Annual Report 2011 to the Chief Executive

by

The Commissioner on
Interception of Communications
and Surveillance

June 2012

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

本處檔號 Our ref.: ICS/12/1C Pt.2　　電話 Tel. No.:

來函檔號 Your. ref:　　傳真 Fax No.:

29 June 2012

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

CONFIDENTIAL

Dear Sir,

Annual Report for the Year 2011

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 2011. The Chinese translation will be provided to you as soon as possible.

Yours sincerely,

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

Encl: Annual Report for 2011

香港灣仔皇后大道東 248 號 15 樓 1501-1504 室
Units 1501-1504, 15/F, 248 Queen's Road East, Wanchai, Hong Kong

CONTENTS

Tables under Chapter 10 ***Page***

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 an executive authorization
ATR	audit trail report
Cap	chapter in the Laws of Hong Kong
capable device	device capable of being used for covert surveillance
Code, Code of Practice	the Code of Practice issued by the Secretary for Security under section 63 of the Ordinance
Commissioner	Commissioner on Interception of Communications and Surveillance
COP 120	paragraph 120 of the Code of Practice
COP 120 report	report submitted pursuant to paragraph 120 of the Code of Practice
CSP	communications services provider
discontinuance report	report on discontinuance of interception or covert surveillance submitted pursuant to section 57 of the Ordinance
DMS	device management system
fresh application	application for a prescribed authorization which is not a renewal

ICSO	Interception of Communications and Surveillance Ordinance
interception	interception of communications
JM	journalistic material
LEA	a law enforcement agency under the Ordinance, namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department or Independent Commission Against Corruption
LPP	legal professional privilege
LPP information	information protected by legal professional privilege
non-ICSO device register	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
non-ICSO purpose	purpose which is not related to ICSO
Ordinance	Interception of Communications and Surveillance Ordinance
PA	prescribed authorization
panel judge	the panel judge appointed under section 6 of the Ordinance
PJO	Panel Judges' Office
prohibited number	specified telephone number the calls through which are prohibited from being listened to

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 form REP-11
Reported LPP Call	a call which might involve LPP information or likely LPP information and is reported to the panel judge by way of an REP-11 report on such
Secretariat	Secretariat, Commissioner on Interception of Communications and Surveillance
section	section of the Ordinance
specified rank	a certain rank of an LEA officer specified in an additional condition of a prescribed authorization
statutory activity	interception of communications and/or covert surveillance activity described in the Ordinance
the report period	the period from 1 January to 31 December 2011
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

Requirements of the Ordinance

1.1 Over five years have elapsed since the coming into operation of the Interception of Communications and Surveillance Ordinance, Cap 589 ('Ordinance' or 'ICSO') and the establishment of my office as the Commissioner in August 2006, when the hitherto interception of communications and covert surveillance operations carried out by law enforcement agencies not pursuant to any statute have come under the tight control of a scheme under the Ordinance with me as the oversight authority.

1.2 The scheme is to envelop the activities of four law enforcement agencies ('LEAs'), namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption [Note 1] in the interception of communications, through the post or through the use of telecommunications facilities, and in covert surveillance by the use of surveillance devices (collectively called 'statutory activities') in a statutory framework, so as to ensure that these statutory activities cannot be lawfully and properly carried out unless the relevant requirements stipulated in the Ordinance are satisfied.

Note 1 See section 2(1) of the Ordinance for the definition of 'department' and Schedule 1 to the Ordinance.

1.3 The first and foremost of the relevant requirements is that any statutory activity can only be lawfully and properly conducted by an officer of an LEA pursuant to a prescribed authorization granted by a relevant authority. The relevant authority includes a panel judge who is empowered to issue a prescribed authorization for interception or for Type 1 surveillance and an authorizing officer of the LEA concerned who can issue a prescribed authorization for Type 2 surveillance [Note 2]. After obtaining a prescribed authorization, the LEA and its officers are required to comply with its terms in carrying out the statutory activity so authorized. They are also required to observe the provisions of the Code of Practice set by the Secretary for Security [Note 3].

1.4 Whether a prescribed authorization should be granted is expressly based on the necessity and proportionality principles [Note 4], and the well being of Hong Kong can be achieved by striking a fair and proper balance between the need for the prevention and detection of serious crimes and the protection of public security on the one hand and safeguarding the privacy and other rights of persons in Hong Kong on the other.

Work completed in the past years

1.5 My task as the Commissioner is to supervise and review the actions of the LEAs and their officers regarding their compliance with all such requirements as described above. These objects and spirit of the

---

Note 2 See sections 6 and 7 of the Ordinance. For the difference between Type 1 and Type 2 surveillance, see their statutory meaning under section 2 of the Ordinance and Chapter 3 below.

Note 3 Under section 63 of the Ordinance, the Secretary for Security shall issue a code of practice and may from time to time revise it.

Note 4 See section 3 of the Ordinance.

Ordinance have constantly been borne in my mind when I carry out my functions.

1.6 I have designed various ways and means to perform and facilitate my work. These have been either put forward to and implemented by the LEAs as my requirements or the procedures I adopted pursuant to section 53 of the Ordinance, or they have been presented to the LEAs and the Security Bureau as advice, suggestions or recommendations. Further, during my review of cases that have been reported to me by the LEAs on their own accord or in the course of my consideration of problems discovered by me when examining those and other cases and matters incidental thereto, I have also made various suggestions or recommendations to them and the Security Bureau wherever appropriate.

1.7 For instance, I exercise control regarding covert surveillance devices by keeping a watchful eye over the use of them that are made available by the LEAs to their officers. Pursuant to my suggestion, all surveillance devices kept by each LEA have to be recorded in inventory lists, and their movements have to be accounted for by way of registers showing details of their withdrawals and returns. This stringent recording system for the deployment of surveillance devices has undoubtedly ensured the proper use of such devices, although it is not and cannot be made absolutely foolproof. The computerised recording system, called the Device Management System ('DMS') that was introduced about three years ago, together with improvements suggested by me where necessary, has upon my advice been applied more extensively, so that this control system is better managed for assisting the performance of my review

function and at the same time reducing clerical and careless mistakes that would inevitably result from the keeping of records manually.

1.8 Regarding interception, I have requested accurate records to be kept as to the time of its commencement and discontinuance, the identity of the officer who performs the monitoring as well as the details of his access to the intercept product. This system of control has been done through computer programmes which have been improved and fine-tuned as appropriate upon my request. It is to keep track of the interception operations carried out by each of the LEAs so as to detect any irregularity or non-compliance with the relevant requirements of the Ordinance.

1.9 In addition, I have made requests for the preservation of various sorts of documents and records relating to interception and covert surveillance operations so as to enable me to check whether all the relevant requirements of the ICSO have been fully complied with.

Continuous improvements

1.10 Despite the work completed as described above, problems and difficulties have never ceased to surface from time to time. Most of the irregularities encountered and mistakes made by LEA officers were attributable to their inadvertence or negligence, which were uniquely related to the individuals concerned, rather than defects in any of the control systems. The experience gathering exercise is still progressing, resulting in my designing ways to resolve hitherto unexpected problems and taking the opportunity to anticipate more. This process will operate for certain in the best interest of all the LEAs and also for the benefit of the society in which we live because improvements can be continuously made

to tackle existing and anticipated situations with the aim to cause the least invasion to the privacy and other rights of individuals.

1.11 Most of my recommendations and suggestions on various procedural matters, save the most important of all referred to below, have been accepted by the Security Bureau and the LEAs, or they have made practical arrangements to remedy the adverse effect of the defects or deficiencies intended to be addressed by such recommendations and suggestions.

