Annual Report 2009 to the Chief Executive

by

The Commissioner on
Interception of Communications
and Surveillance

June 2010

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 2010

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 2009

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 2009, together with its Chinese translation.

Yours sincerely,

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

Encl: Annual Report for 2009
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
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
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
EA	executive authorization
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ICSO device register	device register of devices withdrawn based on loan requests with a prescribed authorization in support and of such devices returned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	a law enforcement agency under the Ordinance, namely, Customs and Excise Department, Immigration Department, ICAC or Police
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

PJO	panel judges' office
Police	Hong Kong Police Force
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
section	section of the Ordinance
statutory activity	interception of communications and/or covert surveillance activity described in the Ordinance
surveillance	covert surveillance
the report period	the period from 1 January to 31 December 2009
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

Change of attitude

1.1 In my previous two annual reports, for the years 2007 and 2008, I referred to some incidents in which I expressed doubts or dissatisfaction as to the attitude of some of the officers of the law enforcement agencies ('LEAs') under the Ordinance[Note 1] towards my oversight and supervising functions as the Commissioner under the Interception of Communications and Surveillance Ordinance, Cap 589 ('Ordinance' or 'ICSO'). What has since happened is that the concerned LEAs have taken steps including revamping its personnel in the central registry that liaises with and assists me and my staff in the carrying out of those functions and the attitude problem does not seem to persist any longer. This evidences the determination of the heads of the LEAs to improve control over ICSO matters within the departments and facilitate my checking and scrutiny of the same. This is a happy note that I must record, not only in recognition of what has smoothened my tasks as the Commissioner, but also to alleviate any fear or worry that members of the public may have that my work is being obstructed to the detriment of the protection of their rights to privacy and communication.

1.2 The experience gathering exercise since the passing of the Ordinance over three years ago is still progressing. A number of 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: see section 2(1) of the Ordinance for the definition of 'department' and Schedule 1 to the Ordinance.

provisions of the Ordinance in various facets have continued to be put into practice, 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.

Improvement on procedure

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. The enhancement in procedure is more significant than it may seem in that it provides better ways of exposing inadequacies and inefficiencies and of improving my checking and control. All these will lead to better compliance by the LEAs with the requirements of the Ordinance. I am glad to report that most of my recommendations and suggestions have been given effect to by the Security Bureau and the 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.

Transparency

1.4 I fully appreciate the importance of transparency, not only to enable members of the public to know that their rights to privacy and communication are well protected, but also to apprise all those involved in the implementation of the scheme under the Ordinance of my treatment of all related matters for them to assess its fairness and share the experience.

Nonetheless 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, as various provisions of the Ordinance expressly stipulate[Note 2]. This is the reason why some matters in this report may not be described in as much detail as all those concerned would like. I have, however, exercised great vigilance in weighing this non-prejudice principle against the treasured principle of transparency which inevitably conflict with each other and endeavoured, hopefully with success, to include as much information in this report as the non-prejudice principle can possibly permit.

Note 2 See, for instance, sections 44(6), 46(4), 48(3), 48(4) and 49(5) of the Ordinance.

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CHAPTER 2

INTERCEPTION

Prescribed authorizations

2.1 Under 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 What requires specific mention is the last category where the authorization allows interception of a telecommunications facility (such as a telephone line) that the targeted subject is 'reasonably expected to use', although at the time when the prescribed authorization was sought, the identifying details of this facility (such as the telephone number) were not yet known. An authorization with such a clause gives the LEA concerned the power to intercept any communication facilities 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 During my inspection visits to the LEAs, I paid particular attention to this type of authorizations and the additional communication facilities which were included by the LEAs under these authorizations to ensure that they were granted properly. It appears to me that the panel judges were very careful and stringent in considering applications requesting the 'reasonably expected to use' clause. If there were insufficient grounds in support, the panel judges simply issued the authorizations for interception without granting the 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 authorization with such clause inappropriately or a case where the LEA concerned had subsequently added a facility pursuant to the clause without justification.

Written applications

2.5 During the report period, a total of 1,796 written applications for interception were made by the LEAs, of which 1,781 were granted and 15 were refused by the panel judges. Among the successful applications, 831 were for authorizations for the first time ('fresh applications') and 950 were for renewals of authorizations that had been granted earlier ('renewal applications').

Reasons for refusal

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

(a) the conditions of necessity and proportionality were not met;

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

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

(d) no valuable/relevant information had been obtained pursuant to the preceding authorization.

Emergency authorizations

2.7 An officer of an LEA 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 by reason of 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)].

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

Oral applications

2.9 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)]. According to the Code of Practice ('the Code') issued by the Secretary for Security, oral application procedures should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedures cannot be followed. An oral application and the authorization granted as a result of such an application is 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.

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

Duration of authorizations

2.11 For the majority (over 87%) 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 52 days while the shortest one was for a few days only. Overall, the average duration for each authorization was about 30 days. This reflects that the panel judges had adopted a cautious approach in determining the duration of the authorizations.

Offences

2.12 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

2.13 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)].

2.14 During the report period, the number of authorizations for interception revoked 'fully' under section 57 was 644. In addition, another 122 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 had stopped using the telephone number concerned for his criminal activities, the interception operation was not productive, or the subject was arrested. This illustrates that the LEAs acted in a responsible manner and vigilantly complied with the requirements and spirit of the Ordinance, in that whenever there was no necessity to continue with the prescribed authorization, or part of it, discontinuance would be undertaken as soon as possible.

2.15 In addition, I noted that an LEA discontinued an interception operation because intelligence revealed that the facility in question would

not be used by the subject for a certain period of time. The LEA concerned applied for a new authorization for interception of that facility again when the subject was expected to resume using the facility. This demonstrates further the LEA's vigilance in compliance with the requirement of the Ordinance because the interception operation was discontinued as soon as the conditions for the continuance of the prescribed authorization under section 3 of the Ordinance were no longer met.

2.16 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 was no revocation made under section 58.

2.17 As pointed out in my previous annual reports, where the relevant authority to whom a section 58 arrest report is made decides to exercise its discretion 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.

2.18 To address the issue, 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. Nonetheless, 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. The issue, I believe, will be covered in the comprehensive review of the Ordinance being carried out by the Security Bureau.

Authorizations with five or more previous renewals

2.19 There were 47 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, particular attention was paid to see whether the renewals were granted properly and whether useful information had been obtained through the interceptions. All the cases with six renewals and a great majority of cases with even more renewals were checked and found in order during my inspection visits to the LEAs.

Legal professional privilege

2.20 During this report period, there was one case in which information 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 under LPP Report 2.

2.21 Besides, a small proportion of applications for interception were assessed to have the likelihood of LPP information being obtained. I have examined the relevant files of a majority of these cases during my inspection visits at the LEAs' premises. It appears to me that the panel judges had considered the cases carefully and had fairly assessed the likelihood of LPP information being obtained, amongst other factors concerned. 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

2.22 During this report period, there were two cases where journalistic material ('JM') had been obtained in consequence of interception carried out pursuant to a prescribed authorization. Details of these cases can be found in Chapter 5.

2.23 There were a few cases where the LEA concerned had assessed to likely involve JM. For those cases which were also assessed by the panel judge to have JM implications, additional conditions were imposed to better protect the freedom of the media.

Effectiveness of interception

2.24 It is and continues to be the common view of the LEAs that interception is a very effective and valuable investigation tool in the prevention and detection of serious crimes and the protection of public security. Information gathered from interception can very often lead to a

fruitful and successful conclusion of an investigation. During this report period, a total of 129 persons, who were subjects of authorized interception operations, were arrested as a result of or further to interceptions carried out pursuant to prescribed authorizations. Moreover, a further 165 non-subjects were arrested consequent upon the interception operations. The relevant arrest figures are shown in Table 3(a) in Chapter 10.

Cases of irregularities

2.25 During this report period, there were not any reports of non-compliance with the requirements of the Ordinance submitted under section 54 in respect of interception operations. Nevertheless, six 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

2.26 There were three different 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').

The following paragraphs further explain how the above reviews were carried out.

Checking of weekly reports

2.27 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 refused, 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.

2.28 The weekly report forms only contain general information relating to cases of that particular week such as whether the application was successful or rejected, the duration of the authorization, the offences involved, 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, identity and particulars of the subject and others, etc is not required and therefore obliterated or sanitized, so that such information will always be kept confidential with minimal risk of leakage.

2.29 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 also seek clarification and explanation in my periodical inspection visits to the 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

2.30 As explained in preceding paragraphs, the LEAs and the PJO only provide general case information in their weekly reports. If 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 LEAs' offices. In these inspection visits, I would also select, on a random basis, some other cases for examination apart from those requiring clarification.

2.31 In case 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.

2.32 During this report period, in addition to the clarification of matters relating to minor discrepancies in the weekly reports from the

LEAs and the PJO, a total of 527 applications for interception, including the granted authorizations and refused applications, and 190 related documents/matters had been checked in my periodical inspection visits to the LEAs.

Counter-checking with non-LEA parties

2.33 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 premises of the LEAs, I have also adopted measures for further checking the interceptions conducted by the LEAs.

2.34 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.

2.35 To further help expose any unauthorized interception should it occur, arrangements had also been made for the 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

2.36 Apart from the cases of irregularities 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.

2.37 The checking of the archived material referred to in paragraphs 2.34 and 2.35 above was useful, as not only the numbers of the facilities subject to duly authorized interception but also the numbers of the facilities intercepted without valid authorization mentioned in paragraphs 5.16, 5.34, 5.43(d), 5.49(b) and 5.72(d) of Chapter 5 and paragraphs 7.93, 7.108 and 7.112 of Chapter 7 were found to have been recorded.

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 130 written applications for Type 1 surveillance made by the LEAs, including one case in which Type 2 surveillance was elevated as Type 1 surveillance because of the likelihood of LPP information being obtained [section 2(3)]. All these applications were granted, including 88 fresh applications and 42 renewal applications. No application for Type 1 surveillance was refused.

Emergency authorizations

3.3 If an officer of an LEA considers that there is immediate need for Type 1 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, he may apply in writing to the head of his department for issue of an emergency authorization for the surveillance [section 20(1)]. An emergency authorization shall not last longer than 48 hours and may not be renewed [sections 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 the 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 30 days whereas the shortest one was less than a day. Overall, the average duration for such authorizations was about 10 days.

Authorizations with five or more previous renewals

3.9 There were three authorizations for Type 1 surveillance 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 surveillance operations. All the cases were checked and found in order during my inspection visits to the LEAs concerned.

Offences

3.10 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 both types of covert surveillance during the report period.

Revocation of authorizations

3.11 For this report period, a total of 82 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 expected meeting/activity to be monitored was postponed or cancelled, or the subject was arrested. 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 (a panel judge for Type 1 surveillance), who shall under section 57(4) revoke the prescribed authorization concerned upon receipt of the report on discontinuance. Of the 82 discontinuance cases reported in relation to Type 1 surveillance, 32 prescribed authorizations concerned were subsequently revoked 'fully' by the relevant authority and one prescribed authorization was revoked 'partially' due to deletion of one of the observation posts. The full revocation applied to cases where the entire covert surveillance operation had been discontinued whereas the partial revocation was required because it had become unproductive or unnecessary to maintain one of a number of observation posts where surveillance devices were originally authorized to be installed. For the other 49 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 relevant authority could only note the discontinuance reported by the LEAs instead of revoking the prescribed authorization.

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

Legal professional privilege and journalistic material

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

Application for device retrieval warrant

3.14 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 operation, successful or otherwise.

Effectiveness of surveillance

3.15 As a result of or further to surveillance operations, be it Type 1 or Type 2, a total of 110 persons who were subjects of the prescribed authorizations were arrested. In addition to the arrests of subjects of the prescribed authorizations, 37 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

3.16 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

3.17 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 2.27 to 2.29 of Chapter 2 for interception equally applies to surveillance and will not be repeated here.

Checking of cases during inspection visits

3.18 The mechanism of checking cases during inspection visits to LEAs is described in paragraphs 2.30 and 2.31 of Chapter 2.

3.19 In addition to matters relating to minor discrepancies in the weekly reports having been clarified, a total of 94 applications for Type 1 surveillance, all resulting in granted authorizations (see paragraph 3.2 above), and 31 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.

3.20 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.

In my inspection visits, I examined the relevant documents of these cases and requested the LEA concerned to answer my queries. The explanations given by the LEA for all such cases were satisfactory and there was no sign of abuse of surveillance devices in these cases for any unauthorized purposes.

3.21 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. This called into question whether the LEA concerned or any of its officers failed to comply with the requirement under section 57.

3.22 The LEA explained that, in the cases concerned, intelligence revealed that the targets and/or their associates might meet with each other, either for the first time or again, for further discussion of their criminal activities within the authorized period, irrespective of whether the surveillance operations that had already been conducted were successful or otherwise. In the circumstances, there was a need to allow the prescribed authorizations to continue to cater for further surveillance operations, if required. In view of the possibility that the anticipated meetings might be postponed or did not materialize, officers were required to return the relevant surveillance devices to the device registries during the interim to minimize the chance of possible abuse of the devices by frontline officers for unauthorized purposes. Only in justified circumstances would officers be allowed to keep the surveillance devices in hand. For the cases referred to in the preceding paragraph, meeting(s) among the targets and/or their associates were anticipated to take place after return of the surveillance devices but it turned out that no meeting occurred before the expiry of the authorizations concerned. Consequently, such prescribed authorizations expired naturally without any further surveillance operation being carried out. Having examined the relevant case documents and heard the LEA's explanations, I considered that the decisions not to discontinue the operations before expiry of the prescribed authorizations concerned were justified and there was no non-compliance with the requirement under section 57.

3.23 There was a case where the device register showed that the surveillance devices drawn were returned about two hours after the time of revocation of a prescribed authorization. I questioned the LEA concerned to clarify if anything untoward might have occurred. The LEA explained that the surveillance devices were drawn for conducting surveillance on a meeting between a participating agent and a subject of the investigation. The subject was arrested during the meeting and a decision was then made to discontinue the surveillance operation. Upon receipt of a discontinuance report submitted about one hour later, the authorizing officer revoked the prescribed authorization immediately. However, as the officers in physical possession of the surveillance devices needed to take a statement from and conduct debriefing with the participating agent at the scene where the surveillance cum arrest operation took place, the surveillance devices could not be returned before the time of revocation of the prescribed authorization. The surveillance devices were returned after the officers returned to their office from the scene. I considered the explanations given by the LEA acceptable.

3.24 I noticed a case in which a fresh authorization and its subsequent renewals authorized the use of two kinds of surveillance devices but only one kind of the surveillance devices authorized was actually used in all the surveillance operations conducted under the fresh or the renewed authorizations. In response to my query, the LEA explained that it was assessed at the time of making the fresh application that there was a need for the use of both kinds of surveillance devices but it was later considered that it would not be desirable to use one of the two kinds of surveillance devices in view of the circumstances of the investigation. In applying for renewing the authorization, the applicant simply repeated the

kinds of surveillance devices authorized by the fresh authorization without dropping the kind that would not be used. I considered this practice improper and advised that when a kind of surveillance devices was no longer involved in the surveillance operation authorized by an authorization, the kind of devices should be taken out from the renewal application and the change of circumstances should be clearly stated in the affidavit in support of the renewal application. On the other hand, if a new or additional kind of devices was required, a fresh application instead of a renewal application should be made.

3.25 During an inspection visit to an LEA, I reviewed four applications for Type 1 surveillance in two investigation cases and found that the quantity of surveillance devices withdrawn might be in excess of what was authorized. I considered that they might be cases of non-compliance and requested the LEA to submit to me reports under section 54. Details of these cases can be found in paragraphs 7.123 to 7.130 of Chapter 7.

Checking of surveillance devices

3.26 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 and a separate device register of devices withdrawn for administrative or other purposes based on loan requests for surveillance devices in respect of which no prescribed authorization is required. Both types of register will

also record the return of the devices so withdrawn. An inventory list of surveillance devices for each device registry is also maintained with a unique serial number assigned to each single surveillance device item for identification as well as for my checking purposes.

3.27 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. If warranted, LEAs were also required to provide me with copies of the request forms for withdrawal of surveillance device for my examination. 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.

3.28 Apart from those stated in my previous annual reports, the following are some of my major observations after checking the inventory lists, device registers and request forms for withdrawal of surveillance devices:

(a) I observed from an ICSO device register of a particular LEA that for all the surveillance operations conducted under the same prescribed authorization, devices were returned on the same day when they were issued except on one occasion where devices were returned only on the following day and were reissued five minutes after their return. In response to my enquiries, the LEA explained that in this case the officer

concerned intended to return the devices to the device registry after a surveillance operation was conducted. However, the officer-in-charge of the device registry refused to take over the devices as the device register was not available at the device registry at the time. It had been taken out by a supervisory officer for conducting routine checking of the device register. Upon retrieval of the device register from the supervisory officer on the following day, arrangements were made for the return of the devices to the device registry. As it happened that the surveillance operation for the day would commence soon, the same devices were reissued five minutes after their return. To ensure early return of devices in future, the LEA concerned instructed that device registers should be kept inside the relevant device registries at all times, and that supervisory officers should normally conduct the checking of the device registers inside the relevant device registries. In case a device register was unavoidably required to be taken out of the device registry, an entry should be made in the Occurrence Book of the device registry to record the movement of any device, if it so happened, with the same information as in the device register and a corresponding remark should also be made in the device register after it was available.

(b) I found that in some request forms for withdrawal of surveillance device, the officer requesting surveillance device did not fill in his post title as required by the form. This made my oversight difficult. I requested the LEA concerned to

remind all relevant officers of the need to duly complete the request form.

(c) I noted that the request form for withdrawal of surveillance device of an LEA did not require the requester to put his signature on the form, which was inappropriate. In response to my suggestion, the LEA revised the request form so that the requesting officer was required to sign on the form to confirm his request.

(d) I spotted a number of errors relating to the entries made in the device registers of a particular LEA, which included items of wrong time of discontinuance of surveillance operation. The officers filled out the time of decision to discontinue the surveillance operation as the time of actual discontinuance of the surveillance operation. This reflected the lack of knowledge of the terms concerned by some LEA officers. The LEA undertook to improve its officers' awareness.

(e) The description of some surveillance devices in the inventory list was too general and hence might be misleading. I requested the LEA to revise the relevant descriptions in order to avoid confusion and to put in the proper names in the inventory.

3.29 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 to ensure that 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.

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

CHAPTER 4

TYPE 2 SURVEILLANCE

Executive authorizations

4.1 Since Type 2 surveillance is less privacy 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 79 written applications for Type 2 surveillance made by the LEAs, of which 75 were granted and four were refused by the authorizing officer. Among the successful applications, 64 were fresh applications and 11 were renewal applications.

4.3 The four refused applications were fresh applications. Of these, three applications did not provide sufficient information to justify the issue of an authorization. For the remaining refused application, some facts provided by the applicant were confusing and justification for the duration of the authorization sought was not provided. For these reasons, the four applications were 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. The applicant should apply in writing to the authorizing officer for confirmation of the orally-granted executive authorization within 48 hours from the issue of the authorization, failing which the executive authorization is to be regarded as revoked upon the expiration of the 48 hours [section 26]. In the report period, three 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 31 days while the shortest one was less than a day. The overall average duration for such authorizations, including both written and oral applications, was about eight days.

Authorizations with five or more previous renewals

4.7 There was no case of any authorization for Type 2 surveillance which had been renewed for more than five times during the report period.

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 (both Type 1 and Type 2) during the report period.

Revocation of authorizations

4.9 For this report period, a total of 65 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 expected meeting/activity to be monitored was postponed or cancelled, or the subject was arrested. Of the 65 discontinuance cases reported to the authorizing officer in relation to Type 2 surveillance, 56 prescribed authorizations concerned were subsequently revoked by the authorizing officer under section 57(4). For the remaining nine 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 of revoking the prescribed authorization.

4.10 There was no revocation made pursuant to section 58 in respect of Type 2 surveillance during this report period.

Legal professional privilege and journalistic material

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

Application for device retrieval warrant

4.12 There was no application for any device retrieval warrant for retrieving the devices used for Type 2 surveillance during this report period.

Effectiveness of surveillance

4.13 As a result of or further to surveillance operations, including both Type 1 and Type 2, a total of 110 persons who were subjects of the prescribed authorizations were arrested. In addition to the arrests of subjects of the prescribed authorizations, 37 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 3.16 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 LEAs and PJO cover all statutory activities, including Type 2 surveillance. This way of

checking has been described in paragraphs 2.27 to 2.29 of Chapter 2 and will not be repeated here.

Checking of surveillance devices

4.16 Please refer to paragraphs 3.26 to 3.30 of Chapter 3 regarding the checking of surveillance devices.

Checking of cases during inspection visits

4.17 Please refer to paragraphs 2.30 to 2.31 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 are granted properly.

Observations

4.19 In addition to matters relating to minor discrepancies in the weekly reports having been clarified, a total of 72 applications[Note 3], both written and oral, for Type 2 surveillance, including granted authorizations

Note 3 Some of the cases occurring in 2008 were checked in early 2009 and similarly some of the cases occurring in 2009 were only checked in early 2010. Of the 79 written applications for Type 2 surveillance (see paragraph 4.2 above) and three oral applications (see paragraph 4.4 above), 63 were checked in 2009 and 19 were checked in 2010 up to the writing of this report.

and refused applications, and 23 related documents/matters had been checked during my periodical inspection visits to the LEAs in this report period.

4.20 With respect to the three oral applications made during this report period, I found that the executive authorizations granted were justified, the use of oral application procedures in these cases was in order and the applications for confirmation of the executive authorizations were made within 48 hours from the issue of the authorizations as required by the Ordinance. Regarding the written applications, although there were some areas for improvement, most of the cases that I had checked were found to be in order. I set out my major observations arising from the inspection visits in the following paragraphs.

Application without sufficient explanation of the validity period of authorization sought

4.21 There was an executive authorization granted for monitoring a meeting between the suspect(s) and a victim of a serious crime. The validity period of the authorization was about 2 days ending at 0200 hours. Having examined the application file during my inspection visit, I did not see any information or explanation provided in the statement in writing in support of the application as to why the authorization was required up to such odd hours as 0200 hours. Despite this, the authorizing officer granted the application without seeking explanation in this respect from the applicant. In response to my enquiry, the LEA explained that the authorizing officer had the knowledge that the victim would leave Hong Kong around the end of the validity period sought, and therefore did not seek explanation from the applicant. The applicant did not provide

explanation of the validity period in the statement in writing because of the short duration of the authorization sought.

4.22 I advised that the authorizing officer should not take it for granted or act in accordance with his knowledge of the case being investigated. If the applicant had not explained in the statement in writing why the authorization sought should end at such odd hours, the authorizing officer ought to ask question in a supplementary sheet. The supplementary sheet which contains the question by the authorizing officer and the answer provided by the applicant should be filed for record purpose and to facilitate my review.

Lack of a reporting system for initial material inaccuracies and material changes of circumstances

4.23 For judge's authorizations, if an LEA is aware of any initial material inaccuracy or any material change of circumstances upon which an authorization was granted or renewed, the LEA should submit a report using form REP-11 ('the REP-11 report') to the relevant authority (a panel judge) to report the initial material inaccuracy or material change of circumstances. However, there was no similar reporting system for executive authorizations.

