoning for my view in a further report to the Chief Executive pursuant to section 50 of the Ordinance.

Difficulties caused by some LEA officers

11.8 As has been described in some detail in Chapter 7, there were instances where my requests were misunderstood by some ICAC officers and where the correctness or accuracy of the answers previously given by them were subsequently denied. It is disappointing to note that some of those who misunderstood the purposes of my review investigations and the significance of real and first-hand evidence to my exercise were officers quite senior in the hierarchy. Although most, if not all, of these officers have been transferred out of the posts in connection with the statutory activities or the performance of my functions, indicating that the leadership is cooperative and helpful in facilitating my work or desirous of being so, my staff and I were frustrated, troubled and delayed in our tasks by having to examining relevant documents many times, pointing out discrepancies, making analyses that were later found to be based on inaccurate information or premises previously informed and having to remake analyses on changed answers.

11.9 The reviewing investigations by my colleagues and I were also hampered by the fact that some of the evidence had been destroyed, resulting from the aforesaid misunderstanding, or caused by the inexorable time-wheel of the policy of destruction adopted by ICAC, or consequent on

the lateness of the notification to me of mistakes made by some of their officers.

Need for the new initiative

11.10 My proposed checking scheme referred to in Chapter 9 may serve to address one of the above-mentioned difficulties, by preserving the most crucial evidence of the intercept product for my and my colleagues' examination. If this new initiative is put in place, in addition to the benefits alluded to in Chapter 9, my requests for preservation of evidence with any possible misunderstanding of them would be greatly reduced, and the time that would otherwise have to be wasted on resolving the operational issues during the reviewing process would be better used to reinforce the performance of my review and oversight functions.

Assistance from the heads of LEAs

11.11 As mentioned in paragraph 7.130 of Chapter 7, the heads of the LEAs had made Reports 5 to 11 to me as cases of irregularities or incidents while there is no statutory duty for them to do so, thus enabling me to examine those cases, contributing towards helping to ensure that non-compliance is minimized and the privacy of citizens better protected. Although I suggest that appropriate amendments be made to the Ordinance to include a duty of the LEA heads to report to me whatever irregularity in the operation of the ICSO scheme instead of leaving such reporting as a matter of non-statutory goodwill or courtesy or gentlemen's agreement, the reporting of these incidents deserves the praise due.

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CHAPTER 12

ACKNOWLEDGEMENT AND WAY FORWARD

Acknowledgement

12.1 As always, the panel judges, the Security Bureau and all the LEAs under the Ordinance have provided me with all the assistance I need. Other parties including CSPs from whom I request information on a frequent or occasional basis have also been most cooperative and helpful. I am particularly thankful to these other parties because they are not public organizations and their cooperation and assistance should not merely be perceived as a bare submission to my statutory power under section 53 of the ICSO, especially where there is no express provision for criminal sanction. Their information provision to me has undoubtedly cost them at least considerable effort but they have never raised any complaint for what they have so unfailingly complied. My task as the Commissioner would have been rendered impossible without the help and cooperation of all these persons. I take this opportunity to express my gratitude to each and every one of them.

12.2 After the publication of my 2007 Annual Report, members of the public, the media and LegCo have raised various concerns and expressed views on many matters under the ICSO. These concerns and views have not only reminded me of my hefty responsibility as the overseer of the LEAs' compliance with the requirements of the law but also enabled me to search in earnest for ways and means whereby such compliance can

be enhanced, if not ensured. These public discussions are most helpful, and although no name is mentioned my thanks are due to everyone involved.

Way forward

12.3 The passage of time has increased the experience of all concerned with the resultant improvements that I could think of and sometimes suggested by the Security Bureau and officers of the LEAs' central registries, doubtless with the aim of achieving full compliance with the ICSO requirements.

12.4 As I said before, not all problems can be anticipated in human ingenuity, but whenever they surface, further improvements will be made to tackle them. I have in Chapter 9 described the improvement measures to enhance the review procedure which, I am confident, will work in producing better compliance and reducing irregularities, stepping closer towards accomplishing the protection of the right to privacy of people in Hong Kong.