Hurdle to overcome

1.12 The single most important of my recommendations is to have the Ordinance amended to give me and my staff as designated by me the express power necessary for listening to, viewing and monitoring the products from interception and covert surveillance of our choice. I have explained in my past annual reports time and again that this power would become the strongest weapon to safeguard citizens' rights to privacy and to privileged confidential legal advice because it would be the key tool to expose malpractices of the LEAs and their officers and would pose as a forceful deterrent against such malpractices and their concealment. I have carefully examined the reasons expressed so far by a few for refusing to give me this power or to delay my suggested amendment to the Ordinance for this purpose, but only to find such reasons more specious than real and they are unsubstantiated or misconceived [Note 5]. However, this recommendation has, to my greatest disappointment, remained unadopted, far less implemented, by the Administration.

Note 5 Please see paragraphs 9.2 to 9.15 of Chapter 9 for a discussion on the various arguments.

Transparency

1.13 I continue my practice of providing the utmost transparency of my work in this annual report, save to take great care not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security, as expressly required by various provisions of the Ordinance [Note 6]. I hope I have not failed in my efforts to include as much information as possible insofar as its publication does not amount to contravention of this non-prejudice principle.

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

CHAPTER 2

INTERCEPTION

Prescribed authorizations for interception

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.

Written applications

2.2 Applications for the issue or renewal of a prescribed authorization should normally be made in writing to a panel judge unless it is not reasonably practicable to do so. During the report period, there were a total of 1,204 written applications for interception made by the LEAs, of which 1,196 were granted and eight were refused by the panel judges. Among the successful applications, 518 were for authorizations for the first time ('fresh applications') and 678 were for renewals of authorizations that had been granted earlier ('renewal applications').

Reasons for refusal

2.3 Of the eight refused applications, seven were fresh applications and the remaining one was a renewal application. The refusals were based on one or both of the following grounds:

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

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

Emergency authorizations

2.4 An officer of an LEA may apply to the head of his department for the issue of an emergency authorization for any interception if he considers that there is immediate need for the interception to be carried out due to an imminent risk of death or serious bodily harm, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances of the case that it is

not reasonably practicable to apply to a panel judge 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 [sections 22(1)(b) and (2)]. As soon as reasonably practicable and in any event within the period of 48 hours from the issue of the emergency authorization, the head of the department shall cause an officer of the department to apply to a panel judge for confirmation of the emergency authorization where any interception is carried out pursuant to the emergency authorization [section 23(1)].

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

Oral applications

2.6 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 in accordance with the relevant written application provisions under the Ordinance. The relevant authority (a panel judge for interception) may orally deliver his determination to issue the prescribed authorization or give the reasons for refusing the application. Paragraph 92 of the Code of Practice issued by the Secretary for Security provides that the 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 are regarded as having the same effect as a written application and authorization. Similar to emergency authorizations, the head of the department shall cause

an officer of the department to apply in writing to the relevant authority for confirmation of the orally-granted prescribed authorization as soon as reasonably practicable and in any event within 48 hours from the issue of the authorization, 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.

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

Duration of authorizations

2.8 For the majority (over 90%) 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, short of the maximum of three months allowed by the Ordinance [sections 10 and 13]. While the longest approved duration was 38 days, the shortest one was for several days only. Overall, the average duration of all the authorizations was about 30 days. This indicates that the panel judges handled the applications carefully and applied a rather stringent control over the duration of the authorizations.

Offences

2.9 Table 2(a) in Chapter 10 gives 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.

Revocation of authorizations

2.10 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 covert surveillance) to be discontinued if he is of the opinion that a 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 [sections 57(3) and (4)].

2.11 The number of authorizations for interception revoked 'fully' under section 57 during the report period was 453. In addition, another 54 cases involved the cessation of interception in respect of some, but not all, of the telecommunications facilities approved under a prescribed authorization, so that while the prescribed authorization is 'partially' revoked regarding those some facilities, interception of the remaining approved facilities continued to be in force.

2.12 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 or no longer productive, or the subject was arrested. This illustrates that the LEAs acted in a responsible manner and complied closely with the requirements and spirit of the Ordinance, in that whenever it was no longer necessary or proportional to continue with the prescribed authorization, or part of it, discontinuance would be undertaken as soon as possible.

2.13 Revocation of authorizations is also expressly provided for in section 58 of the Ordinance. Where the relevant authority (a panel judge) 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 under the Ordinance for the continuance of the prescribed authorization are not met. The arrest of the subject may or may not relate to the offence(s) for which the interception is authorized to investigate, but all the same the officer of the LEA in charge of the interception who has become aware of the arrest is obliged by section 58 to make the report with the assessment to the panel judge. If the conditions for the continuance of the prescribed authorization are still met, the panel judge may decide not to revoke it. During the report period, the LEAs were aware of a total of 76 arrests but only two section 58 reports were made to the panel judge. The panel judge allowed the LEA of both of these two reported section 58 cases to continue with the interception after imposing additional conditions in one of the prescribed authorizations concerned to safeguard LPP information, whereas no additional condition was imposed in the remaining prescribed authorization because its subject had been released unconditionally after his arrest. As regards the other arrest cases, decisions were made by an officer of the LEAs concerned to discontinue the interception operation pursuant to section 57 instead of resorting to the section 58 procedure. This reflects that the LEAs were appreciative of the risk of obtaining LPP information after an arrest when taking the initiative of their own accord to discontinue the interception operation as soon as reasonably practicable under section 57.

2.14 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 covert 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 covert surveillance) carried out during the interim period would in the circumstances become in theory an unauthorized activity.

2.15 To address the issue, the LEAs have put in place arrangements for handling these cases so that the operations concerned could be discontinued within a short period of time after the revocation of prescribed authorizations by the relevant authority, thus reducing the length of the unauthorized activities 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 sometime that is justified as the relevant authority will state in the revocation. The issue is covered in the comprehensive review of the Ordinance being conducted by the Security Bureau.

Authorizations with five or more previous renewals

2.16 There were 44 authorizations for interception with five or more previous renewals within the report period. As these 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 interception operations. All

the cases with six renewals and some of their further renewals were checked and found in order during my inspection visits to the LEAs.

Legal professional privilege

2.17 During the report period, there were three cases in which information subject to LPP had been obtained in consequence of interception carried out pursuant to a prescribed authorization. Details of these three cases can be found in Chapter 5 under LPP Case 1, LPP Case 2 and LPP Case 3.

2.18 Besides, a number of applications for interception were assessed to have the likelihood of LPP information being obtained. My staff and I examined the relevant files of these cases during our inspection visits at the LEAs' offices. It was found that the panel judges had considered the applications carefully and had fairly assessed the likelihood of LPP information being obtained, amongst other factors concerned, in reaching the decision that the authorization applied for should or should not be granted. If an authorization which was assessed to have the likelihood of LPP information being obtained was issued or renewed, additional conditions would be imposed by the panel judges to restrict the powers of the LEA and to protect the LPP right of the subject.

Journalistic material

2.19 As a matter of practice, for an authorization which was assessed by the panel judge to have journalistic material ('JM') implications, additional conditions would be imposed to better protect the freedom of the media.

2.20 During the report period, there were two cases in which JM had been obtained in consequence of interception carried out pursuant to a prescribed authorization. Details of the cases can be found in Chapter 5 under JM Case 1 and JM Case 2.

Effectiveness of interception

2.21 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 the report period, a total of 64 persons, who were subjects of the prescribed authorizations, were arrested as a result of or further to interception operations. In addition, 67 non-subjects were also arrested consequent upon the interception operations. The relevant arrest figures are shown in Table 3(a) in Chapter 10.

Cases of irregularities

2.22 During this report period, there were four reports of non-compliance with the requirements of the Ordinance submitted under section 54 in respect of interception operations. In addition, three reports of incident were made to me not under section 54 because they were not treated by the LEAs concerned as non-compliance with the requirements of the Ordinance. Details of these cases can be found in Chapter 7, namely,

The four reports submitted under section 54:

(a) Report 2 in Chapter 7, 'four cases of listening to intercept products by officers below the rank specified in the LPP additional conditions of the prescribed authorizations after such conditions were lifted', discussed in paragraphs 7.93 to 7.114 thereof.

(b) Report 3 in Chapter 7, 'listening to calls made to or from prohibited numbers on five occasions', mentioned in paragraphs 7.115 to 7.123 thereof.