4.24 During my inspection visit to an LEA, I examined the application file of an executive authorization. I noted that an amendment was made by the applicant on the statement in writing in support of the application after the authorization had been granted by the authorizing officer. In this respect, the LEA explained that shortly after the authorization was granted, the authorizing officer spotted that a piece of

relevant information was omitted from the statement in writing made by the applicant. The authorizing officer then requested and caused the applicant to add the omitted information at the relevant part of the statement in writing. I considered it inappropriate for the applicant to make any amendment on the statement in writing after the executive authorization had been granted. Instead, the applicant should have reported the omission to the authorizing officer via a report similar to the REP-11 report setting out the relevant details and explanations. Such a report should have been provided to me for reference as soon as practicable. In response to my recommendation, the LEA brought this matter to the attention of the Security Bureau, which would design a form similar to the REP-11 report so that the applicant for executive authorization can properly report to the authorizing officer any initial material inaccuracy or material change of circumstances whenever necessary.

Global approach in applying for prescribed authorization for surveillance

4.25 In examining an executive authorization granted for using listening devices to monitor and record conversations amongst the subjects during a meeting, I noted that optical surveillance would also be conducted over the same meeting. However, as the meeting was to be held in a public place where the subjects were not supposed to have a reasonable expectation to be free from being observed visually by others, the applicant considered that the optical surveillance over the meeting did not require an authorization under the Ordinance and the executive authorization was, therefore, sought for covering the use of listening devices only. The optical surveillance devices were issued under the non-ICSO device register.

4.26 Although I did not consider the conduct of the optical surveillance without the authority of an executive authorization illegal, I advised the LEA that in circumstances such as the one in question, it was more advisable for the applicant to adopt a global approach in making the application for the executive authorization. This meant that the applicant should present the entirety of the proposed surveillance operation in the application for the executive authorization by including the use of both listening and optical surveillance devices in the surveillance operation in the statement in writing so that the authorizing officer could see the whole picture and take it into his consideration to determine whether he should grant or refuse the application. The LEA undertook to bring my advice to the attention of the officers concerned.

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CHAPTER 5

LEGAL PROFESSIONAL PRIVILEGE AND JOURNALISTIC MATERIAL

Reporting requirement

5.1 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 legal professional privilege ('LPP'), or may be the contents of any journalistic material ('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 account of these factors when considering whether the issue of a prescribed authorization meets the conditions set out in section 3 of the Ordinance.

5.2 The Code issued by the Secretary for Security provides that LEAs should notify me of interception/covert surveillance operations that are likely to involve LPP information as well as cases where LPP information has been obtained inadvertently. On the basis of the department's notification, I may, inter alia, review the information passed on by the units dedicated to monitoring and examining the product of interception or covert surveillance ('dedicated units') to the investigators to check that it does not contain any information subject to LPP that should have been screened out [paragraph 120 of the Code]. Failure to report LPP

cases to me would be treated as non-compliance with the requirements of the Ordinance.

5.3 On the other hand, there is no similar provision in the Code requiring LEAs to report to me cases where information which may be the contents of any JM has been obtained through interception or covert surveillance. In other words, it is not non-compliant with the requirements of the Ordinance if the LEAs choose not to notify me of such cases. The Code is also silent on how to deal with the matter if such material has been obtained. In paragraph 9.21 of my Annual Report 2008, I flagged up this issue so that it could be looked into when the Ordinance or the Code is reviewed.

Reports received

5.4 In the report period, I received five reports relating to the inadvertent obtaining of information which might be subject to LPP or heightened likelihood of obtaining LPP information. Seven prescribed authorizations were involved. Only the case in LPP Report 2 involved the actual obtaining of LPP information.

5.5 In the report period, I also received two reports on inadvertent obtaining of information which contained JM. Three prescribed authorizations were involved.

The order in dealing with cases

5.6 It should be noted that the numbering of the cases in this chapter was made in accordance with the respective timing when each of the reports was made to me by the LEA concerned. However, the time of

the review of the cases or the order in which the reviews had taken place did not necessarily follow the numbering because sometimes a review of a later numbered (reported) case might have preceded that of an earlier numbered (reported) case.

Legal Professional Privilege

LPP Report 1

5.7 An LEA reported to me an incident where interception continued for seven minutes after the panel judge revoked two prescribed authorizations upon considering REP-11 reports on change of LPP risk.

5.8 Briefly, two prescribed authorizations were issued for interception of the facilities used by the same subject. At the time of application for and issue of the authorizations, it was not envisaged that LPP information would be obtained through interception on those facilities. One day, the LEA intercepted a call on one of the facilities of the subject. After listening to part of the call, the listener realized that the call was between the subject and a solicitor. The listener reported the matter to the team supervisor. The listener resumed listening to the call in which the subject informed the solicitor of an arrest case and negotiated with the solicitor on the legal fees for the solicitor's assistance in bail procedures. The listener reported the contents of this call to the team supervisor who escalated the matter to a senior officer. The senior officer considered that no LPP information had been obtained. Some time later, the solicitor returned call to the subject, which was also listened to by the listener. In that call, the subject asked the solicitor to visit the arrested persons.

5.9 On the next day, another incoming call to the subject's another facility was intercepted. The call was made by another solicitor of another telephone number. The call lasted more than 10 minutes. After listening to T minutes of the call, the listener formed the view that there was likelihood of obtaining LPP information and reported the matter to the team supervisor and the senior officer. The senior officer considered that there was heightened likelihood of obtaining LPP information and directed that monitoring should be put on hold pending re-assessment by the panel judge on the two authorizations. The LEA submitted two REP-11 reports to the panel judge accordingly.

5.10 After considering the two REP-11 reports, the panel judge revoked the two authorizations. He noted that in these cases the subject was highly likely to continue using the two facilities to communicate with the solicitor or other solicitors for legal advice and the contents of such communications would invariably contain matters subject to LPP. Seven minutes later, the facilities used by the subject were removed from interception. The LEA reported the matter to me not pursuant to paragraph 120 of the Code but as an incident report of irregularity because of the continued interception of seven minutes after the revocation of the two authorizations.

My review

5.11 I carried out a review by inspecting the materials and records preserved by the LEA for this case.

5.12 Pending revision of the Ordinance regarding the legitimacy or propriety of listening by me or my officers to audio products derived from

the interception of communications over telecommunications facilities, neither I nor any of my officers listened to the audio products in this case although the LEA had preserved them for my review. See elaboration on this matter under the heading 'Limitations' below.

Findings

5.13 After conducting a review, I made the following findings.

5.14 The summaries produced for my inspection did not contain any LPP information. This verified that no LPP information had been passed to the investigators through these summaries, complying with the requirement in this respect with paragraph 120 of the Code.

5.15 The audit trail report ('ATR') prevailing at the time of this incident was such that the length recorded thereon was indistinguishable between the length of a call and the length of listening. In other words, it could not show the duration of listening by the listener. Neither could it show which part of the call the listener had accessed. Hence, in the present case, I could not verify the claim in the REP-11 reports that the listener had only listened to the call for T minutes (referred to in paragraph 5.9 above) and if so, which part or parts of the call that the listener had listened to.

5.16 The LEA acted swiftly in causing the disconnection of the facilities within seven minutes after the revocation by the panel judge of the prescribed authorizations. The interception carried out during the seven minutes after the revocation of the prescribed authorizations was conducted without the authority of an authorization and was unauthorized. There was no call during the seven minutes of unauthorized interception.

5.17 My inspection of the call data also showed that other than the calls mentioned in the REP-11 reports, there was no other call made by the subject to, or received by the subject from, the facility numbers of the two solicitors.

5.18 As I had not listened to the audio recordings, I could not verify whether the REP-11 reports had truthfully reported the gist of the conversations in the calls concerned. Nor could I check whether, apart from the calls mentioned in the REP-11 reports, there were any other calls preceding the reported calls which might have contained LPP information that should have been reported to the panel judge and me.

Recommendations

5.19 I made the following major recommendations which should apply to all future cases:

(a) A new ATR system should be developed to record which parts of a call the listener had listened to. This is important in LPP cases to see whether the listener has accessed the part containing LPP information and whether he has complied with the restrictive conditions imposed by the panel judge on the authorization.

(b) The formats and printouts of the ATR and relevant records should be improved as specified by me so as to better present such records and their completeness.

(c) If an authorization is revoked due to the obtaining of LPP information or heightened likelihood of obtaining LPP

information, and if the LEA intends to listen to or re-listen to any intercept products obtained prior to the revocation of the authorization if it occurred, the LEA should ensure full disclosure of its intention in the REP-11 report submitted and expressly seek the panel judge's approval to do so. The same notification of intention should also apply in a section 57 (discontinuance) report or a section 58 (arrest) report when likely LPP information has been obtained or encountered.

5.20 In respect of prior cases, I had already recommended that the REP-11 report should make a full and frank disclosure of the number of times a call containing LPP information or possible LPP information had been listened or re-listened to, the respective time and date of each such listening or re-listening, and the identity of each of the listeners.

5.21 The above recommendations were not confined to this LEA alone. I requested the Security Bureau to inform other LEAs of my above recommendations so that all LEAs could follow accordingly.

LPP Report 2

5.22 This report was submitted to me pursuant to paragraph 120 of the Code. It involved one prescribed authorization. At the time of applying for and issue of the authorization, it was not envisaged that LPP information would be obtained through interception on the subject.

5.23 On a day, the LEA intercepted a call made to the subject by a person from a landline telephone number (i) ('the First Call'). The subject addressed this person as Solicitor X. The solicitor informed the subject of the progress of a matter. After listening to the call, the listener reported the

contents of the call to his seniors. A superior officer formed the view that no LPP information had been obtained.

5.24 Later, the subject made a call to the mobile telephone number (ii) of Solicitor X ('the Second Call') following up on the matter discussed in the First Call and sought the solicitor's advice on a specific point. After listening, the listener immediately reported the contents to his seniors. The superior officer considered that it was not apparent that information which might be subject to LPP had been obtained.

5.25 On a day after interception of the Second Call, the LEA intercepted another call made to the subject by Solicitor X from telephone number (i) ('the Third Call'). After listening, the listener reported the contents to the superior officer. The superior officer considered that the solicitor might be representing the subject's company in some matters not known to the LEA and that information which might be subject to LPP had been inadvertently obtained. The superior officer decided that an REP-11 report should be submitted to the panel judge to report the material change of circumstances and seek his re-assessment of the position.

5.26 After receipt of the REP-11 report, the panel judge considered that the facts giving rise to the report on material change were related to section 31 of the Ordinance especially section 31(1)(a)(ii), which read:

> '(1) Notwithstanding anything in this Ordinance, unless exceptional circumstances exist –
>
> (a) no prescribed authorization may contain terms that authorize the interception of communications by reference to –
>
> (i) …

(ii) in the case of a telecommunications interception, any telecommunications service used at an office or other relevant premises, or a residence, of a lawyer, or any telecommunications service known or reasonably expected to be known by the applicant to be ordinarily used by a lawyer for the purpose of providing legal advice to clients; and

(b) …

(2) For the purposes of subsection (1), exceptional circumstances exist if the relevant authority is satisfied that there are reasonable grounds to believe –

(a) that -

(i) the lawyer concerned;

(ii) in the case of an office or other relevant premises of the lawyer, any other lawyer practising with him or any other person working in the office; or

(iii) in the case of a residence of the lawyer, any other person residing in the residence,

is a party to any activity which constitutes or would constitute a serious crime or a threat to public security; or

(b) that any of the communications concerned is for the furtherance of a criminal purpose.

…'

5.27 The panel judge considered that it was probable the telecommunications interception conducted under the prescribed authorization had covered a telecommunications service used at an office of a lawyer, or any telecommunications service known or reasonably expected to be known by the applicant of the authorization to be ordinarily used by a lawyer for the purpose of providing legal advice to clients. The three occasions mentioned in the REP-11 report were probably of such nature. While the REP-11 report admitted that LPP information had been obtained on the third occasion only, the panel judge was of the view that such information was quite possibly obtained on all three occasions.

5.28 The panel judge opined that there was no material to show that the case fell within the exceptional circumstances referred to in section 31(2). The REP-11 report ought to have been made as soon as possible after the First Call.

5.29 The panel judge also pointed out that despite knowledge that one of the parties involved in the communication was a lawyer, there was no evidence of regard (or sufficient regard) having been paid to section 31(1)(a)(ii). Alternatively, if such regard had in fact been paid to that provision, no measure had been put in place to guard against the risk of its contravention.

5.30 The panel judge revoked the authorization by reason of the above matters. Five minutes after the revocation, the facility was disconnected. The LEA reported this incident to me under paragraph 120 of the Code.

My review and findings

5.31 I conducted a review by examining the materials and records preserved by the LEA for my purposes. I did not listen to the audio recordings in this case for the same reason mentioned in paragraph 5.12 above.

5.32 The summaries that were produced for my inspection did not contain any information subject to LPP. This verified that no LPP information had been passed to the investigators through these summaries, complying with the requirement in paragraph 120 of the Code.

5.33 The ATR had been checked to verify the date and time the listener listened to the three calls. The information in the ATR tallied with what was reported in the REP-11 report.

5.34 The LEA acted swiftly in effecting the disconnection of the facility which was completed five minutes after the revocation of the authorization. Interception conducted during these five minutes was without the authority of a prescribed authorization and was unauthorized. There was no call during these five minutes.

5.35 My inspection of the call data also showed that other than the three calls mentioned in the REP-11 report, there was no call made by the subject to, or received by the subject from, the two telephone numbers of Solicitor X.

5.36 As I had not listened to the audio recordings archived in the LEA, no finding could be made as to:

(a) whether the REP-11 report had fully and truthfully reported the gist of the conversations of the three calls to the panel judge; and

(b) whether, apart from the calls mentioned in the REP-11 report, there were any other calls preceding the reported calls which might have contained LPP information that should have been reported to the panel judge and me.

Recommendation

5.37 In the present case, I considered that the obtaining of LPP information on the third occasion could have been avoided had the department taken appropriate precautionary measures after listening to the First Call. After listening to the First Call, the listener acted properly in immediately reporting the case to his seniors for directive. His seniors did not consider that information which might be subject to LPP had been obtained, and hence did not consider that a report to the panel judge was necessary. However, knowing that the conversation was between the subject and a solicitor and that the call was made from a landline of the solicitor (presumably from the solicitor's office or residence), the LEA should at the very least take some precautionary measures to guard against the risk of obtaining LPP information, such as not to listen to further calls made by the subject to, or received by the subject from, that solicitor's telephone number. However, no such precautionary measure was taken. If the First Call did not prompt the LEA to take precautionary measures, the LEA should have realized the need to do so after interception of the Second Call. Had appropriate precautionary measures been taken, the inadvertent obtaining of LPP information through listening to the Third Call could have been avoided because it would have been excluded from listening in the first instance.

5.38 I recommended that in future, apart from considering whether a matter amounts to a material change of circumstances which ought to be reported to the panel judge, the LEA should also put in place appropriate measures to guard against the risk of contravening section 31(1)(a)(ii).

LPP Report 3

5.39 This report involved one prescribed authorization. At the time of applying for and issue of the authorization, the interception was not assessed to involve LPP.

5.40 The LEA intercepted a call made to the subject. The caller addressed himself as a solicitor. After listening to part of the call, the listener reported the matter to his supervisor. After further listening for a while in which the conversation touched on resolving a matter by settlement, the listener considered that LPP information would likely be obtained. He reported the content of the call through the chain of command. His senior officer assessed that the solicitor was representing the subject in some matters not known to the LEA and that there was a heightened likelihood of obtaining LPP information. The senior officer therefore instructed that the monitoring exercise should be put on hold pending re-assessment by the panel judge and that an REP-11 report be submitted to the panel judge. After considering the REP-11 report, the panel judge revoked the authorization. The facility was disconnected five minutes later. The LEA reported this case to me as an incident of irregularity where there was unauthorized interception of five minutes after the revocation of the authorization.

My review and findings

5.41 In my inspection visit to the LEA, I examined the preserved materials and records except the audio recording.

5.42 Checking for verification of what the LEA reported had also been made with the relevant ATR provided by the LEA. The ATR in this

case had improved over the one mentioned in LPP Report 1 (paragraph 5.15 above) in that the duration of the call and the length of listening by the listener were separately recorded. However, this improved version could still not be able to show which part of the call that the listener had accessed.

5.43 My findings in this case were:

(a) The call lasted more than two minutes, and the listener listened to it for a total of T seconds, as verified by the ATR. However, the ATR could not be used to verify which parts of the call that the listener had listened to.

(b) The summaries produced for my inspection did not contain any information subject to LPP.

(c) The LEA submitted the REP-11 report promptly (within the same day of the interception of the call) to the panel judge and acted swiftly in effecting the disconnection of the facility, which was completed five minutes after the revocation of the prescribed authorization.

(d) The interception after the revocation of the authorization and before the disconnection of the facility was conducted without the authority of a prescribed authorization. The unauthorized interception lasted five minutes. There was no call during these five minutes.

5.44 As I had not listened to the audio recording archived in the LEA, no finding could be made as to the veracity of the content of the call

as stated in the REP-11 report and whether there were any communications subject to LPP in the calls intercepted before the call.

LPP Report 4

5.45 This report involved two prescribed authorizations on the same subject. At the time of applying for and grant of the authorizations, interception on the subject was not assessed to involve LPP.

5.46 For the same investigation, the subject's employee was also put under interception authorized by another prescribed authorization. After knowing through interception that the employee had been arrested, the LEA decided to discontinue the interception on the employee and thus submitted a discontinuance report to the panel judge to revoke the authorization in respect of the employee. While the panel judge revoked the prescribed authorization on the employee, he allowed the authorizations in respect of the subject to continue.

5.47 One day, a call on one of the facilities of the subject was intercepted. After listening to part of the call, the listener suspected that the person (Mr Y) to whom the subject spoke might be a lawyer. The listener reported the contents of the call to a supervisor who considered that no LPP information had been obtained.

5.48 Later, the LEA intercepted another call made to the subject by Mr Y. After listening to part of the call, the listener considered that LPP information would likely be obtained. The listener reported the matter through the chain of command. The LEA assessed that there was a heightened likelihood of obtaining LPP information. It appeared that Mr Y was probably a legal adviser or a staff member of a solicitors' firm and that

the communications between him and the subject pertained to impending court proceedings. REP-11 reports were submitted to the panel judge the following day reporting on the heightened likelihood of obtaining LPP information through interception on the subject. The panel judge revoked the two prescribed authorizations. The facilities were disconnected within 20 minutes after the revocation of the authorizations. The LEA subsequently reported this case to me as an incident of irregularity where interception continued up to about 20 minutes after the revocation of the prescribed authorizations.

My review and findings

5.49 During an inspection visit to the LEA, I examined the preserved materials and records except the audio recordings of the intercepted calls. My findings were:

(a) The summaries passed to investigators did not contain information subject to LPP.

(b) There was unauthorized interception of about 20 minutes after the revocation of the prescribed authorizations and before the disconnection of the facilities.

(c) Three calls were intercepted during the unauthorized period but they were not listened to by the LEA.

5.50 As I did not listen to the audio recordings of the intercepted calls, no finding could be made as to the veracity of the contents of the two calls as stated in the REP-11 reports and whether there were any

communications subject to LPP in the calls intercepted before the reported calls.

LPP Report 5

5.51 I received a report from an LEA notifying me that an interception operation was discontinued by the LEA. According to the section 57 (discontinuance) report submitted by the LEA to the panel judge to revoke the authorization, the ground for discontinuing the interception was that interception operation against the subject revealed that the subject's associate was arrested. The subject used the facility under interception to call a person with a view to seeking legal advice. The person was engaged in another matter at that time and promised to return call later. The listener assessed that the person was a lawyer and information relating to LPP might be obtained. The listener reported the incident through the chain of command. The LEA then decided to discontinue the interception and submitted a discontinuance report to revoke the authorization. According to the discontinuance report, no information related to LPP had been obtained since the commencement of the interception operation. The panel judge revoked the prescribed authorization upon receipt of the discontinuance report.

5.52 I requested the LEA to preserve the relevant intercept products and records for my review. After examination of the preserved materials, I found nothing untoward. But as I had not listened to the audio recordings, no finding could be made as to the veracity of the contents of the calls as stated in the section 57 report and whether there were any communications subject to LPP in other calls intercepted by the LEA under the prescribed authorization.

Journalistic Material

JM Report 1

5.53 This report involved one prescribed authorization (Authorization A). The subject was suspected of committing a serious crime involving a member of a media organization. Given the nature of the investigation, it was likely that information which might be the contents of JM would be obtained by carrying out the interception. When granting the prescribed authorization, the panel judge imposed a set of restrictive conditions, differentiating between obtaining JM relevant to the investigation and JM not relevant to the investigation. One of the conditions was that upon detecting any JM, a report should be made to the panel judge indicating the nature of the JM obtained from such interception, whether the same was relevant to the investigation and whether the interception was still continuing.

5.54 For the same investigation, there was another prescribed authorization for interception on another subject which was also subject to the same restrictive conditions imposed by the panel judge because of the likelihood of obtaining JM (Authorization B).

5.55 On Day 1, the LEA intercepted a call under Authorization A in which the subject informed the editor of the media organization of an incident which might be used as JM. After listening, the listener reported the contents of the call to his supervisors. The listener then listened to two additional calls between the subject and the editor, on the same incident. He accordingly informed his supervisors the contents of these two calls.

5.56 On Day 3, when listening to a call between the subject and the editor, the listener realized that the incident had been published in newspapers. He accordingly reported the matter to a superior officer. The superior officer considered that JM had been obtained and instructed a subordinate officer to prepare an REP-11 report for submission to the panel judge reporting on the matter.

5.57 After considering the REP-11 report, the panel judge was satisfied that the conditions under section 3 of the Ordinance continued to be met and allowed Authorization A to continue.

5.58 Although there is no provision in the Ordinance or the Code requiring LEAs to report to me incidents of obtaining information which may be the contents of any JM through interception or covert surveillance, the LEA in this case took the initiative to notify me that JM relevant to an investigation had been obtained pursuant to Authorization A. As it was the first case that the LEA had obtained JM from interception on the subject of a prescribed authorization, the department also sought my advice as to whether any preservation of intercept products or other relevant materials was required.

5.59 There was no report that JM was obtained from interception on another subject authorized by Authorization B.

5.60 I requested the LEA to preserve, in respect of both Authorizations A and B, the intercept product from the time when records or recordings of such product were currently still available until such time as I should notify the LEA, and other records such as summaries, ATRs, and records in whatever form for the same period. My request should also

apply to any renewed applications in respect of the cases. The LEA duly followed my request.

5.61 A couple of weeks later, the department discontinued the interception under Authorizations A and B on the ground that there was no further value to continue with the interception. The panel judge accordingly revoked both authorizations upon receipt of discontinuance reports.

My review and findings

5.62 Before carrying out the review, I asked the Security Bureau about its position on the legitimacy or propriety of my listening to products derived from interception of communications over telecommunications facilities. The Security Bureau replied that the matter would be looked into in the comprehensive review of the Ordinance. Pending revision of the Ordinance regarding the listening to intercept products by me, I decided not to listen to the audio recordings of the intercepted calls in this case.

