

Commissioner on Interception of Communications and Surveillance
Annual Report 2008

Summary

1. The Interception of Communications and Surveillance Ordinance, Cap 589 ('the Ordinance' or 'ICSO')) came into force on 9 August 2006. Mr Justice WOO Kwok-hing, Commissioner on Interception of Communications and Surveillance ('the Commissioner'), submitted his third annual report, ie Annual Report 2008, to the Chief Executive on 30 June 2009. The report covers the period from 1 January 2008 to 31 December 2008. The following is a summary of the report.

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

3. During the report period, a total of 1,924 prescribed authorizations (including fresh and renewed authorizations) were issued.

Among them, 1,719 were judge's authorizations for interception, 98 were judge's authorizations for Type 1 surveillance, and 107 were executive authorizations for Type 2 surveillance (seven of which consequent on oral application) issued by designated authorizing officers of the LEAs. These authorizations included 51 that had been renewed more than five times.

4. During the report period, a total of 28 applications were refused (including 26 applications for interception and two applications for Type 2 surveillance). For reasons for refusal, please see paragraph 2.6 of Chapter 2 and paragraph 4.3 of Chapter 4 of the report.

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

6. A total of 603 persons were arrested in 2008 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. The Ordinance makes specific reference to legal professional privilege ('LPP') and journalistic material ('JM') for particular caution when interception and covert surveillance are to be authorized and carried out. During the report period, there was no reported case of obtaining information which may be the contents of any JM. There was, however, one reported case of inadvertent obtaining of information subject to LPP. Please refer to paragraphs 5.5 to 5.19 of Chapter 5 of the report for details

of the Commissioner's review of the LPP case.

8. After the compilation of the 2007 Annual Report, the Commissioner was apprised of doubts regarding the legitimacy or propriety of his 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. The Commissioner considers that this legality question, one way or another, should be seriously considered and resolved by the Legislature in its review of the provisions of the Ordinance. Please see paragraphs 5.20 to 5.35 of Chapter 5 of the report for details.

9. During the report period, a total of 16 applications for examination were received, among which five were subsequently not pursued by the applicant. Of the remaining 11 applications, two concerned alleged cases of interception, one concerned suspected surveillance and eight claimed a combination of both. After carrying out examination, the Commissioner found eight cases not in the applicant's favour and notified each of them in writing accordingly. Under the Ordinance, the Commissioner was not allowed to provide reasons for his determination. The remaining three cases are still being processed at the

time of the writing of the report.

10. In 2008, the Commissioner 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 the Commissioner for an examination in respect of the unauthorized interception. Having examined the case, the Commissioner 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. Please see paragraph 6.10 of Chapter 6 of the report for details.

11. The Commissioner and his office received altogether 11 reports from LEAs in respect of irregularities and incidents that occurred or discovered in 2008. All of them related to interception. Four of these reports were made under section 54 of the Ordinance on non-compliance with the relevant requirements. For the remaining seven reports, as the heads of LEAs did not consider that the irregularity involved amounted to a non-compliance with the relevant requirements of the Ordinance, they were submitted not under section 54 of the Ordinance. However, the Commissioner considered that five reports submitted not under section 54 should have been made pursuant to section 54. The Commissioner suggests that appropriate amendments be made to the Ordinance to include a duty of the LEA heads to report to the Commissioner 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. Please see Chapter 7 of the report for details.

12. In the two more serious non-compliance cases reported under section 54 of the Ordinance, disciplinary actions had been taken against five officers in the form of advice and warning. One case concerned non-compliance with supervisor's instructions and breach of a condition of the prescribed authorization and the other case concerned interception of a wrong facility. In connection with the second case, there was a big question mark on the appropriateness of the disciplinary action taken by ICAC against the case officer who, in the view of the Commissioner, was amongst the officers concerned the least culpable or blameworthy for what had happened. The Commissioner is separately writing to the Chief Executive to provide him with the details of the facts of the case and of the Commissioner's reasoning, pursuant to section 50 of the Ordinance. Please see paragraphs 7.9 to 7.97 of Chapter 7 and Table 12 in Chapter 10 of the report for details.

13. During his inspection visit to an LEA, the Commissioner also found one case in which there were deficiencies in preparation of documents in connection with revocation of an authorization for Type 2 surveillance. Please see paragraphs 4.27 to 4.31 of Chapter 4 of the report for details.

14. To better carry out the objects of the Ordinance, the

Commissioner made a number of recommendations to the Secretary for Security and the heads of LEAs under sections 51 and 52 of the Ordinance during the report period. Please see Chapter 8 of the report for details.

15. In response to the concerns expressed by Legislative Council Members and the public following the publication of the 2007 Annual Report, the Commissioner has proposed a new initiative for improving the review measures regarding interception of communications, which are for the content of intercept products and related records to be preserved to enable the Commissioner and his staff to check cases of special interest or chosen at random. The Commissioner has informed the Security Bureau of the proposal, which requires legislative amendments to be put into effect. Please refer to Chapter 9 of the report for details of this proposal and other recommendations which require legislative amendments to implement.

16. In Chapter 11 of the report, the Commissioner concluded that the panel judges were vigilant and strict in their consideration of applications by the LEAs. The Commissioner has not found a single case in 2008 in which he entertains any doubt as to the propriety of the panel judges' determination, be it a grant of a prescribed authorization or a refusal. Despite the irregularities mentioned in Chapter 7 of the report, the Commissioner is satisfied with the overall performance of the LEAs and their officers in their compliance with the requirements of the Ordinance.

17. The Commissioner expresses his gratitude to the panel judges, the Security Bureau, the LEAs, the communications services providers and other parties concerned for their co-operation and assistance in the performance of his functions as the Commissioner. He also expresses his thanks to everyone involved in the public discussions after the publication of his 2007 Annual Report. The Commissioner is confident that the proposed improvement measures to enhance the review procedure as described in Chapter 9 of the report 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.

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