(c) Report 7 in Chapter 7, 'unauthorized interception of a wrong facility', referred to in paragraphs 7.159 to 7.188 thereof.

(d) Report 8 in Chapter 7, '893 instances of non-compliance with the Revised Additional Conditions imposed by panel judges in prescribed authorizations for interception', referred to in paragraphs 7.189 to 7.237 thereof.

The three reports not submitted under section 54:

(e) Report 1 in Chapter 7, 'unauthorized access to a call when monitoring was supposed to be put on hold', discussed in paragraphs 7.50 to 7.92 thereof.

(f) Report 4 in Chapter 7, 'unauthorized interception of 10 minutes after revocation of the prescribed authorization by the panel judge upon receipt of REP-11 report on obtaining of journalistic material', mentioned in paragraph 7.124 thereof.

(g) Report 9 in Chapter 7, 'retention by an LEA officer of documents suspected to be related to interception operations', referred to in paragraphs 7.238 to 7.244 thereof.

A categorization of these cases into non-compliance cases or irregularities can be found in the table of Chapter 7 cases under paragraph 11.8 of Chapter 11.

Procedure of oversight for interception

2.23 There were three different ways by 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') and through other means.

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

Checking of weekly reports

2.24 The LEAs were required to submit weekly reports to me on their respective 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 made to the panel judges by all the LEAs, 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 before the week of its submission to my Secretariat.

2.25 The weekly report forms only contain general information relating to cases of the related week such as whether the application was successful or rejected, the duration of the authorization, the offences involved, the assessment on the likelihood of obtaining LPP information and JM from the proposed operation, etc. Sensitive information such as the case details, 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.

2.26 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 offices of the LEAs. The case file and all related documents and records, with all information, secret or

otherwise, would be made available for my inspection upon request. 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' offices to avoid any possible leakage.

Checking of cases during inspection visits

2.27 As explained in the 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, in my periodical inspection visits to the LEA's premises, I would request 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, case files and internal review documents, etc. In these inspection visits, I would also select, on a random basis, some other cases for examination apart from those requiring clarification.

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

2.29 During an inspection visit to an LEA, I examined the related documents of an LPP case where the LEA did not know the name of the subject at the time of the application for the fresh authorization. I found that the full name of the subject surfaced soon after commencement of the

interception operation concerned. However, no REP-11 report was submitted to the panel judge to report the full name of the subject and the full name was also not mentioned in the affirmation in support of the application for the subsequent renewal of the prescribed authorization. I felt that the non-disclosure of the full name of the subject was highly suspicious and therefore requested the LEA to conduct an investigation into the matter and submit a report to me. Details of the case can be found in paragraphs 7.31 to 7.49 of Chapter 7.

2.30 The case of 'accidental access' to intercept product for 15 seconds that was mentioned in paragraphs 5.74 and 5.75 of my Annual Report 2010 was also discovered during one of my inspection visits. Follow-up of the case can be found in paragraphs 7.50 to 7.92 of Chapter 7.

2.31 In addition to matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 549 applications for interception, including granted authorizations and refused applications, and 324 related documents/matters had been checked during my periodical inspection visits to the LEAs in the report period.

Counter-checking with non-LEA parties and through other means

2.32 Apart from examining the weekly returns from the LEAs against those from the PJO, and conducting periodical checks of the relevant files and documents at the LEAs' offices, other measures have also been made available to and adopted by my Secretariat for further checking the interceptions conducted by the LEAs.

2.33 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. While the CSPs are required 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, the Team at my request has archived in a confidential electronic record the status of all interceptions whenever they are effected, cancelled or discontinued. Arrangements have also been made for the archiving of the status of all interceptions being conducted at particular moments as designated by me from time to time. All these records are available to my Secretariat but only the designated staff of my office and myself can access the confidentially archived information for the purpose of checking the intercepted facilities for their status of interception at various points of time and as at any reference point of time so designated by me, ensuring that no unauthorized interception has taken place.

Results of the various forms of checking

2.34 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.

2.35 The checking of the archived material referred to in paragraph 2.33 above was useful, as not only the numbers of the facilities subject to duly authorized interception but also the number of the facility that remained intercepted after the related authorization had been revoked as described in paragraphs 5.94 to 5.98 of Chapter 5 and the number of the

wrongly intercepted facility mentioned in paragraphs 7.159 to 7.188 of Chapter 7 were found to have been recorded.

CHAPTER 3

COVERT SURVEILLANCE

Covert surveillance

3.1 According to section 2 of the Ordinance, covert surveillance means any surveillance carried out with the use of any surveillance device if the surveillance is carried out in circumstances where the subject of the surveillance is entitled to a reasonable expectation of privacy, that it is carried out in a manner calculated to ensure that the subject is unaware that the surveillance is or may be taking place, and that it is likely to result in the obtaining of any private information about the subject. Surveillance device means a data surveillance device, a listening device, an optical surveillance device or a tracking device or a device that is a combination of any two or more of such devices. Any surveillance which does not satisfy the above criteria is not covert surveillance under the Ordinance.

Two types of covert surveillance

3.2 There are two types of covert surveillance under the ICSO: Type 1 surveillance and Type 2 surveillance. Their respective scopes and common and distinguishing features can be found dealt with in my previous annual reports. Since Type 1 surveillance has a higher degree of intrusiveness into the privacy of the subject, it requires a panel judge's authorization whereas an authorization for Type 2 surveillance, termed an executive authorization [sections 2 and 14], can be issued by an authorizing officer of the department to which the applicant belongs, instead of the normal relevant authority of a panel judge. An 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].

Written applications

3.3 During this report period, there were a total of

(a) 20 written applications for Type 1 surveillance made by the LEAs, all of which were granted, including 19 fresh applications and one renewal application; and

(b) five written applications for Type 2 surveillance made by the LEAs, all of which were granted, including four fresh applications and one renewal application.

No application for Type 1 or Type 2 surveillance was refused.

Emergency authorizations

3.4 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 the 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)]. Where any Type 1 surveillance is carried out pursuant to an emergency authorization, the head of the department shall cause an officer of the department to apply to a panel judge for confirmation of the emergency authorization as soon as

reasonably practicable after, and in any event within the period of 48 hours beginning with, the time when the emergency authorization is issued [section 23(1)]. During the report period, no application for emergency authorization for Type 1 surveillance was ever made by the LEAs.

3.5 On the other hand, there is no provision in the Ordinance for application for emergency authorization for Type 2 surveillance.

Oral applications

3.6 All applications for Type 1 and Type 2 surveillance, including applications for emergency authorization, should basically 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 and an authorizing officer for Type 2 surveillance) may orally deliver his determination to issue the prescribed authorization or to refuse the application.

3.7 The Code of Practice issued by the Secretary for Security stipulates 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. For a prescribed authorization orally granted for Type 1 surveillance, the head of the department shall cause an officer of the department to apply in writing to the panel judge, and for such an authorization for Type 2 surveillance, the applicant shall apply in writing to the authorizing officer, for confirmation of the orally granted prescribed authorization as soon as reasonably practicable and in any event within 48 hours from the issue of the

authorization [section 26]. Failing to do so will cause that orally granted prescribed authorization to be regarded as revoked upon the expiration of the 48 hours.

3.8 No oral application for Type 1 or Type 2 surveillance was ever made by any of the LEAs during the report period.

Duration of authorizations

3.9 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 eight days whereas the shortest one was less than a day. Overall, the average duration for such authorizations was about three days. On the other hand, 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 seven days while the shortest one was about a day. The overall average duration of all Type 2 surveillance executive authorizations was about four days.

Authorizations with five or more previous renewals

3.10 During the report period, no authorization for Type 1 or Type 2 surveillance had been renewed for more than five times.

Offences

3.11 Table 2(b) in Chapter 10 sets out the major categories of offences for the investigation of which prescribed authorizations were

issued or renewed for surveillance (both Type 1 and Type 2) during the report period.