5.63 I then carried out a review by examining the preserved materials and records, except the audio recordings of the intercepted calls.

5.64 From the ATR, I found that apart from the listener, the superior officer who directed that an REP-11 report be submitted to the panel judge had also listened to the four calls concerned. The superior officer's explanation was that insofar as the department was concerned, this was the first case of obtaining JM through interception. He listened to the recordings personally for two purposes: (i) to see whether the JM obtained was relevant to the investigation to ensure that there was no non-compliance with the restrictive conditions imposed by the panel judge;

and (ii) to verify the details provided in the REP-11 report prepared by his subordinate officer before submission to the panel judge. As this superior officer was the head of the section responsible for ICSO matters, I considered his act and explanation reasonable.

5.65 Nothing untoward was found after inspection of the preserved materials and records.

5.66 However, as I had not listened to the audio recordings, no finding could be made as to:

(a) the veracity of the gist of the conversations of the four calls as stated in the REP-11 report;

(b) regarding Authorization A, whether, apart from the calls mentioned in the REP-11 report, there were any other calls which might have contained JM that should have been reported to the panel judge in accordance with the restrictive conditions imposed by the panel judge; and

(c) regarding Authorization B on the other subject in the investigation, whether there were any calls which might have contained JM that should have been reported to the panel judge in accordance with the restrictive conditions imposed by the panel judge.

JM Report 2

5.67 This report involved two prescribed authorizations, Authorizations C and D. At the time of application, the LEA assessed that

interception on Subject 1 under Authorization C would possibly result in obtaining JM based on the known circumstances of the case whereas interception on Subject 2 under Authorization D would not. The panel judge, however, assessed that both would not have JM likelihood, hence he did not impose additional conditions when granting both authorizations.

5.68 On Day 1, three calls were intercepted under Authorizations C and D. In the first call, Subject 2 disclosed to Subject 1 details of a law enforcement action which had just taken place. In the second call, Subject 1 told another person the law enforcement action. In the third call, Subject 1 told a reporter of a newspaper the details of the law enforcement action.

5.69 On Day 3, a listener listened to these calls. After listening to the third call or part of it, the listener formed the belief that JM might have been obtained inadvertently. He reported the matter to his supervisors. Further enquiries made by the LEA revealed that the details of the incident had been published in the reporter's newspaper the day before. The LEA considered that JM had been obtained and submitted REP-11 reports to the panel judge to report on the obtaining of JM.

5.70 On the basis of the information contained in the REP-11 reports, the panel judge considered that the conditions for the continuance of the authorizations were not met and revoked Authorizations C and D. The facilities under these two authorizations were disconnected within 15 to 22 minutes after the revocation of the authorizations.

5.71 The LEA reported this case to me as an incident of unauthorized interception after revocation of the prescribed authorizations

by the panel judge upon receipt of the REP-11 reports on inadvertent obtaining of JM.

My review and findings

5.72 I conducted a review by examining the preserved materials and records, except the audio recordings of the intercepted calls. Verification of what the LEA stated was made against the relevant records. My findings were:

(a) The three calls were not listened to by the LEA until Day 3 which was after the newspaper publication of the incident on Day 2. The LEA had acted without delay in submitting the REP-11 reports to the panel judge on Day 4.

(b) The listener had listened to the entirety of the first and second calls, but listened to only part of the third call, as verified by the ATR produced for my inspection.

(c) The LEA acted swiftly in effecting the disconnection of the facilities after the revocation of the prescribed authorizations.

(d) The interception after the revocation of the prescribed authorizations and before the disconnection of the facilities was conducted without the authority of a prescribed authorization. The unauthorized interception ranged from 15 minutes to 22 minutes.

(e) No call was intercepted during the periods of unauthorized interception.

5.73 As I had not listened to the audio recordings archived in the LEA, no finding could be made as to the veracity of the gist of the conversations of the three calls as stated in the REP-11 reports. Nor could I make any finding on whether, apart from the calls mentioned in the REP-11 reports, there were any other calls which might have contained JM that should have been reported to the panel judge.

Stringent approach

5.74 As can be seen from the above cases, in the report period, the panel judges continued to adopt a very stringent approach in dealing with cases which might involve LPP. Where information which might be subject to LPP had been obtained or where there was evidence of heightened likelihood of obtaining LPP information, the panel judge would revoke the authorizations concerned when the situation so warranted. In one of the cases, namely, LPP Report 5, the LEA took a similarly cautious approach in order to avoid the risk of inadvertent obtaining of LPP information.

5.75 Likewise, the panel judges took a careful if not stringent approach in dealing with JM. As evidenced in JM Report 1, where the case to be investigated was assessed to have the likelihood of obtaining JM, the panel judge imposed a set of restrictive conditions broadly in line with those imposed on authorizations assessed to have the likelihood of obtaining LPP information. For JM Report 2, although no restrictive conditions were imposed at the time of the issue of the authorizations, the panel judge revoked the authorizations concerned after receiving reports from the LEA that JM had been obtained through the authorized interception.

Limitations

5.76 It must be noted that the prerequisite to enable the panel judges (or for that matter, me as the Commissioner) to deal with the matter is honest reporting by the LEAs. If an LEA chooses not to report to the panel judge either due to misjudgement or any ulterior motive, or chooses not to report honestly and fully, it would be very difficult, if not impossible, for the panel judges or me to discover such cases under the existing review system which is very much a paper review.

5.77 In fact, the most effective way of ascertaining whether an LEA has reported fully and frankly in its REP-11 reports to the panel judge on LPP or JM cases is through listening to the audio recordings of the intercepted calls. For the five LPP cases occurring in 2007 and 2008, I had listened to the audio recordings of three of them, in January and March 2008 respectively. I did not do so for the remaining two cases because no recordings had been preserved for my review. But after the submission of my Annual Report 2007 in June 2008 to the Chief Executive, my power to listen to products derived from the interception of communications over telecommunications facilities was doubted. Those who questioned my power made reference 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). While I can see that the Canadian case is very much different from the cases that I was required to handle, I consider that the greatest obstacle to my listening to the 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 me as the Commissioner by section 53 of the ICSO to require production of documents or information by any person and to determine the procedure to be adopted in performing any of my functions under the ICSO are not wide enough to entitle me to access LPP information. This argument casts doubt on the propriety and legitimacy of my listening to intercept products subject to LPP. In my Annual Report 2008, I pointed out that this matter, one way or another, should be seriously considered and resolved by the Legislature in its review of the provisions of the Ordinance. The detailed arguments on this issue were set out in paragraphs 5.20 to 5.35 of Chapter 5 of my Annual Report 2008 to the Chief Executive which are not repeated here.

5.78 Owing to the doubts cast on my power to listen to intercept products and to avoid any perception or criticism of my wilfully acting above the law, pending resolution by the Legislature, I have decided not to listen to the intercept products in my review of incidents and irregularities. Hence, in this report period, I did not listen to any of the audio recordings of the intercepted calls of the LPP/JM cases mentioned above although the LEAs concerned had preserved such recordings for my review. It should be noted that without listening to the audio recordings, I could not verify the contents of the calls as reported in the REP-11 report to see if there was any misrepresentation or verify whether there were other LPP/JM calls preceding the reported calls that should have been reported to the panel judge. I therefore completed my review on the above seven LPP/JM cases without making any finding in these respects. Needless to say, this is far from satisfactory.

5.79 In paragraphs 9.1 to 9.11 of Chapter 9 of my Annual Report 2008, I proposed a new method of checking which requires legislative amendments to put it into effect. This new method of checking is to allow my staff and me to check intercept products (listening to the recordings of intercept products) of cases of special interest or chosen at random. By listening to the audio recordings of cases selected at random, it could prevent or expose cases where LPP or JM is involved but no REP-11 report to the panel judge and no report pursuant to paragraph 120 of the Code to the Commissioner have been made. By listening to the audio recordings of selected cases of discontinuance under section 57 of the ICSO, it could ensure whether the statement in the discontinuance report that no LPP information had been obtained was true and correct. Other benefits that could be brought about by this new method of checking were detailed in paragraph 9.4 of my Annual Report 2008. I put up this proposal to the Security Bureau in April 2009. It has not indicated its position up till the completion of this annual report.

The current ATR system

5.80 It is also of importance that the ATR should be able to record which part of an intercepted call the listener has listened to. This is crucial in knowing whether a listener has indeed accessed the part containing LPP information (or JM), whether the listener is at fault in not reporting the matter to his senior officers for onward report to the panel judge, and whether the listener has complied with the additional conditions imposed by the panel judge on the authorization. The ATR as enhanced in November 2009 was such that it could only record the length of listening by the listener but did not possess the important function referred to above.

I had recommended, as early as September 2009, that a new ATR system should be developed to enable the ATR to record which parts of a call a listener had listened to. My recommendation was supported in principle and I was informed in mid May 2010 that the new system could be developed by early or mid 2011. More details on the ATR system can be found in paragraphs 7.19 to 7.20 and 7.28 to 7.31 in Chapter 7.

CHAPTER 6

APPLICATION FOR EXAMINATION AND NOTIFICATION TO RELEVANT PERSON

The law

6.1 Pursuant to 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 covert surveillance activity that has been carried out by officers of the LEAs. Under section 44, the Commissioner shall, save where the circumstances set out in section 45 apply, carry out an examination upon receiving an application to determine:

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

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

After the examination, if the Commissioner finds the case in the applicant's favour, he shall notify the applicant concerned 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 covert 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, as defined under section 45(3), 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.

The applications under section 43

6.3 During the report period, a total of 23 applications for examination were received, among which five were subsequently not pursued by the applicants and one was not within the ambit of my functions. Of the remaining 17 applications, 10 related to alleged interception and seven claimed a combination of interception and covert surveillance. As the Commissioner, I did not consider that any of the 17 applications came within the ambit of the exceptions covered by section 45(1), and except for five cases that are covered by section 45(2), I had carried out an examination provided for in section 44 in respect of each of the 12 cases.

The procedure

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

specified LEA who, as the applicant alleges, has carried out either interception or covert surveillance against him as to whether any such statutory activity has taken place, and if so the reason why. Enquiries will also be made with the PJO as to whether any authorization has been granted by any panel judge for the particular 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. Other than the information given 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 the LEAs in a disadvantageous position as against criminals or possible criminals.

6.5 Regarding the 17 applications for examination, after making enquiries with the necessary parties, I found 12 cases not in the applicants' favour. I accordingly notified each of the applicants in writing of my finding relating to him/her. Seven of such notices were issued during the report period and five thereafter. The remaining five cases are covered by section 45(2) and are still being processed at the time of the writing of this report. By virtue 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 covert surveillance had indeed occurred.

Applications affected by section 45(2)

6.6 In 2009, there were five applications covered by section 45(2) (see paragraphs 6.3 and 6.5 above) whereas in 2008, there were two. Having taken into account the two cases brought forward from 2008, the total number of applications covered by section 45(2) and are still pending at the time of the writing of this report is seven.

Notification to relevant person under section 48

6.7 Under section 48, I am obliged to give notice to the relevant person whenever, during the performance of my functions under the Ordinance, I discover any interception or covert surveillance carried out by an officer of one of the four LEAs covered by the Ordinance without a prescribed authorization. However, section 48(3) provides that I shall 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 covert surveillance on him is negligible.

6.8 To quote an example, the interception of communications on the telephone through the use 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 shall, as obliged by section 48 of the Ordinance, give a notice to the relevant person of the wrong interception, informing him of his right to apply for examination

under section 43 and, if he does so apply, invite him to make written submissions to me in relation to my assessment of reasonable compensation to be paid to him by the Government.

6.9 In considering and assessing the amount of compensation that the Government ought to pay to the relevant person, the following non-exhaustive factors have to be taken into account:

(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 the 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.

6.10 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 or 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 or 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

6.11 During the report period, I did not issue any notice to the relevant person pursuant to section 48 of the Ordinance.

Elaboration on the application requirements

6.12 From the initial applications or letters of complaint made to me in the past three and a half years, I have found that a large number of applicants and complainants did not quite understand the basis of an application for examination under the Ordinance. Such lack of understanding would inevitably generate delay in the process of the application and suspicion on the part of the applicant that I might not be dealing with the application or complaint in good faith. Further suspicion of my fides was caused by the fact that I am not allowed by the Ordinance to disclose reasons for my determination or to inform the applicant whether or not the alleged or suspected interception or covert surveillance had indeed occurred [section 46(4)].

6.13 It is only when the proper basis of an application is satisfied that I am entitled to institute the process of my examination of the case. The proper basis is to satisfy both of the following requirements, namely,

(a) there is suspicion of interception of communications or covert surveillance that has been carried out against the applicant; and

(b) the suspected interception or covert surveillance is suspected to have been carried out by one or more of the officers of the LEAs under the Ordinance, namely, the Police, Independent Commission Against Corruption ('ICAC'), Customs and Excise Department or Immigration Department.

6.14 Regarding requirement (a), one usual complaint was that the complainant was surreptitiously or openly followed or stalked by officers of an LEA. This normally would not satisfy the proper basis for an application for examination, because the matter complained of is not an interception of communications and it does not qualify as a covert surveillance under the Ordinance because there was no suspicion of any surveillance device within the statutory definition being used. There were also complaints of the complainant being implanted in the brain or another part of the body a device that incessantly or occasionally talked to him/her or urged him/her to do something or impersonated him/her to speak to other people. All these again do not form a proper basis for an application for me to initiate an examination; the reason being that the device suspected to be used does not fall within the kind or type of devices under the Ordinance the use of which would constitute a covert surveillance.

6.15 Regarding requirement (b), some complainants described how an employer or a particular person, as opposed to an LEA officer, carried out the suspected interception or covert surveillance. This failed to satisfy this second requirement for me to entertain an application or to engage in an examination.

6.16 I intend to include these explanations in the website of the Commission so that applicants or prospective applicants can make reference to them for properly lodging an application for examination with me.

6.17 Regarding my statutory inability to disclose reasons for my determination and even to respond to any inquiry whether a suspected interception or covert surveillance has taken place, it is hoped that the public will understand that this statutory prohibition against me is designed to forbid the disclosure of any information which would prejudice the prevention or detection of crime or the protection of public security, preventing the provision of an advantage to criminals or possible criminals over the LEAs in the latter's efforts in fighting crimes and in protecting the safety of the community in Hong Kong. There should not be any doubt that I shall carry out my duties and functions under the Ordinance sincerely, faithfully and fairly.

CHAPTER 7

REPORTS OF NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS AND FINDINGS

Reporting of irregularities

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 or constitutes any such non-compliance by the department or any of its officers, 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 The normal practice of the LEAs in reporting irregularities is that they would submit first a brief report (an initial report) to notify me of the occurrence of an incident or non-compliance, to be followed by a detailed investigation report (a full investigation report) after they have conducted in-depth investigation into the case. The full investigation report is usually submitted several months after the initial report.

Cases occurring in 2009

7.4 In 2009, my office and I received 12 reports of non-compliance or irregularities from the LEAs, in the following order:

Report 1	:	An executive authorization authorizing the use of surveillance device which was not sought in the application
Report 2	:	Non-observance of the requirement under Part 1(b)(xi) of Schedule 3 to the ICSO
Report 3	:	Reactivation of four discontinued interceptions for two and a half hours
Report 4	:	Withdrawal of surveillance devices in excess of the quantity authorized in the executive authorization for Type 2 surveillance
Report 5	:	Unauthorized interception of 19 minutes after revocation of prescribed authorization upon refusal of renewal
Report 6	:	Unauthorized interception of 50 minutes after revocation of prescribed authorization upon refusal of renewal
Report 7	:	Duplicated distribution of audio products of telecommunications interception

Report 8	:	Type 2 surveillance conducted on telephone conversation between a participating agent and a person unrelated to the investigation (about 20 seconds)
Report 9	:	Type 2 surveillance on phone calls conducted beyond the terms and conditions of the executive authorization
Reports 10 and 11	:	Quantity of devices used might be in excess of what was authorized in the relevant prescribed authorizations for Type 1 surveillance
Report 12	:	Wrong interception of a call

7.5 Reports 1, 8, 9, 10 and 11 were submitted under section 54 of the Ordinance. The others were submitted *not* under section 54 of the Ordinance.

Outstanding cases from 2008

7.6 There were two outstanding cases brought forward from the Annual Report 2008, namely Report 2 and Report 11 in Chapter 7 thereof. I shall deal with these two cases in paragraphs 7.7 to 7.32 below before proceeding to discuss the cases occurring in 2009.

Report 2 in Chapter 7 of Annual Report 2008: Non-compliance with supervisor's instructions and breach of a condition of the prescribed authorization

7.7 This case happened in November 2007 in ICAC. My Annual Report 2007 dealt with the first portion of this case (LPP Case 2 in Chapter 5 thereof). My Annual Report 2008 gave an account of what happened in the latter half of 2008 and my finding on the review of the non-compliance of the listener (Report 2 in Chapter 7 thereof).

7.8 On 18 December 2008, a new issue arose in that the department claimed that it was unsafe to rely on the audit trail report ('ATR') for ascertaining the exact duration of listening by a listener to any call under interception and that the department might have to review the disciplinary action, which was a strong advice, already taken against the listener because the listener might not have accessed the part containing LPP information in his first listening to the call. In paragraph 7.71 of my Annual Report 2008, I stated that my investigation into the alleged uncertainty of duration of listening had not yet been completed. By now, I have completed the investigation and my findings are set out below.

Facts of the case

7.9 A prescribed authorization was granted by a panel judge authorizing the interception of two facilities. At the time of the grant of the authorization, it was assessed that there was the likelihood of obtaining information subject to LPP. The panel judge therefore imposed conditions to the effect that the case would need to be brought back to the panel judge for re-assessment as soon as any LPP information was likely to be obtained. A listener was assigned to take up the listening duty of this case and he was briefed by his supervisor of the conditions imposed by the panel judge.

7.10 On 13 November 2007 at 0928 hours, the listener listened to a call intercepted under the prescribed authorization ('the LPP Call'). He should have reported this call immediately to his supervisor but he did not. At 1645 hours on the same day, he re-listened to the LPP Call and reported it to his supervisor. He did not mention that he had also listened to this call in the morning. His supervisor instructed him to put on hold the monitoring exercise pending re-assessment by the panel judge. But he listened to another call at 1716 hours. On 14 November 2007, the panel judge allowed the authorization to continue after considering the REP-11 report submitted by the department. On 15 November 2007, the department notified me of this case pursuant to paragraph 120 of the Code. In both the REP-11 report to the panel judge and the notification to me, there was no mention of the twice listening to the LPP Call and the listening at 1716 hours.

7.11 When I started to review this LPP case, I enquired with the department what records had been preserved. On 8 January 2008, the department informed me that there was an ATR recording the duration of

access made by individual listeners to their assigned facilities for internal audit purpose. This ATR had been preserved. The department also stated that reference had been made to the ATR which revealed that the listener had accessed the LPP Call at 0928 hours on 13 November 2007 for duration of T minutes, and at 1645 hours for duration of T minutes.

7.12 On 29 February 2008, the department duly provided a copy of the ATR to me, with an explanatory note on the meaning of the headings of the columns appearing in the ATR: 'FROM' meant the start date and time of the access to the session by the listener; 'TO' meant the end date and time of access to the session by the listener; and 'LEN' meant the duration of access to the session.

7.13 Having examined the ATR, I found that the listener had listened to 23 new calls intercepted pursuant to the said prescribed authorization between his first time and second time of listening to the LPP Call. The ATR also revealed that he listened to another call at 1716 hours after his supervisor had instructed him to put on hold the monitoring exercise pending re-assessment by the panel judge. He had ignored the supervisor's instructions and the conditions imposed by the panel judge. When I pointed these out, the department responded that it would conduct a full investigation into the case.

7.14 On 20 June 2008, the department submitted an investigation report to me under section 54 of the Ordinance. The investigation report reaffirmed that at 0928 hours, the listener listened to the LPP Call for T minutes. He did not realize that the call might be subject to LPP and continued to listen to other calls without reporting the call in question to his supervisor. At 1645 hours, the listener re-listened to the LPP Call for

T minutes for the purpose of preparing a written summary. The investigation report concluded that there was lack of due vigilance on the part of the listener in conducting telecommunications interception operation and the department had strongly advised this listener on 7 January 2008 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. This strong advice was disciplinary in nature.

7.15 Regarding the listening at 1716 hours to another call, the investigation report stated that the department had issued a warning to the listener on 20 June 2008.

7.16 Section 41(2) provides that I shall conduct review on cases in respect of which a report has been submitted to me under section 54 of the Ordinance. On 28 August 2008, on the basis of the information provided in the department's investigation report and the ATR attached to it, I raised certain questions about the ATR in particular the length of listening recorded under the 'LEN' column on the ATR. It was upon this further probe by me that it dawned on the department that its interpretation of the 'LEN' column of the ATR (see paragraph 7.12 above) might have been wrong.

7.17 About four months later on 18 December 2008, the department gave me a reply 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 the department had reviewed all its answers previously given to me with reference to such duration. As the exact duration of listening to the LPP Call for the first time on the morning of 13 November 2007 was

uncertain, the department considered that the listener might not have accessed the information that might be subject to LPP.

7.18 In a further letter dated 24 December 2008, the department stated that subject to the conclusion of my investigation into the existing ATR system, it would consider the necessity of reviewing the actions that had been taken against the listener in this case.

My review on the ATR

7.19 I conducted a review including a test on the ATR system performed without the knowledge of the department concerned. My findings were that the ATR system correctly recorded at what time a listener started to access a call, but did not necessarily reflect the time when the listener stopped listening to the call. Hence one could not tell with certainty how long a listener had listened to an intercepted call.

7.20 The department was not aware of the above facts when giving replies to me on 8 January 2008 and 29 February 2008 (paragraphs 7.11 and 7.12 above) and when conducting a full investigation in June 2008 (paragraph 7.14 above). It transpired that the department had all along relied on the advice given by an officer on the interpretation of the ATR regarding the 'TO' and 'LEN' columns. Before giving his advice that the 'LEN' column represented the length of listening by a listener to a particular call, the officer, though being not technically qualified to give such advice and aware that the advice sought from him would be relied upon by the department in relation to ICSO matters, did not confirm with the relevant engineers the correctness of his advice. The officer's advice

turned out to be wrong and resulted in the wrong or misleading information provided by the department to me.

7.21 This reflected badly on the officer's attitude towards the matter he was entrusted to handle. This was not the first time that I found this officer's work unsatisfactory. I had previously recommended to the department that this officer be removed from all duties relating to the ICSO scheme. In making such a recommendation, I had taken into account, inter alia, this officer's lax attitude as revealed in the present case. My recommendation was duly accepted.

Findings and recommendations

7.22 Having conducted a review, I made the following findings and recommendations:

(a) Twice listening to the LPP Call

7.23 Although it could not be ascertained through the relevant ATR whether the listener actually listened to the entirety of the LPP Call when first listening to the call at 0928 hours on 13 November 2007, all the evidence available pointed 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 particularly dubious. I maintained the view that the giving of a strong advice to the listener was not unfair to him. The reasons for my view can be found in paragraphs 7.73 to 7.78 of my Annual Report 2008.

(b) Listening at 1716 hours after reporting the LPP Call

7.24 The warning given to the listener was appropriate because his listening at 1716 hours was a clear breach of his supervisor's instructions and of one of the additional conditions of the prescribed authorization imposed by the panel judge.

7.25 In view of the mistakes committed by the listener in (a) and (b) above and having regard to his rank, I recommended to the department that officers below a certain rank should not be assigned listening duties in respect of cases assessed to have LPP likelihood. This recommendation is also applicable to other LEAs tasked with interception operations.

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

7.26 In the present case, there was no disclosure to the panel judge about the twice listening and the listening at 1716 hours in breach of the supervisor's instructions and condition of the prescribed authorization because the reporting officer did not consult the ATR before submitting the REP-11 report.

7.27 I recommended that the REP-11 report to report on LPP matters should make a full and frank disclosure of the number of times a call containing LPP information or possible LPP information had been listened or re-listened to, the respective time and date (showing duration) of each such listening or re-listening, and the identity of each of the listeners. The reporting officer should also report whether there were any calls other than the LPP call(s) reported by the listener on the telephone number used in contact with the subject's number (authorized to be intercepted) in the LPP call(s), and whether such other calls had been listened to and if so, the

identity of the listener(s). For these purposes, the reporting officer should be required to check the ATR together with the relevant records when preparing the REP-11 report. This recommendation is also applicable to other LEAs carrying out interception operations.

(d) Limitations of the ATR system

7.28 The ATR system prevailing at the time of this incident did not necessarily reflect the time when the listener stopped listening to a call. Nor could it be used to prove the length of the time the listener actually listened to the call. Moreover, it could not prove which part(s) of a call a listener had accessed. This was unsatisfactory.

7.29 In November 2009, the ATR system had been enhanced so that it could show on the one hand, the duration of an intercepted call and on the other hand, the duration of listening by the listener. But the enhanced system would still not be able to capture and record the particular part(s) of a call that a listener had accessed.

7.30 I recommended that a new ATR system (over and above the enhanced ATR system mentioned above) should be developed so that the oversight authority could know which part(s) of the call the listener had listened to. This is particularly important in LPP cases to see whether the listener has accessed the part containing LPP information and whether the listener has complied with the additional conditions imposed by the panel judge. Priority should be given to the early completion of the new ATR system.

7.31 In September 2009, I made known my recommendation for a new ATR system mentioned in the preceding paragraph and was later

informed that my recommendation was supported in principle. But there was no commitment regarding the time of developing and implementing the new ATR system. I brought up the matter again in March and May 2010. In mid May 2010, I was informed that the new ATR system could be developed by early or mid 2011.

Report 11 in Chapter 7 of Annual Report 2008: Reactivation of discontinued interception

7.32 The Team reported to me an incident on the reactivation of four discontinued interceptions for three hours due to technical problems. The Team submitted a full investigation report to me in May 2009 and a further report in August 2009. The CSP also submitted a report to me on this incident. After considering the reports from the Team and the CSP, in December 2009, I sought comments from the Team on the CSP report and clarification on certain points. Reply is awaited.

Cases occurring in 2009

Report 1: Issue of an executive authorization authorizing the use of surveillance device which was not sought in the application

7.33 This irregularity related to the anomaly in the issue of an executive authorization ('EA') which authorized the use of optical surveillance device(s) by a participating agent that was not sought in the application and was not required for the covert surveillance operation. The LEA reported this irregularity to me first by an initial report. After conducting a detailed investigation, the LEA submitted a full investigation report to me with details of the case. As the LEA was not sure whether the irregularity amounted to non-compliance with the requirements of the ICSO, both the initial report and the full investigation report were submitted *not* under section 54 of the Ordinance.

Statutory provisions and departmental procedures

7.34 Under section 14 of the ICSO, an officer of a department may apply to an authorizing officer of the department for the issue of an EA for any Type 2 surveillance to be carried out by or on behalf of any of the officers of the department. The application is to be made in writing and to be supported by a statement in writing made by the applicant. Pursuant to paragraph 1(b)(i) of Part 3 of Schedule 3 to the Ordinance, the statement in writing should set out the form of the Type 2 surveillance (including the kind or kinds of any devices to be used) and the information sought to be obtained by carrying out the Type 2 surveillance.

7.35 Section 15(1) provides that upon considering an application for the issue of an EA, the authorizing officer may issue the EA sought by the application, with or without variations. In this connection, section 15(2) makes it clear that the authorizing officer *shall* not issue the EA unless he is satisfied that the conditions for its issue under section 3 have been met. One of the conditions under section 3 for the issue of an authorization is that the covert surveillance is necessary for the purpose sought to be furthered by carrying it out [section 3(1)(c)].

7.36 While the statutory requirements are for an applicant to submit an application with a statement in writing only, in practice, an applicant also prepares a draft EA and submits it together with the application and the statement in writing to the authorizing officer for consideration.

7.37 For the LEA in this case, the departmental procedures are such that the applicant should submit the draft application documentation (including a draft application form, a draft statement in writing and a draft EA) to his supervisor for endorsement before submitting the application to the authorizing officer for determination. The supervisor will consider the grounds for carrying out the Type 2 surveillance and at the same time check the accuracy of these draft documents. If the supervisor is satisfied that the application and the draft application documentation are in order, he will endorse the submission of the application to the authorizing officer. Without the endorsement of the supervisor, no Type 2 surveillance can be applied for.

7.38 If an EA is issued by the authorizing officer, the departmental procedures require the applicant to provide a copy of the EA to the supervisor so that the supervisor could play a more active role in ensuring

that the applicant and other officers involved in the investigation comply with the terms of the EA when conducting the Type 2 surveillance.

Facts of the case

7.39 The LEA intended to carry out a Type 2 surveillance operation to obtain direct evidence for arresting the Subject of an investigation. The Type 2 surveillance was to be carried out with the participation of an agent ('the participating agent'). For the purpose of applying for an EA to conduct the Type 2 surveillance, the officer in charge of the investigation ('the Applicant') prepared a draft application form, a draft statement in writing and a draft EA. The Applicant is equivalent in rank to a Superintendent of Police or a Chief Investigator of ICAC or a Superintendent of Customs and Excise or an Assistant Principal Immigration Officer.

7.40 The form of the Type 2 surveillance, as described in the statement in writing, was that the participating agent would use listening devices for recording the conversations between himself and the Subject whereas officers of the LEA would use listening device(s) to monitor their conversation and use optical surveillance device(s) to video-record their activities at the place where they would meet.

7.41 Upon being satisfied that the statement in writing was in order, the Applicant's supervisor ('the Supervisor') verbally instructed the Applicant to formally submit the application to the Acting Authorizing Officer ('the Ag AO'). The Ag AO issued an EA which was in the same terms as the draft EA prepared by the Applicant.

7.42 The Applicant passed a copy of the EA to a subordinate officer, briefed him of the operational plan (paragraph 7.40 above) and instructed him to obtain from the device registry the necessary listening and optical surveillance devices.

7.43 When the subordinate officer approached the device registry, the issuing officer of the registry noted that the EA authorized the use of listening device(s) and optical surveillance device(s) to be carried by the participating agent which was at variance with the operational plan described by the subordinate officer that the participating agent would only use listening devices but not optical surveillance device. The issuing officer consulted his supervising officer, the officer-in-charge of the device registry ('Device Registry OC') who suggested to the subordinate officer that as the optical surveillance device was only intended to be used by LEA officers in *public places*, it would be more appropriate for such device to be withdrawn as a non-ICSO item, meaning an item of device to be withdrawn not under a prescribed authorization and not for the purpose of an ICSO operation.

7.44 The subordinate officer reported the matter to the Applicant. It was at this juncture that the Applicant realized that he had made a mistake in the EA which he prepared for the Ag AO by including optical surveillance device(s) to be carried and used by the participating agent. The Applicant did not report the mistake to the Supervisor or the Ag AO as he did not consider the mistake a material irregularity because he had no intention to let the participating agent use the optical surveillance device when conducting the operation authorized by the EA.

7.45 According to the departmental rules, if an officer wants to make a request to withdraw a surveillance device as a non-ICSO item, he has to seek the endorsement of an officer at the rank of the Applicant and the approval of an officer at the rank of the Supervisor. The subordinate officer therefore filled out a request form for withdrawing one optical surveillance device required to be used by the LEA officers in the operation as a non-ICSO item, and submitted the request form to the Applicant who duly signed to endorse it. The subordinate officer then submitted the request form to the Supervisor who also signed to approve it. At the time of seeking the approval of the Supervisor, the subordinate officer did not inform the Supervisor of the mistake in the EA. Nor did the Supervisor raise any question as to why the optical surveillance device required to be used by the LEA officers in the Type 2 surveillance described in the statement in writing had to be issued as an item not for the purpose of an ICSO operation.

7.46 The device registry then issued:

(a) the listening devices required to be used by the participating agent as devices authorized by the EA;

(b) the listening devices required to be used by the LEA officers as devices authorized by the EA; and

(c) two optical surveillance devices required to be used by the LEA officers as non-ICSO items.

Regarding (c) above, although only one optical surveillance device was requested, the Device Registry OC considered that two should be required.

Hence, two optical surveillance devices were issued. Eventually, only one of them was used.

7.47 Type 2 surveillance was carried out in the form as described in the statement in writing (paragraph 7.40 above). The subject was arrested immediately thereafter and the covert surveillance was discontinued. On the same day, the Applicant submitted a section 57 (discontinuance) report to the Ag AO who revoked the EA. In the discontinuance report, the Applicant made no mention of the mistake in the EA.

7.48 A few days later, in accordance with the departmental procedures, the Applicant submitted a review report through the Supervisor to a departmental reviewing officer at the level of assistant head of department ('the Reviewing Officer') for review of this Type 2 surveillance. In the review report, the Applicant was required to specify matters which should be brought to the attention of the Reviewing Officer. Although the Applicant had earlier discovered the discrepancy between the statement in writing and the EA concerning the use of optical surveillance device(s) by the participating agent ('the discrepancy'), the Applicant reported 'Nil' in the relevant entry of the review report meaning that there was no matter to draw to the attention of the Reviewing Officer.

7.49 When the review report was routed through the Supervisor, the Supervisor initialled it without detecting the discrepancy although both the statement in writing and the EA were contained in the review folder. The review report was passed on to the Reviewing Officer.

7.50 Upon review, the Reviewing Officer detected the discrepancy and reported the matter to the senior management. The Reviewing Officer

considered that there was non-compliance with section 15(2) of the ICSO because the authorizing officer was obliged by this subsection to satisfy himself that the conditions for the issue of the authorization under section 3 of the ICSO had been met. One of the conditions in section 3 is that the covert surveillance is necessary for the purpose sought to be furthered. The authorizing officer could not have been so satisfied given that the Applicant was not seeking authorization for the use of optical surveillance device by the participating agent.

7.51 After detection of the discrepancy, the LEA submitted an initial report notifying me of the occurrence of this incident. Several months later after completing a detailed investigation, the LEA provided a full investigation report to me.

7.52 In the full investigation report, the LEA stated that legal advice had been sought from Department of Justice ('DoJ') which concluded that while there was an irregularity in the issuing of the EA by the Ag AO, it was not a case of non-compliance. The gist of the legal advice is provided in paragraph 7.57 below.

7.53 The head of the LEA considered that the poor performance of the officers concerned in this case, namely the Applicant, the Supervisor and the Ag AO, called for departmental disciplinary actions but a determination as to whether the incident constituted a case of 'non-compliance' in the context of the ICSO would have a bearing on the level of punishment to be given to the officers concerned. The head of the LEA had therefore withheld disciplinary actions pending my review and the notification of my findings pursuant to section 42(1) of the Ordinance.

My review and findings

(a) Irregularities regarding the EA

7.54 Regarding the EA issued by the Ag AO, I made two findings:

(a) the EA authorized the use of optical surveillance device(s) by the participating agent which was not sought in the application; and

(b) the EA did not authorize the use of listening device(s) and optical surveillance device(s) by LEA officers which was sought in the application.

In short, the EA had authorized something *in excess of* what was applied for and unnecessary for the operation **but** had *omitted* to authorize something which was applied for and necessary for the operation.

7.55 The irregularity in paragraph 7.54(a) above was reported by the LEA to me.

7.56 The omission referred to in paragraph 7.54(b) above was discovered when I conducted the review. While the use of listening and optical devices by LEA officers were specifically sought by virtue of what was stated in the statement in writing under the heading 'The Type 2 Surveillance for Which Executive Authorization is Sought', the use of both types of devices by LEA officers was not mentioned in the EA and thus apparently not allowed by it, although the purpose of the use of such devices by them was mentioned as a purpose in the EA (see paragraph 7.65 below).

Whether the irregularity in paragraph 7.54(a) was non-compliance?

7.57 There was difference in opinion between the Reviewing Officer and the legal advice that the LEA subsequently obtained from DoJ. The legal advice is that given the background of the case provided by the Applicant in the statement in writing, it was unlikely that the purpose of the optical surveillance described in the draft EA and the EA issued by the Ag AO was to obtain private information about the Subject of investigation. The ICSO only regulates surveillance operations that fall within the definition of 'covert surveillance' in section 2. A surveillance operation to be carried out in the circumstances where the subject has no reasonable expectation of privacy or the LEA would not obtain any private information about the subject is not an ICSO operation. The use of an optical surveillance device in the circumstances therefore does not fall within the definition of 'covert surveillance' in section 2 of the ICSO and does not constitute Type 2 surveillance. In other words, no prescribed authorization was required for the use of an optical surveillance device in this case, and hence the conditions for the issue of a prescribed authorization were irrelevant as far as the authorization in relation to the use of optical surveillance device was concerned. The Ag AO might have authorized more than what was applied for and he might have authorized something which was unnecessary for the purposes of the investigation. However, this does not, in itself, lead to the conclusion that the Ag AO had failed to comply with the 'relevant requirements' in issuing the authorization.

7.58 I do not agree with the legal advice that the irregularity was not a case of non-compliance. Even if one were to accept that the purposes

for the use of the optical surveillance device as stated in the statement in writing would not affect the Subject's reasonable expectation of privacy because the use was to be made in a public place, the EA did not specifically say so. Nowhere in the EA did it specify any public place or restrict the use of either listening device(s) or optical surveillance device(s) at public places. It merely authorized both kinds of devices to be carried and used by the participating agent during his meeting with the Subject at premises or place as arranged by them. Nowhere in the EA did it forbid the use of optical surveillance device by the participating agent other than at public places. If the optical surveillance device which was not sought in the statement in writing was carried by the participating agent and was turned on to record the activities of the two inside private premises, it would apparently be covered by the wide terms of the EA, but would not satisfy the stringent requirements of the ICSO. After all, optical surveillance device was not sought to be carried by the participating agent and used by him; and there was no reason, save for oversight, for it to be allowed by the EA.

7.59 In my view, the mistakes in this case laid not only on the fact that the EA authorized optical surveillance device(s) to be carried and used by the participating agent which was not sought in the statement in writing but also that such authorization was unrestricted as to the proper places at which the use was to be made. It would allow the use to be made even at a place where the subject would have a reasonable expectation of privacy which the Ordinance would only allow after stringent requirements are satisfied.

7.60 The legal advice accepted that the Ag AO might have authorized more than what was applied for by the Applicant and he might have authorized something which was unnecessary for the purposes of the investigation. In the circumstances of this case, because of the lack of restriction in the EA on the places at which the optical surveillance device was to be used, I considered that the EA, in allowing more than what was applied for and what the circumstances of the case might not justify the necessity for its issue, was a non-compliance with the ICSO.

7.61 I came to the conclusion that the EA issued by the Ag AO did not comply with the relevant requirements of the ICSO. I notified the head of the LEA immediately upon making this finding, pending completion of my review on other aspects of the case. From that point on, the LEA treated the submission of reports on this case as reports under section 54 of the Ordinance.

<u>The omission referred to in paragraph 7.54(b) above</u>

7.62 Since the EA did not authorize the use of listening device(s) and optical surveillance device(s) by the LEA officers, the use of such devices by the LEA officers was outside the ambit of the EA. If the surveillance carried out by the LEA officers fell within the definition of covert surveillance in the Ordinance, then they were carrying out covert surveillance without the authority of a prescribed authorization.

7.63 For the optical surveillance carried out by the LEA officers in this case, it may be argued that it did not require a prescribed authorization because the meeting between the participating agent and the Subject was intended to be and in fact occurred at a public place and the Subject should

not have reasonable expectation of privacy in such circumstances. Hence the optical surveillance that had been carried out by the LEA officers did not fall within the definition of covert surveillance in the Ordinance.

7.64 Be that as it may, the use of listening devices by the LEA officers in the circumstances of this case certainly required the authority of a prescribed authorization by reference to the definition of covert surveillance in section 2 of the Ordinance. First, the surveillance carried out by the LEA officers was with the use of listening devices and was for the purpose of a specific investigation or operation. It was carried out in circumstances where the Subject was entitled to a reasonable expectation of privacy because the Subject would not have expected that the conversation with the participating agent, albeit at a public place such as a restaurant, would be heard by any other person. The surveillance was to obtain private information about the Subject, ie evidence of the crime under investigation. I do not see how the surveillance carried out by the LEA officers with the use of listening devices in the present case did not fall within the definition of covert surveillance in the Ordinance.

7.65 In fact, I had about two years ago advised this LEA that there should be express wording in the EA to authorize the use of surveillance devices by LEA officers in situations where surveillance devices would both be used by the participating agent and LEA officers in the same operation. The LEA had accepted my advice and prepared a template with suggested wording on the terms of an EA for reference by officers drafting an EA. The template contained three paragraphs: (i) the first paragraph authorizing the use of devices by the participating agent; (ii) the second paragraph authorizing the use of devices by LEA officers; and (iii) the third

paragraph stating the purposes of (i) and (ii). In the present case, the EA that was issued contained only the first and the third paragraphs. It omitted to include the second paragraph which was part and parcel of the whole surveillance operation. The omission was a sheer oversight on the part of the officer drafting the EA and the officer issuing the EA.

7.66 When conducting this review, I also examined other EAs issued around the time of this case to see if a similar mistake was made. All those other EAs that I examined contained express wording authorizing the use of surveillance devices by LEA officers (listening and optical).

7.67 To conclude, the non-inclusion of the use of surveillance devices by the LEA officers in the EA issued by the Ag AO, which was sought in the supporting statement in writing, made the covert surveillance carried out by the LEA officers as being without the authority of a prescribed authorization. While it may be arguable as to whether the part on optical surveillance was non-compliance, the part with the use of listening devices by the LEA officers to listen to and monitor the words of the participating agent and the Subject was non-compliant with the requirements of the Ordinance as it was covert surveillance carried out without the authority of a prescribed authorization.

(b) Culpability of officers concerned

Ag AO

7.68 The Ag AO was the most culpable among the officers concerned as he had made two mistakes in the issue of the EA (paragraph 7.54 above). His omission in expressly authorizing in the EA the use of listening and optical surveillance devices intended to be used by LEA

officers had far more serious consequence as it turned part of the covert surveillance (the listening part) conducted by the LEA officers into an unauthorized activity. Although this authorizing officer was in an acting capacity at the time of this incident, he was in no way unfamiliar with what terms an EA should contain because he had been in charge of the ICSO Central Registry for years. It was not due to his unfamiliarity with the terms of an EA that he made the mistakes. Rather it was due to his carelessness and lack of diligence in checking that the terms of the draft EA prepared by the Applicant for him were correct and proper. In fact, this was not the first time I found this officer not exercising care in the performance of his duties. Following this incident, the LEA made a decision that this officer should not be allowed to act as authorizing officer again. He was eventually posted out and would no longer be responsible for any ICSO-related duties.

The Applicant

7.69 The Applicant was the person who created the two mistakes in the EA as the EA was based on the draft prepared by him. His mistakes were inexcusable because the LEA had a template with proper terms for applicants to make reference to in preparing a draft EA.

7.70 The Applicant was under a duty to provide the draft statement in writing, the draft application form and the draft EA to the Supervisor for checking of accuracy before submitting the application to the Ag AO. In the present case, the Supervisor claimed that he had only received a draft statement in writing but not the other two draft documents from the Applicant before he verbally endorsed the application. The Applicant claimed that he could not recall whether he had provided the draft

application form and the draft EA to the Supervisor for checking. While I had doubt on the Applicant's alleged inability to recall, the matter exposed a procedural weakness. There was no departmental rule to require an applicant to document his act of providing the draft application documentation for checking by the endorsing officer. In the absence of such a procedural requirement, the LEA had difficulty to ascertain whether an applicant had complied with the requirement of providing the draft application documentation to the endorsing officer, which document(s) had been provided, and the date and time of provision.

7.71 Similarly, the Applicant claimed that he could not recall whether he had provided a copy of the EA to the Supervisor after issue. The Supervisor, however, claimed that he had not received a copy of the EA from the Applicant. Likewise, there was a procedural weakness in not requiring such acts to be documented.

7.72 The Applicant made another mistake by not reporting to the Supervisor or the Ag AO after he was told by the subordinate officer of the discrepancy between the EA and the statement in writing. Instead, he allowed the Type 2 surveillance to proceed without seeking any remedy. When being told by the subordinate officer that the optical surveillance device to be used by LEA officers had to be issued as a non-ICSO item, it should give a strong hint to the Applicant that the EA had omitted to include surveillance devices required to be used by LEA officers, for otherwise there was no need for the optical surveillance device to be issued as a non-ICSO item. Had he reported the discrepancy and the omission to the Ag AO at this juncture, remedial measures could have been taken. There were two further occasions that the Applicant should have reported

the discrepancy but he simply did not do so: (i) when submitting the discontinuance report; and (ii) when submitting the review report. He explained that he did not so report because of his belief that the discrepancy was not a material irregularity. This explanation was unconvincing. The fact that from what the subordinate officer had told him, the Applicant must have known about the discrepancy and about the need to issue the optical devices for use by the LEA officers not under the EA that he had obtained but as a non-ICSO item would clearly impress upon him that the irregularity was serious, let alone material.

The Supervisor

7.73 The Supervisor did not comply with the departmental requirement of checking the accuracy of the draft application documentation before he gave his endorsement to submit the application for the grant of the EA.

7.74 The Supervisor claimed that the Applicant did not give him a copy of the EA after its issue by the Ag AO. The first time he had a chance to see the EA was when he received the review report from the Applicant. If the Supervisor really had not seen the EA after issue and before the conduct of the Type 2 surveillance, how could he make proper arrangements to ensure compliance by his officers with the terms of the EA (paragraph 7.38 above)? Even if the Applicant did not take the initiative to give a copy of the EA to him, he should have asked for it in order to properly play his role. There was no good reason why he did not get a copy of the EA from the Applicant. Either he was telling lies or he simply ignored his duty of ensuring compliance in carrying out Type 2 surveillance, a role which was expected of him by his department.