Revocation of authorizations

3.12 During the report period, a total of 19 Type 1 surveillance operations were discontinued under section 57 before the natural expiration of the prescribed authorizations for them. The grounds for discontinuance were mainly that the surveillance had been carried out, the anticipated meeting to be monitored did not materialize or the subject was arrested. Section 57(3) requires the LEA, as soon as reasonably practicable after the discontinuance, to report the discontinuance and the ground for discontinuance to the relevant authority who shall pursuant to section 57(4) revoke the prescribed authorization concerned upon receipt of the report on discontinuance. Of the 19 discontinuance cases reported in relation to Type 1 surveillance, eight prescribed authorizations concerned were subsequently revoked by the panel judge, being the relevant authority. For the remaining 11 discontinuance cases, the prescribed authorizations concerned had already expired by the time the panel judge received the discontinuance reports submitted by the LEAs. Thus, the panel judge could only note the discontinuance reported by the LEAs instead of revoking the prescribed authorization.

3.13 As described in paragraph 2.13 of Chapter 2 for interception, revocation of authorizations is also expressly provided for in section 58 of the Ordinance for covert surveillance. During the report period, the LEAs were aware of the arrest of a total of six subjects under Type 1 surveillance but only one report was made to the panel judge pursuant to section 58. For the reported section 58 case, which involved the arrest of one out of a

number of subjects, the panel judge allowed the prescribed authorization to continue against the remaining subjects. As regards the other arrest cases, instead of resorting to the section 58 procedure, decisions were made to discontinue the covert surveillance operation and reports were submitted under section 57 whereby the prescribed authorizations were, as being mandatory, revoked by the panel judge.

3.14 Sections 57 and 58 apply equally to Type 2 surveillance cases. During this report period, a total of four Type 2 surveillance operations were discontinued under section 57 before their natural expiration. The grounds for discontinuance were mainly that the surveillance had been carried out, useful intelligence had been obtained, or the subject had been arrested. All the prescribed authorizations concerned were subsequently revoked by the authorizing officer under section 57(4).

3.15 There was no report made to the authorizing officer under section 58 in respect of Type 2 surveillance during this report period for seeking the continuation of the two prescribed authorizations in spite of the arrest of their respective subject. Instead, those prescribed authorizations were discontinued pursuant to section 57.

3.16 The LEAs' voluntary selection of the section 57 procedure to discontinue the covert surveillance operation as soon as reasonably practicable instead of resorting to the section 58 process of reporting an arrest with a wish to continue with the operation, similar to the situation for interception, reflects that they were appreciative of the risk of obtaining LPP information after an arrest. As I said in paragraph 2.13 of Chapter 2, this is a correct attitude taken by the LEAs.

Legal professional privilege and journalistic material

3.17 There was no report from the LEAs of any case where LPP information or JM was obtained in consequence of Type 1 or Type 2 surveillance carried out pursuant to a prescribed authorization during the report period.

Application for device retrieval warrant

3.18 During the report period, there was no application for any device retrieval warrant for retrieving the devices used for Type 1 or Type 2 surveillance, the reported reason being that the devices were removed upon the completion of the surveillance operation, successful or otherwise.

Effectiveness of covert surveillance

3.19 As a result of or further to surveillance operations, be it Type 1 or Type 2, a total of 19 persons who were subjects of the prescribed authorizations were arrested. In addition, one non-subject was also arrested in consequence of such operations. The relevant arrest figures can be found in Table 3(b) in Chapter 10.

Procedure of oversight

3.20 The compliance with the requirements of the Ordinance in respect of covert 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.

Details on how the above reviews were conducted are set out in the ensuing paragraphs.

Checking of weekly reports

3.21 Weekly reports submitted to me by the LEAs and PJO cover all statutory activities, including both types of covert surveillance. This way of checking that has been described in paragraphs 2.24 to 2.26 of Chapter 2 for interception equally applies to surveillance and is not repeated here.

Checking of cases during inspection visits

3.22 The mechanism of checking cases during inspection visits to the LEAs is described in paragraphs 2.27 and 2.28 of Chapter 2.

3.23 Pursuant to the Ordinance, an application for Type 2 surveillance is submitted to and determined by a designated authorizing officer of the department concerned. As 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 all along been paying special 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. During my periodical inspection visits to the LEAs in this report period, apart from the clarification of matters relating to minor

discrepancies in the weekly reports, a total of eight applications [Note 7] for Type 2 surveillance, all resulting in granted authorizations, and five related documents/matters had been checked. Generally speaking, although there were some areas for improvement, most of the cases that I had checked were found to be in order.

3.24 On Type 1 surveillance, apart from the clarification of matters relating to minor discrepancies in the weekly reports, a total of 25 applications [Note 8] for Type 1 surveillance, all resulting in granted authorizations, and 22 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 carried out.

3.25 In the course of examination of the weekly reports, it was noted that there were some cases where 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;

Note 7 Some of the cases occurring in 2010 were checked in early 2011. Of the eight written applications for Type 2 surveillance checked, three occurred in 2010 and five occurred in 2011. Only five cases occurred in 2011 (see paragraph 3.3 above) and their checking was completed in 2011.

Note 8 Some of the cases occurring in 2010 were checked in early 2011 and similarly some of the cases occurring in 2011 were only checked in early 2012. Of the 25 applications for Type 1 surveillance checked, seven cases occurred in 2010 and 18 cases occurred in 2011. The remaining two cases that occurred in 2011 (see paragraph 3.3 above) were checked in 2012 up to the writing of this report.

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

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

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

Observations

3.26 My major observations arising from the inspection visits are set out in the ensuing paragraphs.

Risk with surveillance over some but not all of multiple subjects

3.27 When I examined the documents in the file of the section 58 report case referred to in paragraph 3.13 above, the arrest of one out of a number of subjects was also reported to the panel judge by way of REP-11 reports on material change of circumstances. The panel judge allowed covert surveillance to continue after revising the terms of the prescribed authorization to exclude the arrested subject. I raised concerns about how the covert surveillance could be carried out in compliance with the revised terms of the prescribed authorization, because the exclusion of the arrested subject from the Type 1 surveillance authorization would make any such surveillance carried out on the other subjects while the arrested subject was

present in breach of the revised terms. In this connection, I suggested to the LEA concerned that in future cases, consideration should be given either to (i) applying for separate prescribed authorizations to cater for different operational objectives; or (ii) stating clearly the operational plan or objectives in the affidavit in support of the application or REP-11 report so that the panel judge could make an informed determination.

Incomplete information provided to authorizing officer

3.28 At an inspection visit to an LEA, I noted that it was mentioned in the statement in writing in support of an application for a Type 2 executive authorization that the authorization was sought for reducing the risk of personal injuries to the LEA officers, given the dangerous behaviour of the subject of the investigation. In response to my enquiry on how it came to know the subject's dangerous behaviour, the LEA explained that before making the application, its officers had conducted overt surveillance on the subject's activities and found that he had behaved dangerously on occasions. In this regard, I advised the LEA that such background information should be included in the statement in writing as this was significant in showing why it would be difficult or dangerous to investigate the case if other less intrusive means of investigation were employed so that the authorizing officer could make a well-informed and well-considered decision as to whether the application should be granted or refused.

Mistake in the review of surveillance operations

3.29 Pursuant to section 56, the head of an LEA is required to make arrangements to keep under regular review the compliance by officers of

the LEA with the relevant requirements under the Ordinance. In this connection, the LEAs were required to adopt certain review forms to enable the departmental Reviewing Officer to review whether there has been non-compliance in the conduct of the covert surveillance operations under a prescribed authorization and whether there has been irregularity in the issue and use of surveillance devices.

3.30 In the course of examination of a review form used by an LEA for reviewing two surveillance operations conducted to monitor telephone conversations and any meetings between the participating agent and the subject of the investigation pursuant to an executive authorization, I found that according to the device register concerned, two listening devices, one for recording telephone calls ('Device A') and the other for use in a meeting ('Device B'), were issued on both occasions. However, it was stated in the review form that Device A was not used and only Device B was used on both occasions because no meeting took place after the monitored telephone conversations. In response to my query, the LEA stated that the devices used and not used were mistakenly transposed in the review form by the officer responsible for the surveillance. The LEA was then requested to explain in writing why the mistake had gone unnoticed during the departmental review process. In its reply, the LEA stated that the mistake made by the officer responsible for the surveillance and the failure on the part of his supervisor and the Reviewing Officer to detect it during the departmental review process were due to oversight of the three officers concerned. They should have been more vigilant when conducting the review, in particular on the checking of the review form for accuracy. In the circumstances, the LEA suggested and I agreed that the

three officers concerned should each be given an advice (non-disciplinary) for their respective oversight in the review process.

Checking of surveillance devices

3.31 Having regard to 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, so as to keep a close watch and control over the devices with a view to restricting their use only for authorized and lawful purposes. Not only is it necessary to keep track of surveillance devices used for ICSO purposes, but it is also necessary to keep track of devices capable of being used for covert surveillance ('capable devices') albeit they may allegedly only be used for non-ICSO purposes. Capable devices should be kept under close scrutiny and control because of the possibility that they might be used without authorization or unlawfully. The LEAs have to maintain 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.

3.32 Pursuant to my request, the LEAs have established 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, are submitted to me on a regular periodical basis for my checking. Where necessary, the LEAs are also required to provide me with copies of the device request forms 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 will be asked to provide clarification and explanation.

3.33 The following are some of my major observations after checking the inventory lists, device registers and device request forms:

(a) As mentioned in paragraph 3.28(a) of my Annual Report 2010, I had previously recommended to the Secretary for Security and the LEAs that the inventory lists provided to me by the LEAs should include all devices (excluding fixtures) capable of performing covert surveillance (ie capable devices) even though they might not be used for covert surveillance. To keep track of the movement of these capable devices and reduce the chance of wrong data entry, I suggested to an LEA that all such devices should similarly be controlled by the computerised device management system for handling devices for ICSO and non-ICSO purposes. The LEA had subsequently developed such a computerised system for a pilot scheme in a unit, which was formally launched in late December 2011. I also noted that another LEA was also in the course of developing a similar computerised system for the control of capable devices.

(b) An LEA proposed changes to the description of some of the devices in the inventory lists for ICSO and non-ICSO devices. However, I expressed disagreement to certain proposed revised descriptions and emphasised that the special feature of the devices including adaptation for concealment of the devices for covert operations had to be appropriately reflected in their descriptions. The LEA undertook to draw up revised lists of devices with appropriate descriptions according to my requirement.

(c) It was noticed that for the issue of devices for non-ICSO purpose in a device store of an LEA, the reference number of device request memo was entered as 'File No.' while the reference number of the file used in the device store to keep device request memos was input under 'Ref. of Request Memo' in the device register. In view of my doubt on whether this arrangement was appropriate, the LEA had clarified the matter with the device store concerned and reminded officers to follow the proper procedures and input the correct reference number.

(d) Regarding the device request forms for the LEAs, I proposed various amendments, in particular, the addition of the time of signature by the officers concerned since this could serve as a piece of useful information to detect any mistake or abuse. The LEAs concerned undertook to examine and revise their respective request forms accordingly.

(e) I observed that for the return of devices, there were two

occasions on which the name of an officer (with the same identity and staff card number) shown in relevant entries of the printout of non-ICSO device registers generated from the computerised device management system (referred to below) of an LEA was slightly different. This called into question the reliability of the records. Upon my query, the LEA confirmed that the returning officers concerned referred to the same person. The printing error was caused by a computer bug in the system which led to the missing of one character of the name of the returning officers concerned. The problem was being studied by the LEA.

3.34 To better control the issue and return of surveillance devices, the majority of the LEAs have adopted a computerised device management system ('DMS') in their device stores. I found the DMS very useful in reducing human errors and keeping track of movement of the devices and suggested an LEA consider implementing the DMS in the department. I also noted that during the report period, an LEA had enhanced its DMS to automatically capture the date and time of making a post-entry record in the remarks column and the identity of the officer who made the post-entry record. However, I found that only the date and time of making the latest post-entry record were shown while the date and time of making all previous post-entry records were overwritten. As such, I recommended the LEA concerned to further upgrade the DMS to keep the history of all the post-entry records made. I also recommended the other LEAs using the DMS to make similar enhancement regarding the automatic capturing and the keeping of all the post-entry records in their respective systems.

3.35 Apart from the 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 their contents are identical;

(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 are 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 or the knowledge of my staff and seek explanation as to how they might be used for conducting covert surveillance operations.

3.36 During the report period, a total of four such visits were made to the LEAs.

Issue of devices pretending to be for ICSO purpose

3.37 An LEA reported to me in June 2011 that an officer was tasked to withdraw two surveillance devices from a device store for training purpose in late May 2011. The device store keeper, instead of making records of issue in the non-ICSO device register in the DMS, made entries in the ICSO device register and made up false ICSO information for withdrawal and return of the devices. The false entries in the ICSO device register were discovered by a senior officer during the weekly inspection in early June 2011. A full investigation report was received in October 2011. Details of the case can be found in Report 6, paragraphs 7.139 to 7.158 of Chapter 7.

Non-ICSO cases

3.38 Most of the cases where mistakes were made by officers of the LEAs concerned the movements of devices capable of performing covert surveillance operations and the procedures of keeping record of their movements, albeit they involved or allegedly involved non-ICSO operations. The details of these cases can be found in Chapter 4.

CHAPTER 4

DEVICES FOR NON-ICSO PURPOSES

Devices used for non-ICSO purposes

4.1 Owing to the definition of 'covert surveillance' under the Ordinance (see paragraph 3.1 of Chapter 3) that excludes surveillance carried out without using the devices mentioned in the Ordinance from being covert surveillance, my view has been that tight control and close scrutiny have to be exercised over all surveillance devices capable of being used for covert surveillance under the Ordinance (ie capable devices) although they may be used by the LEAs for purposes which are not related to ICSO ('non-ICSO purposes'). The tight control and scrutiny are to obviate the possibility and allay the fear that capable devices might be used for covert surveillance without authorization or even unlawfully. Therefore, apart from keeping track of surveillance devices used for ICSO purposes, it is also necessary to heed the movement and use of capable devices, albeit they may or may allegedly be used only for non-ICSO purposes. As a matter of practice, an authorized covert surveillance is always supported by a prescribed authorization issued by a relevant authority which makes checking simpler, but a surveillance claimed to be for non-ICSO purposes will not have that support. This necessitates my making enhanced requirements when devices are drawn out for non-ICSO purposes than for ICSO purposes.

4.2 My requirements that have been accepted by the LEAs are that for the issue of surveillance devices without the support of a prescribed

authorization, which cannot be for the purpose of carrying out covert surveillance under the ICSO, for example, overt surveillance at a public place, a two-level approval by way of an endorsement of an officer ('the endorsing officer') and an approval of a senior officer ('the approving officer') is required. Both officers will sign with date on a device request memo to signify their endorsement and approval respectively. Each device request memo should have a unique memo reference. The withdrawing officer will bring along the device request memo to the device registry where the storekeeper on duty ('the device issuing officer') will issue the surveillance devices requested.

4.3 During the report period, my staff and I devoted not an inconsiderable amount of time in checking device registers and documentation regarding the use of devices for non-ICSO purposes in the LEAs. Unfortunately, we discovered various mistakes and errors relating thereto, which are set out in the ensuing paragraphs.