7.75 The Supervisor was the approving officer for making the request to the device registry for issue of a surveillance device for non-ICSO purpose. When being asked by the subordinate officer to sign to approve the making of the request for an optical surveillance device required to be used by LEA officers, he did not care to ask any question. If one were to believe that the Supervisor had indeed not been apprised by the subordinate officer or the Applicant of the discrepancy between the EA and the statement in writing and that the Supervisor had indeed not been given a copy of the EA by the Applicant or had not had a chance to see it, the Supervisor should have been under the impression that the optical surveillance device was to be used by the LEA officers as part and parcel of the Type 2 surveillance mentioned in the statement in writing in support of the application for grant of the EA. Thus, it would only be natural for the Supervisor to query why the optical surveillance device had to be withdrawn *not* under a prescribed authorization. Had an EA not already been issued for it? Either he had to seek clarification from the subordinate officer or the Applicant or he should ask to see a copy of the EA to clear his doubt before signing to approve the request. The Supervisor explained that it did not occur to him that the issue of an optical surveillance device for purposes other than under a prescribed authorization, which also involved employment of devices issued under a prescribed authorization, was a matter of significance. This revealed how irresponsible the Supervisor was or he simply did not understand the important role he had to play in approving the making of a request for surveillance devices for purposes other than under a prescribed authorization. He seemed to simply rubber stamp the request.

Device Registry OC

7.76 The Device Registry OC's advice of issuing the optical surveillance device for the LEA officers as a non-ICSO item was neither here nor there. According to him, if the EA had express wording authorizing the use of devices by the LEA officers, he would not have advised that the optical surveillance device required to be used by the LEA officers be issued as a non-ICSO item. His advice was based on the fact that there was no express wording in the EA authorizing such use by LEA officers and that he understood the optical surveillance device was to be used at public places where the Subject would not have reasonable expectation of privacy. If so, why did he allow the listening devices required to be used by the LEA officers to be issued as if they were authorized by the EA (paragraph 7.46(b) above)? He was applying double standards in the issue of listening devices as compared with optical surveillance device(s) to LEA officers when the use of neither type of devices by them was expressly authorized by the EA.

7.77 As the controller of issue of devices, the Device Registry OC should stand firm. If the EA authorized the optical surveillance device(s) for use by the participating agent by mistake, he should not allow the optical surveillance device(s) to be issued. If the EA did not expressly authorize the LEA officers to use listening and optical surveillance devices, he should not issue either kind for their use. Knowing that there were mistakes in the EA (ie the discrepancy and the omission), he should not have suggested that the optical surveillance device(s) required to be used by LEA officers be issued as non-ICSO item(s). Had he not made such a suggestion and had he acted stringently in not allowing the issue of the

listening devices required to be used by the LEA officers, it would have caused or forced the Applicant to face the matter squarely as there was no way for the Applicant to get the devices required for the Type 2 surveillance except to report the mistakes in the EA to the Supervisor and the Ag AO for taking remedial measures. With the Device Registry OC's suggestion, there was no incentive for the Applicant to voluntarily disclose his mistakes to the Supervisor or the Ag AO. As the Device Registry OC was too accommodating, it is no wonder why the Applicant could say that he felt the mistakes in the EA immaterial and why the Supervisor considered the issue of devices for whatever (ICSO or non-ICSO) use not a matter of significance.

(c) Performance of the Reviewing Officer

7.78 The Supervisor failed to detect the discrepancy between the EA and the statement in writing when the review report was routed through him. By contrast, despite the misleading information in the review report that there was nil to be reviewed in this case, the Reviewing Officer was able to discover the irregularity regarding the discrepancy between the EA and the statement in writing. Credit is due to the Reviewing Officer for the care and sagacity with which the function of review was exercised. I **commended** the Reviewing Officer accordingly.

(d) Other issue – Withdrawal of devices

7.79 I examined the request form prepared by the subordinate officer for withdrawing the optical device as non-ICSO item and found that some of the information entered in the request form was either wrong or uncalled for or did not match with the request. For instance, the device

under request was an optical device but the information entered related to the use of a listening device. The device under request was to be used by the LEA officers but the information entered related to the use of device by the participating agent. Nowhere in the request form could lead one to know that the device under request was actually required to be used by the LEA officers. But these mistakes or unmatched information were not discovered by the endorsing officer (the Applicant), the approving officer (the Supervisor) and the issuing officers of the device registry. It reflected that no one was acting seriously or carefully about the issue of the optical surveillance device to the LEA officers as a non-ICSO item. This is wrong. The issue of surveillance devices not on the strength of a prescribed authorization should merit equally tight control to ensure that a device would not be withdrawn for carrying out any unauthorized covert surveillance.

(e) Other issue – Review report

7.80 In the review report, the Applicant stated that the participating agent used one listening device for the Type 2 surveillance. As I understood that two listening devices had been issued by the device registry for use by the participating agent, I questioned about the second device. Upon my enquiry, the Applicant explained that two listening devices had in fact been used by the participating agent and the Applicant forgot to mention the second device due to oversight. It is worth mentioning that this oversight was not detected by both the Supervisor and the Reviewing Officer because the review system did not require the Reviewing Officer to check the quantity of the devices issued versus the devices used. I considered that there could be a loophole here. One cannot rule out the

possibility that an officer may obtain approval to withdraw, say, two devices from the device registry under an ICSO authorization but uses only one for the ICSO operation whereas the other one is used for unauthorized covert surveillance. But the existing review system of the LEA on Type 2 surveillance is ineffective in, if not incapable of, monitoring whether there has been any abuse of the devices drawn. Nor could it expose the inappropriateness of issuing a device without the authority of a prescribed authorization, as evidenced in the present case where the Applicant made no mention at all in the review report about the use of devices by the LEA officers. All one could get to know from the review report prepared by the Applicant was that the participating agent had used one listening device and that was all. The review system in its existing form is not conducive to effective monitoring of whether there had been misapplication of devices drawn under a prescribed authorization for unauthorized use or inappropriate issue of devices.

Recommendations

7.81 Having conducted the review, I had a strong feeling that even though the LEA had established tight procedural arrangements in the handling of applications for EA and in the issue of devices, it was still unable to prevent the irregularity as in the present case. While appropriate disciplinary or management actions should be taken against the officers involved, I recommended that more training should be provided to each category of officers concerned so that they would be more familiar with their respective functions and requirements for performing ICSO duties and that such would not be overlooked.

7.82 The review had exposed areas requiring improvement. I made the following recommendations:

(a) It is inappropriate to appoint an officer whose substantive rank is below that of a Senior Superintendent of Police or a Principal Investigator of ICAC or a Senior Superintendent of Customs and Excise or a Principal Immigration Officer to act in the position of an authorizing officer, even temporarily. The LEA should appoint an officer not below this substantive rank to be an authorizing officer in whatever circumstance.

(b) Applicants should submit the draft application documentation to the supervisor for endorsement through e-mail so that there could be a record of such action. The endorsing officer should also give his endorsement through e-mail indicating that he has perused the draft application documentation.

(c) The provision of an EA or a copy of it after its issue by the applicant to his supervisor should be documented.

(d) The issuing officers of the device registry should ensure that the request form has been correctly and properly filled in before they issue the surveillance devices. The request form should also contain the signature of the requesting officer.

(e) The device registry should be given a template of the EA to enable the issuing officers to familiarize themselves with what an EA should normally contain so that they could easily recognize any irregularity or anomaly in the EA when one is presented to them for issue of surveillance devices, for

instance, the omission of a paragraph authorizing the use of surveillance devices by the LEA officers as in the current case.

(f) Instead of distinguishing which part of a surveillance operation requires the authority of a prescribed authorization and which part does not, the LEA should take a global approach when applying for authorization for conducting covert surveillance. Take this case as an example, the Applicant had correctly included in the statement in writing both the surveillance by the participating agent and the surveillance by LEA officers as the form of the Type 2 surveillance for which authorization was sought. It was only because of the mistakes in the EA that the device registry artificially treated the listening and optical operation as separable in order to enable devices to be issued partly as non-ICSO items though for the same ICSO surveillance operation.

(g) The departmental review system should be improved to enable the detection of malpractice or abuse in the issue and use of surveillance devices.

7.83 I notified the head of the LEA of my findings and recommendations. My recommendations in (b), (d), (f) and (g) above were accepted by the LEA while the other recommendations are under consideration.

Report 2: Non-observance of the requirement under Part 1(b)(xi) of Schedule 3 to the ICSO

7.84 In my inspection visit to a department in early 2009, when I examined a fresh application for authorization for telecommunications interception made in 2008, I found that in the affirmation in support of the application, the applicant only confirmed that there had been no previous ICSO application in respect of the subject in the preceding two years. There was no confirmation as to whether there had been any ICSO application in the previous two years on the telecommunications service sought to be intercepted. I considered that this was not in full compliance with the requirements in Part 1(b)(xi) of Schedule 3 to the Ordinance which states:

> ' if known, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in which –
>
> (A) any person set out in the affidavit under subparagraph (ii) has also been identified as the subject of the interception or covert surveillance concerned; **or**
>
> (B) where the particulars of any telecommunications service have been set out in the affidavit under subparagraph (iii), the interception of any communication to or from that telecommunications service has also been sought,
>
> and if so, particulars of such application;' (Emphasis added.)

I advised the department that the conjunction 'or' actually means 'and' in the circumstances of an interception of a known telecommunications

service of a subject. That means, an applicant should confirm in the supporting affidavit whether, in the previous two years, there have been previous applications in respect of the subject and whether there have been previous applications in respect of the telecommunications service sought to be intercepted. I requested the department to submit a report to me on this irregularity.

7.85 Several months later, the department submitted a report to me, *not* under section 54 of the Ordinance. According to the report, since inception, the department's applications for telecommunications interception were drafted with reference to a specimen incorporating the comments of the Security Bureau and DoJ, which contained the following sample wording: 'I am not aware of any previous applications having been made in the past two years in respect of the subject or any of the persons mentioned in this my affirmation.' The specimen was prepared in early July 2006 when the Interception of Communications and Surveillance Bill was still being deliberated by the Bills Committee of the Legislative Council. The 'previous two years' provision, which was originally not included in the Bill, had not yet been finalized. However, relying on the specimen and without realizing that the law as it was ultimately enacted does contain the 'previous two years' provision covering both the subject and the telecommunications service, the designated applicants of the department mistakenly thought that the reporting of whether there had been any application for the issue or renewal of a prescribed authorization on the subject in question in the preceding two years would have already satisfied the statutory requirement.

7.86 In late 2007 when the department attended an inter-departmental meeting chaired by the Security Bureau, the department learned of my advice to another LEA that in accordance with Part 1(b)(xi) of Schedule 3 to the ICSO, the affidavit supporting an application for telecommunications interception should, in addition, set out, if known, whether during the preceding two years, there had been any applications on the telecommunications service specified in the affidavit. The meeting agreed that legal advice should be sought on the interpretation.

7.87 Subsequently in February 2008, DoJ provided its advice to the Security Bureau. The legal advice supported my interpretation that the particulars of any applications in the previous two years on both the subject and the telecommunications service sought to be intercepted should be provided in the affidavit if both are known. After receipt of the legal advice, the Security Bureau inadvertently omitted to transmit the legal advice to this department.

7.88 In paragraph 9.8 of my Annual Report 2007 submitted to the Chief Executive in June 2008, I set out my aforesaid interpretation of the 'previous two years' provision and recommended that this should be followed in future applications. In a paper issued to the Legislative Council Panel on Security on 9 February 2009 entitled 'Results of study of matters raised in the Annual Report 2007 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance', the Security Bureau stated that it had accepted my recommendation and paragraph 45 of the Code of Practice issued on 9 February 2009 was revised to reflect the requirement. Paragraph 45 of the amended Code read:

> '… The facts of any previous application that are required to be disclosed to the relevant authority by virtue of Schedule 3 to the Ordinance should be mentioned in the affidavit / affirmation or statement for the application.'

7.89 The panel paper was circulated to LEAs for comments before issue. This was the first time after the inter-departmental meeting in late 2007 that the department's attention was drawn to the subject matter. After seeking clarification with the Security Bureau on the said revision to paragraph 45 of the Code, with effect from February 2009, the department followed the statutory requirement by stating, if known, in the affidavit supporting application for telecommunications interception whether, during the previous two years, any application for the issue or renewal of a prescribed authorization on the subject and the telecommunications service specified in the affidavit had been made.

7.90 Having reviewed this case, I accepted that this irregularity was due to the misunderstanding of the officers concerned in interpreting the provisions of the Ordinance. However, regarding the amendment to paragraph 45 of the Code, I was of the view that if an applicant did not know that he had to confirm on both the subject and the telecommunications service regarding the 'preceding two years' provision in Part 1(b)(xi) of Schedule 3 to the Ordinance, the wording in the amended paragraph 45 of the Code would not help him understand this requirement. This was evidenced by the fact that the department in this case had to seek clarification with the Security Bureau on the said revision to paragraph 45 of the Code. On 11 September 2009, I recommended to the Secretary for Security that the relevant sentence in paragraph 45 of the Code should be

amended in the following manner to make the requirement clearer to applicants (my amendments are underlined):

> 'The fact and particulars of any previous application relating to the subject person and/or telecommunications service of the proposed authorization that are required to be disclosed to the relevant authority by virtue of Schedule 3 to the Ordinance should be mentioned in the affidavit / affirmation or statement supporting the application.'

7.91 My proposed amendments were accepted by the Secretary for Security. The relevant sentence in paragraph 45 of the Code was amended as above in the revised Code gazetted on 4 December 2009.

7.92 To avoid the occurrence of similar incident in future, the Security Bureau had worked out ways to ensure timely sharing of information among the LEAs on my comments and recommendations.

Report 3: Reactivation of four discontinued interceptions for two and a half hours

7.93 This incident concerned the reactivation of four discontinued interceptions for about two and a half hours until the matter was discovered and the re-activated status removed immediately. During the reactivation, a call was intercepted but it was an unanswered call and was not listened to by any of the LEA officers. The Team and the CSP reported this incident to my Secretariat. Having reviewed the facts of the case with the Team and the CSP concerned, I was satisfied that the reactivation was caused by technical complications which did not involve any LEA officers or any person acting on their behalf. The Team and the CSP concerned had worked out remedial measures to avoid recurrence. It would not be prudent

for me to divulge further details about the case since doing so might be prejudicial to the prevention or detection of crime or the protection of public security.

Report 4: Withdrawal of surveillance devices in excess of the quantity authorized in the executive authorization for Type 2 surveillance

7.94 Through a weekly report form, a department notified me in the 'Remarks' entry therein that an EA for Type 2 surveillance had authorized the use of *one* set of listening device but the officer-in-charge of the investigation ('OC Case') withdrew *two* sets of device for the surveillance operation. The additional set was for back-up purpose in case the first set was out of order. The additional set was returned to the device store as soon as the OC Case was aware of the mistake. No covert surveillance had been carried out because there was no contact between the suspected person and the victim.

7.95 I found that the case had exposed deficiency in the procedure in withdrawal of surveillance devices and one or more of the officers concerned might have erred. I requested the department to provide additional documents and information for my review which the department duly did.

Facts of the case

7.96 The OC Case applied for and was granted an EA which stated that the form of Type 2 surveillance intended to be used was one set of listening device with recording function and the purpose was to record the conversations at a controlled meeting. Immediately after the grant of the

authorization, the OC Case signed a request memo for withdrawing tape recorders without stating the quantity required. A junior officer presented the request memo to the device store and withdrew two sets of listening device. The next day, the department's Central Registry ('CR') (responsible for ICSO matters) discovered the matter and informed the OC Case that only one set of listening device should have been withdrawn in accordance with the EA. The OC Case immediately returned the second set to the device store. No surveillance had been carried out since the withdrawal of devices. The EA was revoked a few days later.

My review

7.97 In an inspection visit in August 2009, after inspecting the documents provided by the department, I raised the following major queries on this case:

(a) The EA authorized the use of one set of listening device but the OC Case requested 'tape recorders' (plural) in the request memo without specifying the quantity required and two sets of listening device were eventually withdrawn.

(b) The OC Case wrongly stated in the device request memo that the EA was an 'Oral Authorization'. By citing oral authorization, the device store keeper would not be able to view the EA even if he had any doubt as to the type and quantity of surveillance devices authorized.

(c) In the weekly report form submitted to me, the form of the Type 2 surveillance in this case was also classified as object-based (one mobile phone). But there were insufficient

facts in the application and the EA to support the 'object-based' classification.

7.98 I also observed that there were omissions and mistakes made in the filling out of the device register, the device return memo and the weekly report form by officers concerned. For instance, the timing for the return of the first set of listening device shown in the device register (1250 hours) was different from the time shown in the weekly report form (1550 hours) submitted to me; the handwriting of entries in the device register was unclear or illegible or overwritten; the listening device was returned with accessories but the device return memo stated that the listening device was returned without accessories, etc.

7.99 In view of my queries, the department subsequently carried out a full investigation into this case and submitted an investigation report to me in January 2010. The investigation report stated that the OC Case committed two mistakes. First, he asked the junior officer to withdraw two sets of listening device when the prescribed authorization only authorized the use of one set of listening device. Second, he inappropriately described 'Oral Authorization' in the device request memo when a written EA had in fact been issued. The department considered that the mistakes made by the OC Case were mainly due to his inexperience, poor understanding of the Ordinance and unfamiliarity with the relevant procedures. He had received only one-day training on the processing of applications under the Ordinance before the present incident. This case was the first application he had made after receiving the training. He withdrew the second device as a back up. There was no suggestion that he intended to use both devices at the same time during the surveillance operation. He took steps to return

one of the devices to the store immediately after he had been informed of the mistake he had made. No surveillance operation was ever conducted and the surveillance devices withdrawn were never used. Hence, there was no intrusion to any privacy in this incident. Having considered all factors including the fact that the mistakes made by the OC Case had a statutory status under the Ordinance, the department decided that a warning should be given to this officer.

7.100 The department also concluded that the omissions and mistakes referred to in paragraph 7.98 above were due to the carelessness of the officers concerned and they were appropriately advised by their senior officers to be more careful in future.

7.101 The department also explained why 'one mobile phone' and 'object-based' were entered in the weekly report form as the form of surveillance authorized. An officer from the CR who was responsible for filling out the weekly report form had spoken with the OC Case on the form of surveillance to be carried out and was told that the listening device, in addition to being used to record conversations between the victim and the suspected person, would also be used to record *telephone* conversation. Although this fact was not revealed in the supporting statement in writing and the EA, based on the additional information provided orally from the OC Case, the CR officer entered in the weekly report form that the surveillance was also object-based, involving one mobile phone. The department considered that the CR officer had used his initiative to get a clearer understanding of the surveillance to be conducted and made use of the supplementary information obtained from the applicant (ie OC Case) to complete the weekly report form, but he should have reflected this fact in

the weekly report form under the 'Remarks' entry for my information, and to avoid misunderstanding.

7.102 I was quite alarmed with what was alleged by the CR officer regarding what the OC Case had told him for entering into the weekly report form 'one mobile phone' and 'object-based'. According to the department's investigation report, that oral information was that the listening device would also be used to record *telephone* conversations. While it was correct for the investigation report to continue to point out that this fact was not revealed in the statement in writing and the EA, the reaction by the CR officer (at a rank equivalent to that of the OC Case) to come to the conclusion that the EA was also 'object-based' and involving 'one mobile phone' without further ado was, to say the least, surprising. The statement in writing in support of the application and the EA itself did not allude to this intended use of recording telephone conversations. Indeed, the statement in writing in its paragraph 3(i)(a) 'The form of the Type 2 surveillance' specifically and succinctly states:

> 'The form of Type 2 surveillance intended to be used is a listening device with recording function to record the conversations between … and … **at a controlled meeting**.' (Emphasis added.)

Not only was the use for recording telephone conversations not mentioned; conversations at a controlled meeting were expressly the intended target for recording. The same purpose of recording conversations at a controlled meeting among parties concerned was also clearly stated in the EA. The intended use of tapping any conversation over the telephone was therefore clearly **unauthorized**.

7.103 I immediately wrote to the head of the department expressing my concern about the serious deficiency in the understanding on the part of the two officers of the strict compliance with the ICSO requirements. Had the CR officer appreciated that recording of telephone conversations between the suspected person and the victim was not authorized, he would never have allowed the idea of 'object-based' to creep in.

7.104 By a further letter in March 2010, the head of department acknowledged that there was a need for continued education and training for officers who were required to discharge duties under the Ordinance, including experience sharing sessions and training workshops.

Findings and recommendations

7.105 Having conducted a review, I made the following findings:

(a) I was in agreement with all the matters said in the department's investigation report, except the point regarding the choice of 'object-based' (one mobile phone) under the form of surveillance authorized in the weekly report form. I notified the department of my concern and comments.

(b) Two sets of listening devices were withdrawn, albeit only one set was authorized by the EA. The case, however, eventually turned out not to be a non-compliance under section 54 of the Ordinance because no surveillance operation was conducted.

(c) There was no indication of any ulterior motive in this case.

7.106 I was also satisfied with the improvement measures recommended by the department including review of the device request memo, new system to manage the issue and return of devices, amendment to the department's Manual on Type 2 surveillance to make it clear that only the correct type and number of devices that were authorized could be withdrawn.

7.107 Regarding the proposed amendment to the Manual, I recommended to the department that it should ensure that the revised version would remind (i) the applicant, (ii) the authorizing officer, and (iii) the storekeeper of the devices of the significance of the type and number of the devices requested and allowed to be withdrawn. I also proposed some amendments to the revised version of the device request memo submitted by the department.

Report 5: Unauthorized interception of 19 minutes after revocation of prescribed authorization upon refusal of renewal

7.108 An LEA reported to me an incident where a panel judge revoked a prescribed authorization upon refusing an application for its renewal, resulting in 19 minutes of unauthorized interception after the revocation of the existing authorization. The report was *not* made under section 54 of the Ordinance.

Facts of the case

7.109 On the 2nd day of a month, an LEA submitted an application to a panel judge for the second renewal of an existing prescribed authorization on interception which was due to expire on the 4th day of the month. On

the same day of application, the panel judge refused the application for renewal. In refusing the renewal application, the panel judge also revoked the existing prescribed authorization. After being notified of the revocation of the existing prescribed authorization, the LEA immediately caused the disconnection of the facility which was completed within 19 minutes after the revocation of the authorization.

My review and findings

7.110 I examined the preserved materials and records, except the audio recordings of intercepted calls. I noticed nothing untoward. After carrying out a review, I made the following findings:

(a) The LEA acted swiftly in removing the facility from interception. The time of disconnecting the facility as reported by the LEA was verified to be true.

(b) The interception after the revocation of the prescribed authorization and before the disconnection of facility was conducted without the authority of a prescribed authorization. The unauthorized interception lasted about 19 minutes.

(c) There was no call during the 19 minutes of unauthorized interception.

(d) There was no listening to the intercepted calls after the revocation of the prescribed authorization.

7.111 This case amounted to non-compliance which should have been reported under section 54 of the Ordinance, despite the fact that the

LEA did not intend to commit the non-compliance which in the circumstances was neither expected nor avoidable.

Report 6: Unauthorized interception of 50 minutes after revocation of prescribed authorization upon refusal of renewal

7.112 An LEA reported to me an incident where a panel judge revoked a prescribed authorization upon refusing an application for its renewal, resulting in 50 minutes of unauthorized interception after revocation of the existing authorization. The report was *not* submitted under section 54 of the Ordinance.

Facts of the case

7.113 A prescribed authorization was due to expire on the 4th day of a month. On the 2nd day of the month, the LEA submitted an application for the first renewal of the prescribed authorization. The renewal application was refused by the panel judge who also revoked the existing prescribed authorization at 1519 hours on the same day on the ground that he was not satisfied that the conditions prescribed by section 3 of the Ordinance had been met. After being notified of the panel judge's determination at 1552 hours, the LEA immediately informed the listeners to cease listening and arranged to disconnect the facility from interception which was completed at 1609 hours, ie 50 minutes after the revocation of the prescribed authorization.

My review and findings

7.114 The preserved materials and records were inspected, except the audio recordings. Having conducted a review, I made the following findings:

(a) The interception in the 50 minutes after the revocation of the prescribed authorization and before the disconnection of the facility was conducted without the authority of a prescribed authorization and was unauthorized.

(b) The LEA acted swiftly in effecting the disconnection which was completed within 17 minutes after being notified of the panel judge's determination.

(c) Three calls were listened to by the LEA officers after the revocation of the prescribed authorization and before receiving notification of the panel judge's determination. The first two of these calls were intercepted before the revocation but the last of them was intercepted after the revocation. This last call that was listened to was the call mentioned below.

(d) Two calls were intercepted during the 50 minutes of unauthorized interception. The first call lasted more than one minute and was listened to by an LEA listener and the team supervisor at 1537 hours before the LEA was notified at 1552 hours of the panel judge's determination. No summary was made on the content of this call. The second call was less than one minute and was not listened to by any LEA officers.

7.115 This case, similar to the case under Report 5 above, amounted to non-compliance which should have been reported under section 54 of the Ordinance, despite the fact that the LEA did not intend to commit the unexpected and unavoidable non-compliance.

7.116 In connection with the cases under this Report and Report 5 above, it should be noted that in the whole of the Ordinance, there is no express power given to the panel judge (and for that matter, the authorizing officer) to stay a revocation or defer a revocation until a time later than when he makes such a determination. Rather, section 58(2) and (3) seems to imply that a revocation takes effect upon its being made. I propose that the Security Bureau should take the opportunity of the impending comprehensive review of the Ordinance to include a provision granting express power to the relevant authority who makes a revocation to stay or defer it whenever circumstances require. Elaboration of this matter can be found in Chapter 9.

Report 7: Duplicated distribution of audio products of telecommunications interception

7.117 In November 2009, a department submitted an initial incident report to me on an incident where audio products of telecommunications interception were distributed to another section of the department by mistake. Briefly, Section A of the department had obtained 26 prescribed authorizations for telecommunications interception for investigating certain crimes. Section B of the department was not involved in the investigation of these crimes. Due to human error, audio products obtained from telecommunications interception authorized by these 26 prescribed

authorizations which should be sent to Section A only, were also made available to Section B. It was not until an officer of Section B listened to some of the audio products and found that the intended target was different that the mistake was discovered. The department had also reported the case to the panel judge as a material change of circumstances. In March 2010, the department submitted a full investigation report to me, *not* under section 54 of the Ordinance. I have not yet completed the review on this case.

Report 8: Type 2 surveillance conducted on telephone conversation between a participating agent and a person unrelated to the investigation

7.118 An LEA obtained an authorization for conducting Type 2 surveillance on the telephone conversations between the participating agent and the subject of the investigation. In the course of conducting covert surveillance, a call made to the participating agent from a person unrelated to the investigation was also recorded and partly listened to by an LEA officer. The recording of this call, lasting about 20 seconds, was not covered by the terms of the EA. In November 2009, the LEA reported this case to me by an initial report. It submitted a full investigation report in April 2010 under section 54 of the Ordinance. I have not completed the review on this case.

Report 9: Type 2 surveillance on phone calls conducted beyond the terms and conditions of the executive authorization

7.119 An LEA obtained an authorization for conducting Type 2 surveillance on telephone conversations between the participating agent and the subject of the investigation. A person acting on behalf of the subject ('the Representative') approached the participating agent over the telephone. The conversations in several telephone calls exchanged between the participating agent and the Representative were recorded by the LEA. After conclusion of the Type 2 surveillance and upon review of the case, the officer-in-charge of the investigation realized that the Type 2 surveillance conducted on the phone calls between the participating agent and the Representative was outside the ambit of the EA which only authorized covert surveillance on telephone conversations between the participating agent and the subject of the investigation. In November 2009, the LEA made an initial report to me on this non-compliance.

7.120 In May 2010, the LEA submitted a full investigation report under section 54 of the Ordinance. The LEA stated that the Representative, together with the subject and their other associates, were arrested and being prosecuted.

7.121 Section 48(1) of the Ordinance provides that if, in the course of performing any of his functions, the Commissioner considers that there is any case in which interception or covert surveillance has been carried out by an officer of a department without the authority of a prescribed authorization, he *shall as soon as reasonably practicable* give notice to the relevant person. Section 48(3) provides that the Commissioner shall only give such notice when he considers that the giving of the notice would *not*

be prejudicial to the prevention or detection of crime or the protection of public security. In the present case, the relevant person is 'the Representative'. He had been arrested and was being prosecuted. In the full investigation report, the LEA stated that in its view, my giving of a notice pursuant to section 48(1) of the Ordinance to the relevant person would not be prejudicial to the prevention and detection of crime. There is a conundrum here to which I shall return in Chapter 9 of this report.

7.122 I have not completed the review on the non-compliance in this case.

Reports 10 and 11: Quantity of devices used might be in excess of what was authorized in the relevant prescribed authorizations for Type 1 surveillance

7.123 During an inspection visit to a department, I found that the affirmation supporting an application for Type 1 surveillance in an investigation case described the form of the Type 1 surveillance as follows:

> 'The surveillance devices that are sought to be used to carry out the Type 1 surveillance are optical surveillance **device** and listening **device**, namely concealed video recorder, concealed audio recorder with … microphone, which will be deployed or installed …' (Emphasis added.)

The prescribed authorization that was granted by the panel judge read:

> 'The use of optical surveillance **device** and listening **device**, namely, concealed video recorder, concealed audio recorder with … microphone, to be deployed or installed …' (Emphasis added.)

7.124 The word 'device' in both the affirmation and the prescribed authorization was in the singular form, which should normally mean that only one optical device and one listening device should be used but in actual fact, three devices with both optical and listening functions were withdrawn and two of them were used in the covert surveillance.

7.125 I also found that there were three other prescribed authorizations in another investigation case with a similar situation, ie the word 'device' was used in singular form in both the affirmation and the prescribed authorization but the quantity of devices withdrawn or used in the covert surveillance was more than one.

7.126 I considered that in the above cases, there might be non-compliance with the terms of the relevant prescribed authorizations. I requested the department to submit a report on each of the two investigation cases for my review which the department duly did in December 2009.

7.127 The department explained that the applicants used the word 'device' in singular form which was meant to refer, in a generic sense, to the kind of device sought to be used. They did not intend the word to carry any numerical or quantitative meaning.

7.128 I inspected the affirmations and prescribed authorizations of some other Type 1 surveillance cases of this department and found that the wording used therein was 'optical surveillance devices and listening devices' or 'optical surveillance device(s) and listening device(s)'. This did not seem to bear out the explanation that the word 'device' in the cases under review was used in the generic sense. In fact, since applications

from the same department used 'device', 'device(s)' and 'devices', it might have misled the panel judges to think that the word 'device' should mean one device only or otherwise the word 'device(s)' or 'devices' would be used. The department explained that different applicants might have different interpretations.

7.129 Having reviewed the documents, I suggested to the department that it should submit a report on each of the relevant prescribed authorizations to the panel judge explaining the matter and obtained the panel judge's view as to the true ambit of the prescribed authorizations concerned which were granted by the panel judges. In April 2010, the department submitted reports on the four prescribed authorizations of the two investigation cases to the panel judge. In these reports, the department made it clear that should the panel judge consider that the understanding of the applicants about the meaning of the word 'device' was wrong (paragraph 7.127 above refers), a review would be conducted to identify all previous cases relating to the same issue so that reports on those cases would be submitted to the panel judge for consideration. The panel judge noted the four reports without adding any comments.

7.130 To prevent recurrence of similar incidents, the department reminded its officers that if they needed to deploy more than one optical surveillance device and/or more than one listening device for conducting the proposed covert surveillance operation, they should make the numeric sense clear in the affirmation in support of the application and in the draft prescribed authorization.

Report 12: Wrong interception of a call

7.131 In December 2009, I received an initial report from a department *not* made under section 54 of the Ordinance. It reported an irregularity where a call was intercepted wrongly due to a technical problem. I have not yet received the full investigation report pending the completion of this annual report.

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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. Under 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. Pursuant 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) 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, save for the case arising in 2008 in respect of which I made a report to the Chief Executive on the fairness of the

disciplinary awards in that case (see Table 10 in Chapter 10), 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 Apart from the relevant recommendations made in my review of the cases concerned as described in Chapters 5 and 7 and summed up in paragraphs 8.17 and 8.18 below, the following proposal was also put forward to the Secretary for Security during the report period.

Duration of executive authorization for Type 2 surveillance

8.4 Following my recommendations in paragraphs 8.11 and 9.20 of my Annual Report 2008 to delete the wording 'Until the following event takes place or 3 months, whichever is the earlier' from the forms COP-9 and COP-13 as well as other similar forms, the Secretary for Security identified the following five forms which contain similar wording and proposed to make the same amendment to these forms:

(a) Record of application for executive authorization made orally (REC-5).

(b) Record of application for renewal of executive authorization made orally (REC-6).

(c) Statement in writing in support of an application for

confirmation of an executive authorization for Type 2 surveillance issued upon oral application (STA-1).

(d) Statement in writing in support of an application for confirmation of the renewal of an executive authorization for Type 2 surveillance granted upon oral application (STA-2).

(e) Statement in writing in support of an application for an emergency authorization for Type 1 surveillance (STA-3).

8.5 While I agreed with the Secretary for Security's suggestion, I also proposed the following amendments to some of the forms for further improvement, which were accepted:

(a) The wording '(no more than 3 months)' should be added to the forms REC-5 [paragraph 3(i)(c)], REC-6 [paragraph 2(d)], STA-1 [paragraph 4(i)(c)] and STA-2 [paragraph 3(d)] to remind the applicant that the duration of the prescribed authorization applied for should not be longer than three months.

(b) The following wording should be added to paragraph 5(i)(c) of form STA-3 to remind the applicant that an emergency authorization must be confirmed in the time highlighted:

'*(no more than **48 hours** beginning with the time when the emergency authorization is **issued**)*'.

Recommendations to heads of LEAs

8.6 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 below.

(1) Designation of authorizing officer

8.7 In April 2009, ICAC informed me of its changes in personnel dealing with ICSO matters. One of the changes was that a substantive Chief Investigator acting as Principal Investigator would be the new authorizing officer for granting Type 2 surveillance authorizations. According to section 7 of the ICSO, the head of a department may designate any officer not below a rank equivalent to that of Senior Superintendent of Police to be an authorizing officer. As I understand, Legislative Council members originally required that the rank of authorizing officer be set at D1 level. But in view of the fact that ICAC does not have D1 rank, they agreed to accept the Administration's proposal to pitch the authorizing officer at not below the rank of Senior Superintendent of Police (equivalent in rank to the post of Principal Investigator of ICAC). This notwithstanding, other LEAs all designate officers at D1 or above as authorizing officers.

8.8 Based on the experience that I gathered from the examination of ICAC cases under the ICSO, I felt concerned that the important function of authorizing Type 2 covert surveillance is undertaken by an officer in acting capacity as Principal Investigator. I would have more faith in a substantive Principal Investigator discharging this important function under the ICSO.

8.9 A Chief Investigator straddles the ranks of Chief Inspector of Police and Superintendent of Police. ICAC's arrangement might be seen as deviating further from the original expectation of Legislative Council members of having an officer with the experience, capability and judgmental power commensurate with a D1 officer to be the authorizing officer and from the existing practice of other LEAs.

8.10 To better carry out the objects of the ICSO, I recommended to Commissioner, ICAC that he should consider designating an officer not below a substantive Principal Investigator to be the authorizing officer. Alternatively, he might consider assigning this function to the supervisor of the acting Principal Investigator (who was an Assistant Director) until such time when the post concerned was taken over by a substantive Principal Investigator.

8.11 Commissioner, ICAC accepted my view. A substantive Principal Investigator was subsequently designated as the authorizing officer for granting Type 2 surveillance authorizations.

(2) Addition of communication facilities with the likelihood of obtaining LPP information to a prescribed authorization

8.12 As pointed out in paragraph 2.2 of Chapter 2, a prescribed authorization with the 'reasonably expected to use' clause gives the LEA concerned the power to intercept any communication facilities 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 the facility. During my inspection visits, I advised the LEAs concerned that regarding the addition of communication facilities with the likelihood of obtaining LPP information, the following course of action should be taken:

(a) If the panel judge granted a prescribed authorization (with the 'reasonably expected to use' clause) with further conditions on LPP, interception of additional communication facilities might be granted with the same further conditions attached.

(b) If the panel judge granted a prescribed authorization (with the 'reasonably expected to use' clause) without attaching further conditions on LPP, in case an additional communication facility with the likelihood of obtaining LPP information was proposed, the application should be temporarily suspended and an REP-11 report be submitted to the panel judge informing the panel judge the intention to include such an additional communication facility. If the panel judge rejected the application, it should not be pursued further. If the panel judge revoked the original prescribed authorization, action should be taken in

accordance with established procedures.

(c) If a case in situation (b) above is urgent, emergency authorization should be applied for.

(3) Report of previous applications in REP-11 report and affirmation in support of an application

8.13 During an inspection visit, it came to my attention that when an LEA submitted an REP-11 report to inform the panel judge of the full name of the newly identified subject of a prescribed authorization who was only known by his nickname in the previous application, the LEA reported that there was no previous application regarding the subject's full name and failed to report two previous Type 1 surveillance applications made in the subject's nickname. I advised the LEA that it should report the previous applications, both in the subject's full name and nickname, if any, in the REP-11 report as well as the affirmation in support of an application in order to avoid any possible misunderstanding. If there was reasonable ground to believe that the unidentified subject and the subscriber of the telecommunications facility intended to be intercepted were one and the same person, the LEA should also confirm if there were previous applications in respect of the subscriber. The recommendation was accepted by the LEA.

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

8.14 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).

8.15 During my inspection visit to an LEA, I noticed that the REV-1 form did not require/allow the reporting officer to fill in the details as to who made the decision of discontinuance and when such decision was made. It was different from the corresponding standard form for the revocation of an authorization upon a report on the discontinuance of interception and Type 1 surveillance, which required the reporting officer to fill in such details. The LEA informed the Secretary for Security of my above observations.

(5) Recommendations in connection with covert surveillance

8.16 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) *Kind of surveillance devices in surveillance operation*

When a kind of surveillance devices was no longer involved in the surveillance operation authorized by an authorization,

the kind of devices should be taken out from the renewal application and the change of circumstances should be clearly stated in the affidavit in support of the renewal application. On the other hand, if a new or additional kind of devices was required, a fresh application instead of a renewal application should be made [paragraph 3.24].

(b) *Completion of the request form for withdrawal of surveillance device*

All relevant officers of the LEA concerned should be reminded of the need to duly complete the request form [paragraph 3.28(b)].

(c) *Revision of the request form for withdrawal of surveillance device*

The LEA should revise the request form to require the requesting officer to sign on the form to confirm his request [paragraph 3.28(c)].

(d) *Description of surveillance devices in the inventory list*

The LEA was requested to revise the descriptions of some surveillance devices in order to avoid confusion and to put in the proper names in the inventory [paragraph 3.28(e)].

(e) *Application without sufficient explanation of the validity period of authorization sought*

If the applicant had not explained in the statement in writing

why the authorization sought should end at odd hours, the authorizing officer ought to ask question in a supplementary sheet. The supplementary sheet which contains the question by the authorizing officer and the answer provided by the applicant should be filed for record purpose and to facilitate my review [paragraph 4.22].

(f) *Lack of a reporting system for initial material inaccuracies and material change of circumstances for Type 2 surveillance cases*

It was inappropriate for the applicant to make any amendment on the statement in writing after the executive authorization had been granted. Instead, the applicant should report the mistake or omission to the authorizing officer via a report similar to the REP-11 report setting out the relevant details and explanations. A properly sanitized copy of such a report should also be provided to me for reference as soon as practicable [paragraph 4.24].

(g) *Global approach in applying for prescribed authorization for surveillance*

It was more advisable for the applicant to adopt a global approach in making the application for the executive authorization, instead of merely referring to devices that were to be used under the executive authorization but not to devices that did not fall within the ambit of the ICSO. This meant that the applicant should present the entirety of the

proposed surveillance operation in the application for the executive authorization by including the use of both listening and optical surveillance devices in the surveillance operation in the statement in writing so that the authorizing officer could see the whole picture and take it into his consideration to determine whether he should grant or refuse the application [paragraph 4.26].

(6) Recommendations made upon review of LPP cases

8.17 In my review of the LPP cases in Chapter 5 of this report, I made a number of recommendations to the Secretary for Security and the LEAs concerned. A summary of these recommendations is shown below:

LPP Report 1

(a) A reminder that a new ATR system should be developed to record which parts of a call the listener had listened to [paragraph 5.19 (a) and see paragraph 8.18(c)].

(b) The formats and printouts of the ATR and relevant records should be improved as specified by me so as to better present such records and their completeness [paragraph 5.19 (b)].

(c) If an authorization is revoked due to the obtaining of LPP information or heightened likelihood of obtaining LPP information, and if the LEA intends to listen or re-listen to any intercept products obtained prior to the revocation of the authorization if it occurred, the LEA should ensure full disclosure of its intention in the REP-11 report submitted and

expressly seek the panel judge's approval for doing so. The same notification of intention should also apply in a section 57 (discontinuance) report or a section 58 (arrest) report when likely LPP information has been obtained or encountered [paragraph 5.19 (c)].

(d) The Security Bureau was requested to inform other LEAs of my above recommendations so that all LEAs could follow accordingly [paragraph 5.21].

LPP Report 2

(e) In future, apart from considering whether a matter amounts to a material change of circumstances which ought to be reported to the panel judge, the LEA should also put in place appropriate measures to guard against the risk of contravening section 31(1)(a)(ii) [paragraph 5.38].

(7) Recommendations made upon review of cases of non-compliance, irregularities and incidents

8.18 In the course of my review of the non-compliance, irregularities and incidents mentioned in Chapter 7, I also made a number of recommendations to the Secretary for Security and the LEAs concerned, which are summed up below:

Outstanding case from 2008

Report 2 in Chapter 7 of Annual Report 2008: Non-compliance with supervisor's instructions and breach of a condition of the prescribed authorization

(a) Officers below a certain rank should not be assigned listening duties in respect of cases assessed to have LPP likelihood [paragraph 7.25].

(b) The REP-11 report to report on LPP matters should make a full and frank disclosure of the number of times a call containing LPP information or possible LPP information had been listened or re-listened to, the respective time and date (showing duration) of each such listening or re-listening, and the identity of each of the listeners. The reporting officer should also report whether there were any calls other than the LPP call(s) reported by the listener on the telephone number used in contact with the subject's number (authorized to be intercepted) in the LPP call(s), and whether such other calls had been listened to and if so, the identity of the listener(s). For these purposes, the reporting officer should be required to check the ATR together with the relevant records when preparing the REP-11 report [paragraph 7.27].

(c) A new ATR system should be developed so that the oversight authority could know which part(s) of the call the listener had listened to [paragraph 7.30].

Cases occurring in 2009

Report 1: Issue of an executive authorization authorizing the use of surveillance device which was not sought in the application

(d) More training should be provided to each category of officers concerned so that they would be more familiar with their respective functions and requirements for performing ICSO duties and that such would not be overlooked [paragraph 7.81].

(e) The LEA should appoint an officer not below the substantive rank of a Senior Superintendent of Police or a Principal Investigator of ICAC or a Senior Superintendent of Customs and Excise or a Principal Immigration Officer to be an authorizing officer in whatever circumstance [paragraph 7.82(a)].

(f) Applicants should submit the draft application documentation to the supervisor for endorsement through e-mail so that there could be a record of such action. The endorsing officer should also give his endorsement through e-mail indicating that he has perused the draft application documentation [paragraph 7.82(b)].

(g) The provision of an executive authorization or a copy of it after its issue by the applicant to his supervisor should be documented [paragraph 7.82(c)].

(h) The issuing officers of the device registry should ensure that

the request form has been correctly and properly filled in before they issue the surveillance devices. The request form should also contain the signature of the requesting officer [paragraph 7.82(d)].

(i) The device registry should be given a template of the executive authorization to enable the issuing officers to familiarize themselves with what an executive authorization should normally contain so that they could easily recognize any irregularity or anomaly in the executive authorization when one is presented to them for issue of surveillance devices [paragraph 7.82(e)].

(j) Instead of distinguishing which part of a surveillance operation requires the authority of a prescribed authorization and which part does not, the LEA should take a global approach when applying for authorization for conducting covert surveillance [paragraph 7.82(f)].

(k) The departmental review system should be improved to enable the detection of malpractice or abuse in the issue and use of surveillance devices [paragraph 7.82(g)].

Report 2: Non-observance of the requirement under Part 1(b)(xi) of Schedule 3 to the ICSO

(l) An applicant should confirm in the supporting affidavit whether, in the previous two years, there have been previous applications in respect of the subject and whether

there have been previous applications in respect of the telecommunications service sought to be intercepted [paragraph 7.84].

(m) The relevant sentence in paragraph 45 of the Code of Practice issued on 9 February 2009 should be amended to make the requirement of disclosing if there was any previous application on the subject and on the telecommunications service clearer to applicants [paragraph 7.90].

Report 4: Withdrawal of surveillance devices in excess of the quantity authorized in the executive authorization for Type 2 surveillance

(n) The department should ensure that the revised version of its Manual on Type 2 surveillance would remind (i) the applicant, (ii) the authorizing officer and (iii) the storekeeper of the devices of the significance of the type and number of the devices requested and allowed to be withdrawn [paragraph 7.107].

(o) Some amendments to the revised version of the device request memo submitted by the department were also proposed [paragraph 7.107].

Additional recommendations

8.19 I have made a number of recommendations on a few matters relating to interception of telecommunications services to the Security Bureau and the LEAs. However, the disclosure of the matters and issues involved would be prejudicial to the prevention or detection of crime or the protection of public security. Therefore, no further details can be given in this annual report.

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CHAPTER 9

OTHER RECOMMENDATIONS

Introduction

9.1 Noting that the ICSO will shortly be under comprehensive review, I consider this an opportune moment to set out in this chapter matters which I have not raised before but require clarification in or revision of the Ordinance. The observations and recommendations set out below are derived from cases handled in 2009 and the first half of 2010.