A. Duplicate use of request memo reference

4.4 In paragraph 3.28(e) of the Annual Report 2010, I mentioned an irregularity in an LEA where different device request memos for different operations bore the same memo reference. We discovered the duplication when we examined the 'device registers for the month of January 2010' submitted by the LEA in mid February 2010. We wrote to the LEA in April 2010 requesting an explanation and copies of the relevant device request memos for our examination. In June 2010, the LEA furnished the copies to us and explained that it was the fault of the endorsing officers who overlooked the duplication in the memo reference. At an inspection visit to the LEA in late 2010, I expressed concern over the

duplication in the reference of the device request memos. Such duplication, which happened for four times within a month within the same device registry and involved several officers, smacked of widespread malpractice in that registry. For example, one might suspect that the device request memo was non-existent at the time of withdrawal of devices but was created at a later date and backdated to the date of withdrawal. I stressed the importance of good record keeping otherwise it would be difficult to check whether there had been abuse in the use of surveillance devices. I requested the LEA to conduct an investigation into the matter and advised me the detailed procedures for the issuance and documentation of the request memos.

4.5 After more than three months, I still had not received the investigation report from the LEA. In April 2011, my Secretariat wrote to the LEA putting forth our observations and queries on the four duplication cases. As no reply was forthcoming after repeated reminders, in late October 2011, I personally wrote to the head of the LEA drawing his attention to the matter and requested an investigation report from him within a month. In late November 2011, the head of the LEA provided an investigation report to me. Since then there was further exchange of correspondence between the head of the LEA and me on the review of this duplication issue.

Facts of the case

4.6 There were four duplication cases. In each of these cases, there was a pair of device request memos with duplicated memo reference and the endorsing officer was the same, as follows:

Duplication Case	Date of request memo	Date of endorsement	Date of approval	Issue of devices
1	6.1.2010	6.1.2010 Officer D	6.1.2010 Officer H	6.1.2010 at 1130 hours
	8.1.2010	8.1.2010 Officer D	8.1.2010 Officer I	8.1.2010 at 1030 hours
2	8.1.2010	**8.1.2010** Officer E	**8.1.2010** Officer J	8.1.2010 at **0700 hours**
	9.1.2010	9.1.2010 Officer E	9.1.2010 Officer J	9.1.2010 at 0930 hours
3	15.1.2010	**14.1.2010** Officer F	**14.1.2010** Officer J	15.1.2010 at 1015 hours
	16.1.2010	13.1.2010 Officer F	15.1.2010 Officer J	16.1.2010 at 0815 hours
4	24.1.2010	24.1.2010 Officer G	24.1.2010 Officer F	24.1.2010 at **0655 hours**
	25.1.2010	23.1.2010 Officer G	23.1.2010 Officer F	25.1.2010 at 0810 hours

4.7 According to the procedures prevailing at the time, a team supervisor would assign a junior officer as the withdrawing officer for withdrawal of surveillance devices for an operation. The withdrawing officer would then prepare a device request memo and obtain a memo reference by referring to the latest enclosure in the master file which contained copies of the request memos after execution. The device request memo would be signed with date by the endorsing officer and the approving officer respectively. As advised by the LEA, the duplicate use

of request memo reference was caused by the respective withdrawing officers, who either forgot to file a copy of the request memo back into the master file after execution or did not make a note on the master file on the use of the reference number; hence the other withdrawing officers unknowingly used the same reference in preparing the subsequent request memos.

4.8 Upon our enquiry, the LEA stated that the endorsing officer had the responsibility to check the master file of his division before he signed the request memo. In all these four duplication cases, the endorsing officers had not requested the master file for checking as they trusted the officers who prepared the request memo. Besides, the endorsing officers had focused more on the details about the use of the devices on the request memos, and hence they did not pay attention to the reference numbers of the request memos. The LEA had reminded officers concerned to be more careful.

Duplication Case 1

4.9 In this duplication case, the two request memos bearing the same memo reference were signed by the same endorsing officer but approved by different approving officers. The LEA considered that the mistake was caused by the endorsing officer who overlooked the duplication of the reference number on the two request memos. The approving officer of the later memo could not be held responsible because he would not have known that a previous memo with identical memo reference had been issued.

Duplication Case 2

4.10 In this duplication case, the two request memos, one dated 8 January 2010 and the other dated 9 January 2010, bearing the same memo reference were signed by the same endorsing officer (Officer E) and the same approving officer (Officer J). The LEA attributed the mistake to the carelessness of the endorsing officer who overlooked the duplication of the reference number on the two request memos.

4.11 According to the LEA, the mistake was later discovered by the officer-in-charge ('OC') of the device registry during a routine counter-checking exercise in early February 2010. With the consent of the endorsing officer and the approving officer, a junior officer was then directed to amend the reference number in the later request memo of 9 January 2010 and the relevant entries in the device register, who however did not indicate on which date and at what time he made the amendments. Moreover, the amended copies of the device register were not sent to my office immediately after the amendments were made or in the next regular monthly return of device register. I considered this undesirable and **advised** the LEA that in future, whenever amendments were made, they should be signed with date and time by the officer making the amendments. The amended pages of the device register should also be promptly sent to my office under cover of a memo providing the reason for the amendments.

4.12 In addition to the duplication in the memo reference, I also found two mistakes in this duplication case as stated in the paragraphs below.

Date of endorsement and date of approval were wrong

4.13 Regarding the request memo dated 8 January 2010, it was signed by the endorsing officer and the (woman) approving officer both on 8 January 2010. As the surveillance devices were issued at 0700 hours on 8 January 2010, we enquired at what time on 8 January 2010 that the endorsing officer and the approving officer signed the request memo.

4.14 In reply, the LEA stated that the device request memo was prepared by the withdrawing officer on 7 January 2010 for withdrawal of devices for an operation which would take place on the early morning of 8 January 2010. The withdrawing officer had in mind the thinking that the request memo would be executed on 8 January 2010, he therefore mistakenly put down 8 January 2010 as the memo date, the endorsement date and the approval date. The endorsing officer and the approving officer signed the request memo on 7 January 2010 and they overlooked the mistake in the date of endorsement and date of approval, which should be 7th January instead of 8th January.

The signature of the device issuing officer was missing

4.15 A device request memo contained a Part IV which should be signed by both the device issuing officer and the withdrawing officer to signify what devices had actually been issued and the date and time of issue. This Part IV would then be sent by the device issuing officer to the approving officer to notify the latter of what devices had actually been issued pursuant to the approval given in the request memo. The approving officer would then sign on the same part to acknowledge the notification by the device issuing officer.

4.16 For the request memo dated 9 January 2010, we found that Part IV of the request memo was signed by the withdrawing officer only without any signature of the device issuing officer. Upon our enquiry, the LEA replied that it was the fault of the device issuing officer as he had forgotten to sign Part IV. The approving officer also overlooked the absence of the device issuing officer's signature when she signed on the same part to acknowledge the notification from the device issuing officer.

4.17 I wondered whether the approving officer had checked the information in the request memo before signing to acknowledge the notification and why the withdrawing officer who was required to sign on the same part of the request memo after the handover of devices from the device issuing officer also failed to notice the omission. The LEA explained that it was a mistake that the approving officer did not check the request memo carefully before signing to acknowledge it while the withdrawing officer had done his part by signing the request memo but he did not notice the omission as he was required to join an operation which was due to start.

Duplication Case 3

4.18 In this duplication case, the first request memo dated 15 January 2010 and the later memo dated 16 January 2010 with the same memo reference were signed by the same endorsing officer (Officer F) and the same approving officer (Officer J). The LEA attributed the mistake in the duplicate use of the same memo reference to the carelessness of the endorsing officer.

Request memo dated 15 January 2010

4.19 With regard to the request memo dated 15 January 2010, I observed two anomalies:

(a) The date of the request memo was 15 January 2010 but the date of signing the memo by the endorsing officer and the approving officer was 14 January 2010. It seemed unreasonable that the endorsing officer and the approving officer could have signed the memo earlier than its creation.

(b) The surveillance devices were issued on 15 January 2010 and the device issuing officer notified the approving officer on the same day (15 January 2010) of what devices had been issued by completing Part IV of the request memo with an 'Attached Sheet for Devices Issued'. However, the approving officer signed with a date of 14 January 2010 to acknowledge the notification. This was illogical.