Circumstances where notifying the relevant person under section 48 is undesirable

9.2 The case described in Chapter 7 under Report 9 is one where unauthorized covert surveillance had occurred. The LEA concerned conducted covert surveillance on a person who was not the subject, albeit a suspected accomplice of the subject, of the executive authorization granted for Type 2 surveillance. The person and others involved were arrested and being prosecuted. The LEA reported the matter to me as a non-compliance with the requirements of the Ordinance. The LEA considered that my notification to the relevant person, ie the person subjected to the unauthorized covert surveillance, under section 48 of the Ordinance would not prejudice the prevention or detection of crime or the protection of public security. In the circumstances, I was obliged to give a notice to the relevant person 'as soon as reasonably practicable' pursuant to section 48(1) of the Ordinance, which provides:

> 'If, in the course of performing any of his functions under this Ordinance, the Commissioner, …, considers that 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, …, the Commissioner **shall** as soon as reasonably practicable give notice to the relevant person –
>
> (a) stating that there has been such a case and indicating whether the case is one of interception or covert surveillance and the duration of the interception or covert surveillance; and
>
> (b) informing the relevant person of his right to apply to the Commissioner for an examination in respect of the interception or covert surveillance.'

9.3 According to section 48(2) of the Ordinance, however, where the relevant person makes an application for an examination in respect of the unauthorized covert surveillance within six months after the receipt of my notice to him referred to in the preceding paragraph, my making a determination on the application under section 44(2) (in his favour) is expressly subject to the provisions of section 45 other than section 45(1)(a).

9.4 Section 45(2) that applies to the situation provides that the Commissioner **shall** not carry out the examination where he is satisfied that any relevant criminal proceedings are pending or likely to be instituted, until they have been finally determined or disposed of or they are no longer likely to be instituted.

9.5 It is to be noted that in both section 48(1) and section 45(2), the imperative 'shall' is used for the Commissioner's action or inaction, namely 'shall give notice' in section 48(1) and 'shall not carry out the

examination' in section 45(2). Although my obligation under section 48(1) to notify the relevant person does not seem to conflict with the prohibition section 45(2) imposes on me from carrying out the related examination, the working of both provisions would in practice cause embarrassment, to say the least.

9.6 The Commissioner's notice to the relevant person pursuant to section 48(1), informing him of his right to apply for an examination in respect of the unauthorized activity mentioned in the notice, is tantamount to an invitation from the Commissioner for the relevant person to lodge the application. Most probably, the relevant person will make the application. However, because as in the case under review, he is being prosecuted, ie, that he has criminal proceedings pending against him and the unauthorized covert surveillance may be relevant to the determination of a question concerning any evidence which may be adduced in those proceedings [see section 45(3)], I am obliged by section 45(2) not to carry out the requested examination until the final determination or disposal of the criminal proceedings. While section 48(1) obliges me to notify the relevant person of an unauthorized statutory activity against him and his right to make the application for examination, section 45(2) only prohibits me from carrying out the examination where he makes the application, and there is no provision in the Ordinance to allow me any discretion to refrain from giving him such a notice.

9.7 There is little doubt that when the relevant person receives my response to his application that I am not going to proceed with the examination for which he applies due to the provisions of section 45(2), he would query why I have notified him and invited him to make the

application in the first place. My response to such a query can merely cite and rely on the provisions of section 45(2) and I cannot offer any good explanation for this suspected 'approbation and reprobation'. The semblance of disrespect for the right of the person who was subjected to an unauthorized statutory activity to seek a remedy from me, generated from the encouragement by my notice under section 48(1) in one breath and the discouragement by my refusal to carry out the examination under section 45(2) in the following breath would, to put it at the lowest, diminish the trust of the public in the reasonableness or justification of the Ordinance and the scheme established under it.

9.8 I recommend that the Administration consider appropriate amendments to the Ordinance so as to resolve this conundrum.

Application for examination in respect of a deceased person

9.9 Pursuant to section 43 of the Ordinance, a person may apply to me for an examination if he suspects that his communication has been intercepted by or he has been subject to any covert surveillance carried out by an officer of an LEA. Under the existing procedures designed by me, the person will be asked to complete and sign a consent form to the effect that he understands that information including the personal data provided by him will be used for purposes directly related to his application for examination and that such information may be transferred to other parties who will be contacted by my office in the course of handling his application. If the person does not complete and sign the consent form to signify his consent for my office to do so, I would not carry out an examination.

9.10 In the course of my handling applications for examination, I encountered a case where a person had initially indicated through his solicitors his wish to make an application for examination under section 43 but when my office requested the person to fill out the aforesaid consent form, his solicitors informed my office that the person died before completing the consent form. The solicitors stated that prior to his death, he had indicated to them that he wished to pursue the examination in respect of the covert activities carried out on him.

9.11 The ICSO does not expressly provide for an examination being conducted in respect of a person who has deceased. Moreover, it would cause difficulty to me in carrying out an examination on an application if the applicant has not signed and is not able to sign an appropriate consent form for the purpose.

9.12 While the case I encountered was one which the person dies before providing a consent form to me, that is, before my carrying out of an examination, there may be situations where an applicant dies in the course of my examination or before I make my determination on his application or before I give a notice of my determination to him. What should I do in such circumstances? Should I proceed with the carrying out of the examination including the making of a determination on his application and giving a notice of it to his legal representative or the personal representative of his estate?

9.13 Section 45(1)(c) provides that if the applicant cannot, after the use of reasonable efforts, be traced, I may refuse to carry out the examination or where the examination has been commenced, to proceed with the carrying out of the examination (including the making of any

determination further to the examination). But this provision does not seem to fit squarely into a situation where an applicant has died.

9.14 I propose that the Ordinance should expressly address the issue of how to proceed with an application for examination in respect of the applicant who dies before or in the course of an examination.

9.15 Similar situation may also arise regarding notification to relevant persons under section 48 of the Ordinance. The Ordinance should also address how such matters should be dealt with in respect of a relevant person who dies before or after my giving of a notice under section 48(1).

Substantive rank of the Authorizing Officer

9.16 An authorizing officer has an important role of dealing with applications for executive authorizations for a Type 2 surveillance operation. Section 7 of the Ordinance provides that the rank of an authorizing officer should not be below a rank equivalent to that of Senior Superintendent of Police ('the minimum rank'). Equivalent ranks or posts in other LEAs are Senior Superintendent of Customs and Excise, Principal Investigator of ICAC and Principal Immigration Officer.

9.17 Because of the acting arrangement in the civil service, a lower rank officer may be appointed to fill a post at a higher rank on an acting basis, for example, a Superintendent of Police acting as Senior Superintendent of Police, a Chief Investigator of ICAC acting as Principal Investigator, a Superintendent of Customs and Excise acting as Senior Superintendent of Customs and Excise, and an Assistant Principal Immigration Officer acting as Principal Immigration Officer.

9.18 If the post of the authorizing officer is set at the minimum rank and if an officer of a lower rank is appointed to act up the post either on a long term basis or as temporary replacement, then the substantive rank of the officer performing the duties of an authorizing officer would be below the minimum rank specified in section 7. Experience has shown that sometimes mistakes were made by officers acting in the post. A case in point where blatant mistakes were made by the acting authorizing officer is the case in Report 1 in Chapter 7. The substantive rank of that acting authorizing officer was below the minimum rank specified in section 7 and he was acting the post of authorizing officer as leave relief at the material time. In fact, his substantive rank was the same as that of the applicant making the application for Type 2 surveillance.

9.19 Given the important role played by an authorizing officer, I consider that it is undesirable for the duties to be taken up by any officer whose substantive rank is below the minimum rank specified in section 7, irrespective of whether the appointment is on a long term basis or temporary in nature. It is particularly undesirable if the substantive rank of the acting authorizing officer is the same as the rank of applicants making Type 2 surveillance applications. I therefore recommend that in all circumstances, only officers whose **substantive** rank is not below a rank equivalent to that of Senior Superintendent of Police should be appointed as the authorizing officer and that this requirement should be clearly spelt out in the Ordinance. This recommendation is suggested for improving the standard of authorizing officers which will hopefully reduce errors.

Unauthorized interception due to revocation of authorization

9.20 In Chapter 7 under Reports 5 and 6, I reported two cases of unauthorized interception where the panel judge revoked the existing prescribed authorizations at the time when he refused the applications for their renewal. The revocation took immediate effect but lead time was required to effect the disconnection of the facilities concerned. Interception during the period after the revocation of the prescribed authorizations and before the disconnection of the facilities was interception without the authority of a prescribed authorization and was thus unauthorized. The situation is similar to that of revocation under section 58(2) and (3) and revocation after consideration of an REP-11 report on material change of circumstances or initial material inaccuracies where a short period of unauthorized interception is bound to occur after the revocation of the prescribed authorization which takes immediate effect.

9.21 As stated in paragraph 7.116 of this annual report, throughout the Ordinance, there is no express power given to the panel judge or the authorizing officer to stay a revocation or defer a revocation until a time later than when he makes such a determination. I propose that the Ordinance should be amended to provide such power to the relevant authority so that they can exercise such power whenever circumstances require.

9.22 An alternative would be to allow the LEA who faces revocation of a prescribed authorization to cause the disconnection of the facility concerned to be effected within a reasonable time after the revocation which would render any interception taking place in between revocation and disconnection as not being unauthorized. Such reasonable

time of course must relate to the particular circumstances of the case but discretion can be given to the Commissioner on Interception of Communications and Surveillance to consider and determine if the reasonableness has been satisfied.

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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 4]

Table 1(a)

		Judge's Authorization	Emergency Authorization
(i)	Number of authorizations issued	831	0
	Average duration[Note 5]	29 days	-
(ii)	Number of authorizations renewed	950	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	47	Not applicable
(vi)	Number of applications for the issue of authorizations refused	8	0
(vii)	Number of applications for the renewal of authorizations refused	7	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 4 Executive authorization is not applicable to interception.

Note 5 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	88 Note 6	64	0
	Average duration	5 days	5 days	-
(ii)	Number of authorizations renewed	42	11	Not applicable
	Average duration of renewals	20 days	22 days	-
(iii)	Number of authorizations issued as a result of an oral application	0	3	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	3	0	Not applicable
(vi)	Number of applications for the issue of authorizations refused	0	4	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

Note 6 This figure included one case in which Type 2 surveillance was elevated as Type 1 surveillance because of the likelihood of LPP information being obtained.

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
Attempting to export unmanifested cargo	Cap. 60 & Cap. 200	Section 18(1)(b), Import and Export Ordinance Section 159G, Crimes Ordinance
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
Conspiracy to commit forcible detention with intent to procure a ransom / forcible taking or detention of persons with intent to sell him	Cap. 212	Section 42, Offences Against the Person 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	129	165	294

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	110	37	147

Note 9 Of the 294 persons arrested, 75 were attributable to both interception and surveillance operations that had been carried out.

Note 10 Of the 147 persons arrested, 75 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 366.

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	32	Interception & Surveillance	In addition to the checking of weekly reports, the Commissioner had paid 32 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 693 applications and 244 related documents / matters had been checked.

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			(See paragraphs 2.32, 3.19, 3.30 and 4.19 of this report.)
(c) LPP cases reviewed by the Commissioner	5	Interception	LPP Report 1 The panel judge revoked two prescribed authorizations on the same subject upon consideration of REP-11 reports on change of LPP risk. The Commissioner examined the summaries on the intercept product, the REP-11 reports and the call data. The summaries produced for the Commissioner's inspection did not contain any LPP information. Inspection of the call data showed that other than the calls mentioned in the REP-11 reports, there was no other call made by the subject to, or received by the subject from, the facility numbers of the solicitors concerned. As the Commissioner had not listened to the audio recordings, he could not verify whether the REP-11 reports had truthfully reported the gist of the conversations in the calls concerned. Nor could the Commissioner check whether, apart from the calls mentioned in the REP-11 reports, there were any other calls preceding the reported calls which might have contained LPP information that should have been reported to the panel judge

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			and the Commissioner. The facilities concerned were disconnected seven minutes after the revocation by the panel judge of the prescribed authorizations, resulting in unauthorized interception of seven minutes. There was no call during the seven minutes of unauthorized interception. (See paragraphs 5.7 – 5.21 of Chapter 5.)
		Interception	<u>LPP Report 2</u> The panel judge revoked a prescribed authorization upon consideration of an REP-11 report reporting on the obtaining of LPP information. There were three calls which involved or were likely to involve LPP information. While the REP-11 report admitted that LPP information had been obtained from interception of the last call, the panel judge was of the view that such information was quite possibly obtained in all the three calls. The Commissioner examined the summaries on the intercept product, the REP-11 reports and the call data. The summaries produced for the Commissioner's inspection did not contain any information subject to LPP. Inspection of the call data showed that other than the three calls mentioned in the REP-11 report, there was no other call made by the subject

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			to, or received by the subject from, the facility numbers of the solicitor concerned. As the Commissioner had not listened to the audio recordings, he could not verify whether the REP-11 report had fully and truthfully reported the gist of the conversations of the three calls. Nor could the Commissioner check whether, apart from the calls mentioned in the REP-11 report, there were any other calls preceding the reported calls which might have contained LPP information that should have been reported to the panel judge and the Commissioner. The facility concerned was disconnected five minutes after the revocation by the panel judge of the prescribed authorization, resulting in unauthorized interception of five minutes. There was no call during these five minutes. (See paragraphs 5.22 – 5.38 of Chapter 5.)
		Interception	<u>LPP Report 3</u> The panel judge revoked a prescribed authorization upon consideration of an REP-11 report on a heightened likelihood of obtaining LPP information. The Commissioner examined the summaries on the intercept product and the REP-11 report. The summaries

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			produced for the Commissioner's inspection did not contain any information subject to LPP. As the Commissioner had not listened to the audio recordings, no finding could be made as to the veracity of the contents of the call as stated in the REP-11 report and whether there were any communications subject to LPP in the calls intercepted before the call. The facility concerned was disconnected five minutes after the revocation by the panel judge of the prescribed authorization, resulting in unauthorized interception of five minutes. There was no call during these five minutes. (See paragraphs 5.39 – 5.44 of Chapter 5.)
		Interception	<u>LPP Report 4</u> The panel judge revoked two prescribed authorizations on the same subject upon consideration of REP-11 reports on a heightened likelihood of obtaining LPP information through interception on the subject. The Commissioner examined the summaries on the intercept product and the REP-11 reports. The summaries produced for the Commissioner's inspection did not contain any information subject to LPP. As the Commissioner had not

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			listened to the audio recordings, no finding could be made as to the veracity of the contents of the calls stated in the REP-11 reports and whether there were any communications subject to LPP in the calls intercepted before the reported calls. The facilities concerned were disconnected about 20 minutes after the revocation by the panel judge of the prescribed authorizations, resulting in unauthorized interception of about 20 minutes. Three calls were intercepted during the unauthorized period but they were not listened to by the LEA concerned. (See paragraphs 5.45 – 5.50 of Chapter 5.)
		Interception	<u>LPP Report 5</u> An LEA discontinued an interception operation and then submitted a discontinuance report to the panel judge. It was assessed that information relating to LPP was likely to be obtained, but according to the discontinuance report, no information related to LPP had in fact been obtained since the commencement of the interception operation. There was no unauthorized interception as disconnection of the facility concerned was effected before revocation of the prescribed authorization by the panel judge. The

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			Commissioner examined the materials preserved by the LEA and found nothing untoward. However, as the Commissioner had not listened to the audio recordings, no finding could be made as to the veracity of the contents of the calls as stated in the discontinuance report and whether there were any communications subject to LPP in other calls intercepted under the prescribed authorization. (See paragraphs 5.51 – 5.52 of Chapter 5.)
(d) JM cases reviewed by the Commissioner	2	Interception	<u>JM Report 1</u> The subject of an authorization (Authorization A) was suspected of committing a serious crime involving a member of a media organization. Given the nature of the investigation, the prescribed authorization was subject to a set of restrictive conditions imposed by the panel judge. One of the conditions was that upon detecting any JM, a report should be made to the panel judge indicating the nature of the JM obtained from such interception, whether the same was relevant to the investigation and whether the interception was still continuing. For the same investigation, there was another prescribed authorization for interception on another subject which was

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			also subject to the same restrictive conditions imposed by the panel judge because of the likelihood of obtaining JM (Authorization B). After realizing that an incident mentioned in the conversation of a call intercepted from Authorization A had been published in newspapers, the LEA concerned submitted an REP-11 report to the panel judge reporting on the matter. Upon consideration of the REP-11 report, the panel judge allowed Authorization A to continue. The Commissioner examined materials and records preserved by the LEA in respect of both Authorization A and Authorization B, except the audio recordings of the intercepted calls. Nothing untoward was found. However, as the Commissioner had not listened to the audio recordings, no finding could be made as to: (i) the veracity of the gist of the conversations of the calls as stated in the REP-11 report; (ii) regarding Authorization A, whether, apart from the calls mentioned in the REP-11 report, there were any other calls which might have contained JM that should have been

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			reported to the panel judge in accordance with the restrictive conditions imposed by the panel judge; and (iii) regarding Authorization B, whether there were any calls which might have contained JM that should have been reported to the panel judge in accordance with the respective conditions imposed by the panel judge. (See paragraphs 5.53 – 5.66 of Chapter 5.)
		Interception	<u>JM Report 2</u> This report involved two prescribed authorizations, which authorized interception on two different persons. On the same day, a total of three calls were intercepted under the two authorizations in which details of a law enforcement action were mentioned. In one of the three calls, a reporter of a newspaper was told the details of the law enforcement action. Two days after interception of the calls, the LEA concerned listened to the calls and subsequently confirmed that the details of the law enforcement action had been published in the reporter's newspaper the day before. The LEA considered that JM had been obtained and submitted REP-11 reports to

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			the panel judge to report on the obtaining of JM. Upon consideration of the REP-11 reports, the panel judge revoked the prescribed authorizations concerned. The facilities concerned were disconnected within 15 to 22 minutes after the revocation of the prescribed authorizations. No call was intercepted during the periods of unauthorized interception. The Commissioner examined the materials and records preserved by the LEA, except the audio recordings of the intercepted calls. Verification of what the LEA stated was made against the relevant records. As the Commissioner had not listened to the audio recordings, no finding could be made as to the veracity of the gist of the conversations of the three calls as stated in the REP-11 reports. Nor could the Commissioner make any finding on whether, apart from the calls mentioned in the REP-11 reports, there were any other calls which might have contained JM that should have been reported to the panel judge. (See paragraphs 5.67 – 5.73 of Chapter 5.)
(e) Incidents / irregularities reviewed by the Commissioner	8	Interception	<u>Report 11 in Chapter 7 of Annual Report 2008</u> This case was brought forward from the Annual Report 2008. The

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			interception of four facilities had been discontinued but subsequently re-activated for three hours due to technical problems. The review has not been completed at the time of writing this report. (See paragraph 7.32 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 2</u> Since inception of the Ordinance, applicants of a particular LEA only confirmed in the affirmation whether there had been previous ICSO application in respect of the subject in the preceding two years and there was no confirmation as to whether there had been any ICSO application in the previous two years on the telecommunications service sought to be intercepted. The Commissioner considered that this approach was not in full compliance with the requirement under Part 1(b)(xi) of Schedule 3 to the Ordinance which requires confirmation as to previous application on both the subject and the telecommunications service. Having reviewed the case, the Commissioner accepted that this irregularity was due to the misunderstanding of the officers concerned in interpreting the provisions of the Ordinance. Paragraph 45 of the Code of Practice issued

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			on 9 February 2009 was revised by the Security Bureau to reflect the requirement. However, the revised version was still not clear enough to help the applicant understand the requirement. In response to the Commissioner's recommendation, the Security Bureau further revised the relevant sentence in paragraph 45 of the Code to make the requirement of disclosing if there was any previous application on the subject and on the telecommunications service clearer to applicants. (See paragraphs 7.84 – 7.92 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 3</u> The interception of four facilities authorized under four prescribed authorizations respectively had been discontinued but subsequently re-activated for about two and a half hours until the matter was discovered and the re-activated status removed immediately. During the reactivation, a call was intercepted but it was an unanswered call and was not listened to by the LEA concerned. Having reviewed the case, the Commissioner was satisfied that the reactivation was caused by technical complications which did not involve any LEA officers or any person acting

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			on their behalf. The Team and the CSP concerned had worked out remedial measures to avoid recurrence. (See paragraph 7.93 of Chapter 7.)
		Surveillance	<u>Non-compliance / Irregularity Report 4</u> An executive authorization for Type 2 surveillance had authorized the use of one set of listening device but the officer-in-charge of the investigation ('OC Case') withdrew two sets of device. The additional set was for back-up purpose in case the first set was out of order. The additional set was returned to the device store as soon as the OC Case was aware of the mistake. This case eventually turned out not to be a non-compliance under section 54 of the Ordinance because no covert surveillance was carried out. In reviewing the case, the Commissioner also found that: (i) The OC Case requested 'tape recorders' (plural) in the device request memo without specifying the quantity required. (ii) The OC Case wrongly stated in the device request memo that the executive authorization was an 'Oral Authorization'.

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			(iii) In the weekly report form submitted to the Commissioner, the form of the Type 2 surveillance in this case was also classified as object-based (one mobile phone). But there were insufficient facts in the application and the executive authorization to support the 'object-based' classification. On the issue of two sets of device and the mistakes referred to in (i) and (ii) above, the Commissioner agreed with the department's findings that they were due to the OC Case's inexperience, poor understanding of the Ordinance and unfamiliarity with the relevant procedures. A warning should be given to the OC Case. Improvement measures would be taken by the department. On (iii) above, the department explained that 'one mobile phone' and 'object-based' were entered in the weekly report form because the officer who filled out the form was told verbally by the OC Case that the listening device issued, in addition to being used to record conversations between the victim and the suspected person at a controlled meeting, would also be used to record telephone conversation. As the latter purpose was not

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			stated in the statement in writing and the executive authorization, the intended use of tapping any conversation over the telephone was therefore clearly unauthorized. In this regard, the Commissioner immediately wrote to the head of the department expressing his concern about the serious deficiency in the understanding on the part of the two officers of the strict compliance with the ICSO requirements. The head of department acknowledged that there was a need for continued education and training for officers who were required to discharge duties under the Ordinance, including experience sharing sessions and training workshops. (See paragraphs 7.94 – 7.107 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 5</u> The panel judge revoked a prescribed authorization upon refusing an application for its renewal and the facility concerned was disconnected 19 minutes after the revocation of the authorization. The interception after the revocation of the prescribed authorization and before the disconnection of the facility was conducted without the authority of a prescribed authorization and was

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			unauthorized. No call was intercepted during the 19 minutes of unauthorized interception and there was no listening to the intercepted calls after the revocation of the prescribed authorization. (See paragraphs 7.108 – 7.111 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 6</u> The panel judge revoked a prescribed authorization upon refusing an application for its renewal and the facility concerned was disconnected 50 minutes after the revocation of the authorization. In other words, there was unauthorized interception of 50 minutes. Two calls were intercepted during the unauthorized period. Before being notified of the panel judge's determination, the LEA officers listened to one of the two calls intercepted during the unauthorized period. In addition, two calls intercepted before the revocation of the prescribed authorization were also listened to by the LEA officers after the revocation and before receiving notification of the panel judge's determination. Having reviewed this case and the case under Non-compliance / Irregularity Report 5 above, the Commissioner proposed that the Security Bureau should

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			take the opportunity of the impending comprehensive review of the Ordinance to include a provision granting express power to the relevant authority who makes a revocation to stay or defer it whenever circumstances require. (See paragraphs 7.112 – 7.116 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 7</u> Audio products of telecommunications interception authorized by 26 prescribed authorizations were wrongly distributed to another section of the LEA which was not responsible for the investigations concerned. The Commissioner has not completed the review at the time of writing this report. (See paragraph 7.117 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 12</u> A call was intercepted wrongly due to a technical problem. The Commissioner has not yet received the full investigation report pending the completion of this annual report. (See paragraph 7.131 of Chapter 7.)