4.20 Regarding (a), the LEA replied that the memo was prepared by the withdrawing officer on 13 January 2010. As he thought that the request memo would be executed on 15 January 2010, he put down 15 January 2010 as the date of the memo. The endorsing officer signed the memo on 13 January 2010 (as he would be on training on 14 and 15 January 2010) but he wrongly took the date as 14 January 2010 and thus made the wrong entry of date.

4.21 Regarding (b), the LEA replied that the approving officer signed the request memo on 14 January 2010. After signing the request memo, she intended to sign under 'Part II: Attached Sheet for Devices

Requested' to confirm the details of the devices requested but instead she signed under 'Part IV' on the bottom portion of the attached sheet. The LEA considered that it was wrong for the approving officer to sign under Part IV of the attached sheet to confirm the details of the devices requested. This was because the design of the attached sheet covered the devices *requested* under Part II (the upper part) and devices *issued* under Part IV (the lower part) on the same page. The approving officer should sign separately in the upper part for the devices requested and in the lower part for the devices issued respectively at the time of approving the request memo and later at the time of acknowledging the notification after the devices were issued. The LEA stated that officers had since been advised to use separate attached sheets for devices requested and devices issued to avoid confusion.

Request memo dated 16 January 2010

4.22 For the request memo dated 16 January 2010, it was signed by the endorsing officer on 13 January 2010 and by the approving officer on 15 January 2010. We requested the LEA to explain why the memo was signed before its creation. The LEA explained that the memo was actually prepared by the withdrawing officer on 13 January 2010. As he thought that the request memo would be executed on 16 January 2010, he put down the date of 16th as the date of the memo. The endorsing officer signed the memo on 13 January 2010 as he would have to attend a training course on 14 and 15 January 2010.

4.23 The surveillance devices were issued on 16 January 2010 and the device issuing officer notified the approving officer on the same day of what devices had been issued. However, the approving officer signed

with a date of 15 January 2010 to acknowledge this notification of 16 January 2010. We enquired about this illogicality. The LEA replied that the approving officer made a similar mistake as that described in paragraph 4.21 above.

Duplication Case 4

4.24 In this duplication case, the first device request memo dated 24 January 2010 and the subsequent device request memo dated 25 January 2010 with identical memo reference were signed by the same endorsing officer (Officer G) and approving officer (Officer F). The LEA attributed the mistake to the carelessness of the endorsing officer who overlooked that the memo reference in the latter memo had been used in the previous memo.

Request memo of 24 January 2010

4.25 For the first device request memo dated 24 January 2010, the date of the memo, the endorsement date and the approval date were all stated to be 24 January 2010. Noting that the devices were issued as early as 0655 hours on that day, we asked at what time on 24 January 2010 that the endorsing officer and the approving officer signed the request memo.

4.26 The LEA replied that the request memo was actually prepared by the withdrawing officer on 23 January 2010 for operation to be conducted on the following day. As he thought that the execution of the memo was on the 24th day, he therefore put down the date of 24th as the date of the request memo, the date of endorsement and the date of approval. The request memo was signed by the endorsing officer and the approving

officer on the 23rd day but they overlooked the mistake in the date of endorsement and the date of approval (the 24th day) when they signed.

4.27 The surveillance devices were issued at 0655 hours on 24 January 2010 and the device issuing officer notified the approving officer on the same day with an 'Attached Sheet for Devices Issued' showing what devices had been issued. The approving officer signed it with a date of 24 January 2010. As 24 January 2010 was a Sunday, we asked whether the approving officer did sign the attached sheet on 24 January 2010. In reply, the LEA stated that the approving officer actually signed the attached sheet on 23 January 2010 which was supposed to approve the request for the issue of the devices stated in it. But he wrongly signed at the bottom of the attached sheet which then became to acknowledge that the devices stated had been issued and he overlooked that the date was wrongly entered as 24 January 2010 when he signed.

Request memo of 25 January 2010

4.28 For the request memo of 25 January 2010, it was signed by the endorsing officer and the approving officer on 23 January 2010. Upon our enquiry, the LEA explained that the memo was actually prepared by the withdrawing officer on 23 January 2010 for execution on 25 January 2010. The withdrawing officer put down the execution date of 25 January 2010 as the date of the memo.

4.29 The surveillance devices were issued on 25 January 2010 and the device issuing officer notified the approving officer of the issue of devices on the same day through the 'Attached Sheet for Devices Issued'. The approving officer signed the attached sheet with a date of 25 January

2010. We asked the LEA whether the approving officer did sign the attached sheet on 25 January 2010. The LEA replied that the approving officer actually signed on the attached sheet on 23 January 2010 (which was intended to approve the issue of the devices under request but he wrongly signed on the bottom part) and he forgot to enter the date under his signature. Later, the withdrawing officer found that the date was missing when he withdrew the devices on 25 January 2010. The withdrawing officer therefore put down the execution date (25 January 2010) below the signature of the approving officer on the attached sheet.

Other anomalies in the device register of the same registry

4.30 Apart from the above mistakes relating to the duplication cases, when examining the aforesaid device register of the same registry, we found a number of other anomalies, mistakes or irregularities. The major one was that not an insignificant number of the entries had the name and rank of the endorsing officer crossed out and replaced by another name. On the day following receipt of the device registers, my Secretariat immediately raised this with the LEA. The LEA provided a very short reply saying that the names and ranks of the endorsing officers were amended due to wrong entries made by the withdrawing officers, that the amendments were made as a result of counter-checking exercises conducted by the OC of the device registry referred to in paragraph 4.11 above and that a certain officer had been instructed to make the amendments. Unsatisfied with such simplistic reply, I stepped in to request the LEA to submit an investigation report on this issue with which the LEA duly complied.

4.31 According to the investigation report from the LEA, the mistakes were due to the introduction of the new request memo on 1 January 2010. Prior to that date, there was only one-tier approval. With effect from 1 January 2010, the two-tier approval requiring the endorsement of an endorsing officer and the approval of an approving officer (referred to in paragraph 4.2 above) was introduced. However, officers withdrawing devices in the month of January 2010 did not follow the new request memo in filling out the names of the endorsing officer and approving officer on the device register. All the 17 officers who had withdrawn devices in that month did not fill in the 'approving officer' column of the device register (which was not required to be filled in before 1 January 2010), of which 11 officers also made mistakes in the 'endorsing officer' column of the device register. Some mistakenly put down the name of their team leaders (who used to playing the role of approving officer under the old practice) under the 'endorsing officer' column of the device register when in fact they were not the endorsing officers. Some erroneously put down the name of the approving officer as appeared in the request memo under the 'endorsing officer' column of the device register. On 29 January 2010, the OC of the device registry conducted a routine inspection and spotted that the 'approving officer' column on various pages of the device register were not filled in and he instructed an officer to fill in the information according to the respective device request memos. In early February 2010, the OC conducted a further checking and discovered the data entered in the 'endorsing officer' column on various pages of the device register were wrong and he caused amendments to be made to these wrong entries. Following our query in mid February 2010, the OC conducted another checking in late February 2010 and spotted a few more errors including the one described below.

4.32 On 29 January 2010, a withdrawing officer put down the name of an officer in the 'endorsing officer' column of the device register who was neither the endorsing officer nor the approving officer. He made this error in 17 entries when withdrawing 17 surveillance devices for an operation. The mistake was discovered by the OC in late February 2010 after receipt of our query in mid February 2010. The withdrawing officer explained that he used the wrong name chop and was not aware of the mistake at the material time. In my view, if the withdrawing officer had really brought the wrong name chop as claimed, he should have immediately discovered the mistake when he chopped the name on the device register particularly as he chopped the wrong name for 17 times. I was concerned that the withdrawing officer could put in whatever name for endorsing officer as he wished in the device register without documentary support and had in his possession the name chop of that officer. It also called into question whether a request memo was produced to the device issuing officer when withdrawing the devices and if so, why the device issuing officer did not spot that the name was wrong.

4.33 The LEA's investigation report claimed that all the errors mentioned above were due to the introduction of the new request memo requiring the two-level endorsement and the carelessness and oversight of officers concerned. The mistakes were unintentional and there was no ulterior motive behind. The LEA stated that officers concerned had been reminded to be more careful in future.