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
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 made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours of issue	Nil	Not applicable	For the report period, there was no report submitted under this category.
(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	6	Interception	Report 2 in Chapter 7 of Annual Report 2008 This case was brought forward from the Annual Report 2008. The panel judge granted a prescribed authorization for interception with additional 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

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			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 listened to another call intercepted after the LPP Call, which was a breach of the supervisor's instructions and a breach of one of the additional 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. In the course of review, a new issue arose in that the department claimed that it was unsafe to rely on the audit trail report ('ATR') for ascertaining the exact duration of listening by a listener to any call under interception and that the department might have to review the disciplinary action already taken against the listener of this case because he might not have accessed the part containing LPP information in his first listening to the call. Having reviewed the case, the Commissioner made the following findings and recommendations: (i) The giving of a strong

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			advice to the listener for his non-realization of the LPP Call on the morning of 13 November 2007 was not unfair to him. (ii) The warning given to the listener for his listening to another call after reporting the LPP Call was appropriate. (iii) Officers below a certain rank should not be assigned listening duties in respect of cases assessed to have LPP likelihood. (iv) The REP-11 report to report on LPP matters should make a full and frank disclosure of the number of times a call containing LPP information or possible LPP information had been listened or re-listened to, the respective time and date (showing duration) of each such listening or re-listening, and the identity of each of the listeners. The reporting officer should also report whether there were any calls other than the LPP call(s) reported by the listener on the telephone number used in contact with the subject's number (authorized to be intercepted) in the LPP call(s), and whether such

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			other calls had been listened to and if so, the identity of the listener(s). For these purposes, the reporting officer should be required to check the ATR together with the relevant records when preparing the REP-11 report. (v) The ATR system prevailing at the time of the incident was such that it could not show the duration of listening by the listener and which part(s) of a call a listener had accessed. (vi) The ATR system had been enhanced in November 2009, but the enhanced system would still not be able to capture and record the particular part(s) of a call a listener had accessed. (vii) A new ATR (over and above the enhanced ATR system mentioned above) should be developed so that the oversight authority could know which part(s) of a call the listener had listened to. Priority should be given to the early completion of the new ATR system. (See paragraphs 7.7 – 7.31 of Chapter 7.)

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
		Surveillance	<u>Non-compliance / Irregularity Report 1</u> An LEA intended to carry out a Type 2 surveillance with the participation of a participating agent. It was described in the statement in writing that the participating agent was required to use listening devices for recording the conversations between himself and a subject of investigation. The use of optical surveillance device(s) by the participating agent was not sought in the application. However, the executive authorization granted authorized the use of both listening device(s) and optical surveillance device(s) by the participating agent mistakenly. This discrepancy was detected by the Reviewing Officer of the LEA upon review of the executive authorization. Subsequently, the LEA reported this irregularity to the Commissioner. In conducting the review, the Commissioner also found that while the use of listening device(s) and optical surveillance device(s) by LEA officers was specifically sought by virtue of what was stated in the statement in writing, the use of both types of devices by LEA officers was not expressly mentioned in the executive authorization and thus apparently not allowed by it, although the purpose of the use of such devices by

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			them was mentioned as a purpose in the executive authorization. Regarding this omission, the Commissioner considered that the non-inclusion of the use of surveillance devices by the LEA officers in the executive authorization had made the covert surveillance carried out by the LEA officers as being without the authority of a prescribed authorization. Apart from the irregularities regarding the executive authorization, the Commissioner also looked into the following matters: (i) culpability of officers concerned; (ii) performance of the Reviewing Officer; (iii) mistakes made or unmatched information stated in the request form for withdrawing surveillance devices; and (iv) inadequacies of the departmental review system. The Commissioner made the following recommendations: (i) More training should be provided to each category of officers concerned so that they would be more familiar with their respective functions and

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			requirements for performing ICSO duties and that such would not be overlooked. (ii) The LEA should appoint an officer not below the rank of a Senior Superintendent of Police or a Principal Investigator of ICAC or a Senior Superintendent of Customs and Excise or a Principal Immigration Officer to be an authorizing officer in whatever circumstance. (iii) Applicants should submit the draft application documentation for executive authorization to the supervisor for endorsement through e-mail so that there could be a record of such action. The endorsing officer should also give his endorsement through e-mail indicating that he has perused the draft application documentation. (iv) The provision of an executive authorization or a copy of it after its issue by the applicant to his supervisor should be documented. (v) The issuing officers of the device registry should ensure that the request form has been

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			correctly and properly filled in before they issue the surveillance devices. The request form should also contain the signature of the requesting officer. (vi) The device registry should be given a template of the executive authorization to enable the issuing officers to familiarize themselves with what an executive authorization should normally contain. (vii) Instead of distinguishing which part of a surveillance operation requires the authority of a prescribed authorization and which part does not, the LEA should take a global approach when applying for authorization for conducting covert surveillance. (viii) The departmental review system should be improved to enable the detection of malpractice or abuse in the issue and use of surveillance devices. (See paragraphs 7.33 – 7.83 of Chapter 7.)
		Surveillance	<u>Non-compliance / Irregularity Report 8</u> An executive authorization was granted for conducting

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			Type 2 surveillance on telephone conversations between a participating agent and a subject of the investigation. In the course of conducting covert surveillance, a call made to the participating agent from a person unrelated to the investigation was also recorded and partly listened to by an LEA officer. The recording of this call was not covered by the terms of the executive authorization. The Commissioner has not completed the review at the time of writing this report. (See paragraph 7.118 of Chapter 7.)
		Surveillance	<u>Non-compliance / Irregularity Report 9</u> An executive authorization was granted for conducting Type 2 surveillance on telephone conversations between a participating agent and a subject of the investigation. A person acting on behalf of the subject ('the Representative') approached the participating agent over the telephone. The conversations in several telephone calls exchanged between the participating agent and the Representative were recorded by the LEA concerned, which was outside the ambit of the executive authorization. The Commissioner has not completed the review at the

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			time of writing this report. (See paragraphs 7.119 – 7.122 of Chapter 7.)
		Surveillance (2 reviews)	<u>Non-compliance / Irregularity Reports 10 and 11</u> The Commissioner found that in four prescribed authorizations issued for two investigation cases, the quantity of devices used might be in excess of what was authorized in the relevant prescribed authorizations for Type 1 surveillance. Regarding the device(s) sought / authorized, the word 'device' stated in both the affirmation in support of the application and the prescribed authorization was in singular form. However, the quantity of devices withdrawn or used in the covert surveillance was more than one. The department explained that the applicants used the word 'device' in singular form which was meant to refer, in a generic sense, to the kind of device sought to be used. They did not intend the word to carry any numerical or quantitative meaning. In response to the Commissioner's suggestion, the department submitted respective reports on the four prescribed authorizations concerned to the panel judge explaining the matter and seeking the panel judge's view as to the true ambit of the prescribed authorizations.

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			In these reports, the department made it clear that should the panel judge consider that the understanding of the applicants about the meaning of the word "device' was wrong, a review would be conducted to identify all previous cases having the same issue so that reports on those cases would be submitted to the panel judge for consideration. The panel judge noted the four reports without adding any comments. (See paragraphs 7.123 – 7.130 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 of LPP cases pursuant to paragraph 120 of the Code	4	Interception	LPP Report 1 Unauthorized interception of seven minutes after the panel judge revoked the prescribed authorizations following receipt of REP-11 reports on change of LPP risk.
		Interception	LPP Report 2 Unauthorized interception of five minutes after the panel judge revoked the prescribed authorization following receipt of an REP-11 report on obtaining of LPP information.
		Interception	LPP Report 3 Unauthorized interception of five minutes after the panel judge revoked the prescribed authorization following receipt of an REP-11 report on heightened likelihood of obtaining LPP information.
		Interception	LPP Report 4 Unauthorized interception of about 20 minutes after the panel judge revoked the prescribed authorizations following receipt of REP-11 reports on heightened likelihood of obtaining LPP information. (For details, see item (c) under section 41(1) in Table 5 and Chapter 5.)

Number of cases of irregularities or errors identified in the reviews under		Interception / Surveillance	Broad nature of irregularities or errors identified
(b) Reviews of JM cases	1	Interception	JM Report 2 Unauthorized interception ranging from 15 minutes to 22 minutes after the panel judge revoked the prescribed authorizations following receipt of REP-11 reports on obtaining of JM. (For details, see item (d) under section 41(1) in Table 5 and Chapter 5.)
(c) Other reviews	8	Interception	Report 11 in Chapter 7 of Annual Report 2008 Reactivation of four discontinued interceptions. This review has not been completed at the time of writing this report.
		Interception	Non-compliance / Irregularity Report 2 Non-observance of the requirement under Part 1(b)(xi) of Schedule 3 to the Ordinance – no confirmation as to whether there had been any ICSO application in the previous two years on the telecommunications service sought to be intercepted.
		Interception	Non-compliance / Irregularity Report 3 Reactivation of four discontinued interceptions.
		Surveillance	Non-compliance / Irregularity Report 4 Withdrawal of surveillance devices in excess of the quantity authorized in the executive authorization.

Number of cases of irregularities or errors identified in the reviews under		Interception / Surveillance	Broad nature of irregularities or errors identified
		Interception	Non-compliance / Irregularity Report 5 Unauthorized interception of 19 minutes after the panel judge revoked the prescribed authorization upon refusing an application for its renewal.
		Interception	Non-compliance / Irregularity Report 6 Unauthorized interception of 50 minutes after the panel judge revoked the prescribed authorization upon refusing an application for its renewal.
		Interception	Non-compliance / Irregularity Report 7 Wrong distribution of audio products of telecommunications interception to another section of the LEA which was not responsible for the investigations concerned. This review has not been completed at the time of writing this report.
		Interception	Non-compliance / Irregularity Report 12 Wrong interception of a call. This review has not been completed at the time of writing this report. (For details, see item (e) 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	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.

Number of cases of irregularities or errors identified in the reviews under		Interception / Surveillance	Broad nature of irregularities or errors identified
by the head of department under section 23(3)(b)			
(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	6	Interception	<u>Report 2 in Chapter 7 of Annual Report 2008</u> Non-compliance with supervisor's instructions and breach of a condition of the prescribed authorization.
		Surveillance	<u>Non-compliance / Irregularity Report 1</u> Authorizing the use of optical surveillance device(s) by a participating agent which was not sought in the application and non-inclusion of the use of listening and optical surveillance devices by LEA officers in the executive authorization.
		Surveillance	<u>Non-compliance / Irregularity Report 8</u> Surveillance on telephone conversation between a participating agent and a person unrelated to the investigation for about 20 seconds.
		Surveillance	<u>Non-compliance / Irregularity Report 9</u> Surveillance on phone calls beyond the terms and conditions of the executive authorization.

Number of cases of irregularities or errors identified in the reviews under		Interception / Surveillance	Broad nature of irregularities or errors identified
		Surveillance (2 reviews)	Non-compliance / Irregularity Reports 10 and 11 Quantity of devices used might be in excess of what was authorized in the relevant 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
23	10	0	7	6

Note 11 Of the 23 applications received, five were subsequently not pursued by the applicants and one fell outside the ambit of the Commissioner.

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)]	12	5	-	7

Note 12 As mentioned in Note 11 above, there were six out of the 23 applications for examination that could not be processed. In addition, there were also five applications that were still pending 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 12. The number of notices given by the Commissioner under section 44(5) was therefore 12, seven of which were given during the report period and five of which thereafter.

In addition, the Commissioner had also issued one notice during the report period under section 44(5) in respect of an application for examination brought forward from 2008 which was reported in the Annual Report 2008.

In 2009, there were five applications covered by section 45(2) whereas in 2008, there were two. Having taken into account the two cases brought forward from 2008, the total number of applications covered by section 45(2) and are still pending at the time of the writing of this report is seven.

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)]	0	0

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]	1	Interception	For a report of non-compliance submitted in 2008 regarding interception of a wrong facility, the Commissioner considered that the disciplinary treatment towards an officer was unfairly severe. The Commissioner wrote to the Chief Executive in 2009 to provide him with the details of the facts of the case and of the Commissioner's reasoning. (See paragraphs 7.23 – 7.27 of Chapter 7 of the Annual Report 2008.)
Recommendations to the Secretary for Security on the Code [section 51]	2	Surveillance	(1) REC-5, REC-6, STA-1 and STA-2 should be amended to add the wording '(no more than 3 months)' under the relevant paragraph thereof. (See paragraph 8.5(a) of Chapter 8.) (2) STA-3 should be amended to add the wording *'(no more than **48 hours** beginning with the time when the emergency authorization is **issued**)'*. (See paragraph 8.5(b) of Chapter 8.)
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the Code [section 52]	7	Interception & Surveillance	(1) Designating an officer not below a substantive Principal Investigator to be the authorizing officer for granting Type 2 surveillance authorizations. (See paragraphs 8.7 – 8.11 of Chapter 8.)

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			(2) Adopting certain arrangements for addition of communication facilities with the likelihood of obtaining LPP information to a prescribed authorization. (See paragraph 8.12 of Chapter 8.) (3) Reporting the previous applications, both in the subject's full name and nickname, if any, in REP-11 report and affirmation in support of an application. (See paragraph 8.13 of Chapter 8.) (4) Revising the REV-1 form to require / allow the reporting officer to fill in the details as to who made the decision of discontinuance and when such decision was made. (See paragraphs 8.14 – 8.15 of Chapter 8.) (5) Recommendations in connection with covert surveillance on: (i) kind of surveillance devices in surveillance operation; (ii) completion of the request form for withdrawal of surveillance device; (iii) revision of the request form for withdrawal of surveillance device; (iv) description of surveillance devices in the inventory list; (v) application without sufficient explanation of the validity period of authorization sought;

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			(vi) lack of a reporting system for initial material inaccuracies and material change of circumstances which should be applied for rectifying errors or omissions in Type 2 surveillance cases; and (vii) global approach in applying for prescribed authorization for surveillance. (See paragraph 8.16 of Chapter 8.) (6) Recommendations made upon review of LPP cases: (i) a reminder that a new ATR system should be developed to record which parts of a call the listener had listened to; (ii) the formats and printouts of the ATR and relevant records should be improved as specified by the Commissioner so as to better present such records and their completeness; (iii) intention to listen to any intercept products should be disclosed in the REP-11 report, the section 57 (discontinuance) report or the section 58 (arrest) report when likely LPP information has been obtained or encountered; and (iv) appropriate measures should be put in place to guard against the risk of contravening section 31(1)(a)(ii). (See paragraph 8.17 of Chapter 8.)

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			(7) Recommendations made upon review of cases of non-compliance, irregularities and incidents: (i) not assigning officers below a certain rank listening duties in respect of cases assessed to have LPP likelihood; (ii) making full and frank disclosure in the REP-11 report regarding listening or re-listening to LPP calls; (iii) developing a new ATR system so that the oversight authority could know which part(s) of the call the listener had listened to; (iv) providing more training to officers so that they would be more familiar with their functions and requirements for performing ICSO duties; (v) appointing an officer not below certain substantive rank to be an authorizing officer in whatever circumstance; (vi) using e-mail to submit the draft application documentation and give endorsement; (vii) documenting the provision of an executive authorization or a copy of it after its issue by the applicant to his supervisor; (viii) ensuring that the request form has been correctly and properly filled in before the surveillance devices are issued; (ix) giving a template of the

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			executive authorization to the device registry for reference; (x) taking a global approach when applying for authorization for conducting covert surveillance; (xi) improving the departmental review system to enable the detection of malpractice or abuse in the issue and use of surveillance devices; (xii) confirming in the supporting affidavit whether, in the previous two years, there have been previous applications in respect of the subject and the telecommunications service sought to be intercepted; (xiii) amending the relevant sentence in paragraph 45 of the Code to make the requirement of disclosing if there was any previous application on the subject and on the telecommunications service clearer to applicants; (xiv) ensuring that the revised version of the department's Manual on Type 2 surveillance would remind the officers concerned of the significance of the type and number of the devices requested and allowed to be withdrawn; and (xv) amending the revised version of the device request memo. (See paragraph 8.18 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 [section 52]	Not applicable	Not applicable	0
Disciplinary action taken in case of report on non-compliance [section 54]	Not applicable	Not applicable	0

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

Introduction

11.1 Under section 54 of the Ordinance, the head of any of the LEAs shall report to me cases of non-compliance with the requirements of the Ordinance handled by his own department, including non-compliance with any provisions of the ICSO and of the Code or with any prescribed authorization. The cases described in Chapter 7 include those reported to me by the heads of the LEAs under section 54 or alternatively as irregularities or incidents pursuant to the practice that has been established between them and me.

11.2 On the other hand, cases that involved LPP were referred to me by the heads of the LEAs either through incident reports or by reports pursuant to paragraph 120 of the Code, the relevant provisions of which have been adopted by me to oblige LEAs also to report to me cases involving JM. I also obtained knowledge of cases involving LPP and JM through the examination of the weekly reports submitted to me by the LEAs as part of the procedural arrangements established by me, with sanitized copies of the relevant REP-11 reports reporting on material change of circumstances after the issue of a prescribed authorization including changed LPP risks provided together with such weekly reports.

11.3 The requirement to report LPP cases to me apparently stems from the importance that is attached to the protection of the right to

confidential legal advice guaranteed by the Basic Law[Note 13]. Such cases are sensitive and delicate, need handling with particular care and are prone to errors being made by LEAs[Note 14] ; they ought therefore to be reported to me for my examination and review.

LEAs' compliance

11.4 Despite the non-compliance and 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. I have not made any finding that any non-compliance or irregularity was due to deliberate flouting or disregard of the statutory provisions or the law, nor could I find any of the officers committing the mistakes being actuated by ulterior motive. Indeed, from the analysis of the cases referred to in Chapter 7, it is obvious that apart from the defects caused by technical problems, the incidents, be they irregularities or more serious non-compliance, were consequences of inadvertent or careless mistakes or unfamiliarity with the rules and procedures of the ICSO scheme.

11.5 These included Report 1 where the non-compliance originated from the applicant's careless non-inclusion or omission in the draft executive authorization of a standard paragraph to authorize the LEA's officers (in addition to the participating agent) to use surveillance devices in the planned covert surveillance operation, coupled with the negligence on the part of the supervising officer and the authorizing officer in failing

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Note 13 Article 35 of the Basic Law.

Note 14 See for instance, HKSAR v WONG Hung Ki and Anr, CACC 424 of 2008 (11 May 2010).

to notice the mistake that resulted in the defective executive authorization as drafted being granted.

11.6 The irregularity in Report 2 in Chapter 7 was due to the difference in interpretation of a provision of the Ordinance, rather than a wilful flouting of the requirement under Part 1(b)(xi) of Schedule 3 to the Ordinance. Report 3 was spawned from a technical problem, not the fault of the LEA. Report 4 arose mainly because the officers concerned were not familiar with or did not fully understand the provisions and terms used in ICSO matters. The non-compliance in cases in Reports 5 and 6 was caused by the insufficiency of the Ordinance to cover the situation giving rise to the unavoidable unauthorized activity after the undeferred revocation of the prescribed authorization. Report 9 was due mainly to the carelessness of officers concerned and their not being familiar with the terms of the executive authorization under which they operated.

11.7 In the course of my examination and review of the cases, I continue to make recommendations and give advice to the LEAs so as to enhance the procedural rules, not only for strengthening my checking capability but also to draw the attention of the LEAs to ways and means of how better to comply with the ICSO requirements and further the object of the Ordinance. A great majority, if not all, of my advice and recommendations have been accepted and adopted for use by the LEAs, including the removal of the officers from ICSO-related work whom I considered to be unfit or unreliable, which demonstrates the wish of at least the higher echelon of the departments to comply with the statutory requirements.

Limitation in ensuring compliance

11.8 From what is stated in paragraphs 11.1 and 11.2 above, it is abundantly clear that the report or revelation of cases of non-compliance or irregularity was done by the LEAs on a voluntary basis, albeit for complying with the statutory provision or the Code or the established practice. Without such voluntary assistance from the LEAs, it would be difficult, if not impossible, for me and my staff to discover or unearth any contravention by the LEAs, although as in the case in Report 1 in Chapter 7, we were able to discover instances of non-compliance over and above those voluntarily reported in the course of my examination of the case and investigation into it.

11.9 It must therefore be recognized that my capability and that of my staff in my small Secretariat is very limited, which may not act as a sufficient deterrence to any possible contravention or its concealment if such were unfortunately committed by any of the LEAs or any of their officers. I must hasten to add, however, that there has been no evidence that such contravention or concealment has occurred. Nonetheless, prevention is better than cure.

11.10 The new initiative that I have proposed, as detailed under the second heading in Chapter 9 of my Annual Report 2008, to check the audio intercept products, may be a step in the right direction in providing the necessary deterrence against any contravention or abuse of the Ordinance or the statutory activities authorized by it or its concealment.

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 in the performance of my oversight and review functions under the Ordinance. 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 for their cooperation and assistance which should not merely be perceived as a bare submission to my statutory power to seek information under section 53 of the ICSO in fear of criminal sanction. Their provision of the requested information to me has undoubtedly cost them considerable expenditure on manpower and resources, but they have never raised any complaint for what they have so generously done nor attempted at procrastination. My task as the Commissioner would have been rendered impossible without the help and cooperation of all these persons. I am grateful to each and every one of them.

12.2 After the publication of my 2007 and 2008 Annual Reports, members of the public, the media and the Legislative Council have raised concerns and expressed views on a number of matters under the Ordinance. These concerns and views pose as a constant reminder to me of my hefty responsibility as the overseer of the LEAs' compliance with the requirements of the law and behove 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 In this year, with the experience gathered and new situations encountered, I have made suggestions so that any loopholes that might otherwise render non-compliance with the statutory requirements to be unnoticed are plugged and further and better control mechanisms for detecting or deterring non-compliance are introduced. All these improvement measures will 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 rights to privacy and communication of people in Hong Kong. As I said before, however, not all problems can be anticipated in human ingenuity, but whenever they surface, I assure you that further improvements will be made to tackle them.

12.4 In the year covered by this report, from what the LEAs under the Ordinance have done, whether for the purpose of preventing criticisms from me as the Commissioner which are almost unavoidable if the justifiable situation arises, as apparent from what was mentioned in my previous annual reports, or of improving performance of their officers in complying with the requirements of the Ordinance out of their own accord, I am sure that they have endeavoured to reduce non-compliance and irregularities, although some of these could not be avoided due to the insufficiencies of the provisions of the Ordinance. Moreover, my checking abilities to unearth improprieties, if any, are not as comprehensive and

effective as I would like, which is again resultant from the insufficiency of the Ordinance. I am therefore eagerly awaiting the amendments to the Ordinance as I have suggested in these past years to be effected, without which I cannot be sure that the defects I have alluded to in my annual reports will be cured.