4.34 Having examined the investigation report and the reply of the LEA, I considered that the mistakes made by officers of that registry were worrying. The new request memo was introduced for use in all the device

registries of the LEA but only the said device registry made such mistakes. This was inexplicable and inexcusable. Even though the withdrawing officers made the mistakes, the device issuing officers should be able to spot the mistakes immediately because they had the request memos in hand which showed clearly who the endorsing officer and approving officer were. It is very difficult to understand why such mistakes were not discovered at the time of withdrawal. The OC of the device registry only spotted the errors that the 'approving officer' column in the device register were not filled in by the end of January 2010, but not sooner after the implementation of the new request memo on 1 January 2010. He also did not discover the various wrong entries under the 'endorsing officer' column until a further inspection in early February 2010, the date of which he could not recall. Upon receipt of our queries on the device register concerned, the OC conducted a further inspection and spotted a few more errors. All these called into question whether the OC himself knew what the requirements were, how comprehensive his inspections were and whether he had performed his inspection duties conscientiously.

4.35 While the LEA attributed the mistakes to the carelessness and oversight of officers concerned, as I see it, the mistakes demonstrated the **lax attitude** of officers in filling out the device registers and the lack of checking by device issuing officers of the information entered in the device register before devices were issued. This to a certain extent defeated the purpose of my requirement of creating such a system of device registration as a means to properly control the issue and use of surveillance devices for non-ICSO purpose which is without the support of a prescribed authorization. The mistakes made me worried about the accuracy and integrity of the records of this registry. This is particularly so as we had

spotted the irregularity in this registry in that different request memos for different operations used the same memo reference (ie the four duplication cases mentioned in earlier paragraphs). This registry also made mistakes of one kind or another such as no indication of the date of issue or the date of return of devices in entries on various pages of the device register. There was also no indication that the OC or other senior officers who had checked the device register cared about the absence of the date of issue of device or the date of return of device in the relevant entries of the device register. All these, in aggregate, presented a worrying picture if not suggestions of abuse and ulterior motive.

Proposal on disciplinary actions

4.36 The LEA attributed the repeated anomalies and irregularities unearthed to inadvertent oversight and carelessness of the officers concerned and the difficulties they encountered in adapting to the new requirements for withdrawal of devices. The only remedial action taken by the LEA was to remind the officers concerned to exercise greater care in handling the device register and request memo. However, from the nature and number of errors made, the number of officers involved and the frequency of commitment of errors by the officers concerned, I noticed a worrying picture which should be addressed seriously. It was not merely carelessness or inattentiveness of the officers concerned, but a problem of their **lax and slapdash working attitude** and their disregard of my advice to maintain a clear and accurate record in the device-recording system. I am of the view that certain officers had failed to perform their responsibilities as expected of their respective post and rank and they should be subject to a higher level of discipline. In this regard, I

requested the LEA to conduct a review and submit its recommendation on the proposed disciplinary actions to be taken against the officers concerned.

4.37 Given the nature / frequency of procedural impropriety or supervisory oversight involved, the LEA proposed that counselling (non-disciplinary in nature) be made to some of the officers concerned. I have not completed the review on this series of cases.

B. Discrepancies between device register and device request memos

4.38 During an inspection visit to an LEA in late 2010, I spotted a number of discrepancies between certain entries in the device register and the request memos for withdrawal of surveillance devices for non-ICSO purposes in that LEA. The LEA undertook to investigate the discrepancies found and reported its findings to me. However, I was dissatisfied with the brief and inadequate findings provided by the LEA in early 2011 and required it to carry out a thorough investigation on a total of five cases (ie Discrepancy Cases 1 to 5). In May 2011, the LEA submitted a full investigation report ('the investigation report'), in which the LEA attributed the mistakes and errors to mere carelessness and inattentiveness on the part of the officers involved, but I did not agree. I therefore requested the LEA to provide clarification on my observations on the cases concerned and submit recommendation on the disciplinary actions proposed to be taken against the officers involved. The LEA submitted a further investigation report ('the further report') with the proposed disciplinary actions in November 2011. These five cases are described in some detail in the ensuing paragraphs.

Prevailing procedures in drawing and returning of devices for non-ICSO purposes

4.39 To facilitate understanding of the five cases concerned, I set out below the procedures and practices adopted by the LEA for drawing and returning of devices prevailing at the material time:

(a) A junior officer ('the drawing officer') would fill in the upper part of a device request memo for signature by the approving officer to make application for withdrawal of a device to the device issuing officer. If the device issuing officer approved the request, he would sign in the device request memo and return the signed memo to the drawing officer for action.

(b) The drawing officer would then bring the device request memo to the Support Unit to draw the device. The designated officer of the Support Unit would physically hand the device to the drawing officer. The drawing officer would enter the identifying device code(s) of the device(s) in the lower part of the device request memo. Right after the drawing officer had collected the device, he would bring the device and the device request memo to the device issuing officer for checking. The device issuing officer and the drawing officer would sign the lower part of the memo to confirm the withdrawal and receipt of the device concerned.

(c) The drawing officer would then bring the device and the memo to the approving officer to acknowledge the drawing of the device, and the approving officer would sign to so

acknowledge against the 'To' entry on the lower part of the device request memo. Afterwards, the drawing officer would send the device request memo to the Support Unit.

(d) Having received the device request memo, the designated officer of the Support Unit would fill in the file reference (without the enclosure number) for the device request memo by referring to the file reference list which was maintained and kept by the Support Unit. At this point of time, the enclosure number remained unavailable.

(e) The designated officer of the Support Unit would then fill in an 'issue' entry in the device register in accordance with the information in the device request memo and seek the signatures of the officers concerned, ie the drawing officer first and followed by the device issuing officer.

(f) The enclosure number of the device request memo could only be obtained after the relevant operation document was logged into the respective operation files by the designated officer of the Support Unit. As there could be several operations on a single day, the relevant operation documents would be logged in the respective files in one go usually at a later time of the day or the following working day. When the operation documents were logged in the respective files, the enclosure number of a particular operation document would become the enclosure number of the relevant device request memo.

(g) The enclosure number and full file reference on the device request memo would be entered in one go by the designated officer of the Support Unit when the completed device request memo was ready to be logged into the file. The designated officer of the Support Unit would finally log away the device request memo.

(h) When the drawing officer returned the device to the Support Unit, the designated officer of the Support Unit would make the 'return' entry in the device register for his signature. After that, the designated officer of the Support Unit would bring the device and the device register to the device issuing officer for checking and signature. Then the designated officer would lock the device in the cabinet in the Support Unit for safe-keeping.

Discrepancy Case 1

4.40 The mistake in this case was that the name of the drawing officer was stated as the endorsing officer in the device register, when in fact the endorsing officer should be another officer. As advised by the LEA, the mistake was created by the designated officer of the Support Unit when he made the entries in the device register. However, the mistake was not discovered by the drawing officer and the device issuing officer when they signed the device register the first time when the device was issued and the second time when the device was returned. Severe counselling (non-disciplinary in nature) was given to the device issuing officer and the drawing officer in April 2011 for failing to detect the

mistake. The disciplinary action given to the designated officer of the Support Unit can be found in paragraph 4.61 below.

Discrepancy Case 2

4.41 The mistake in this case was that the drawing officer was changed from one officer (ie Officer A) to another officer (ie Officer B) but the lower part of the device request memo still *stated* that Officer A drew the device. According to the LEA, the approving officer originally instructed Officer A to prepare the device request memo. Meanwhile, he found that Officer A was deployed to another operation and therefore instructed Officer B to follow up the withdrawal of the device. Officer B then amended 'Officer A' to 'Officer B' on the upper part of the device request memo and crossed out the name and signature of Officer A at the lower part of the memo (but without amending the statement that Officer A drew the device). Upon approval by the device issuing officer, Officer B brought the device request memo to the designated officer of the Support Unit for drawing the device. After the device was issued to *Officer B*, the device issuing officer, Officer B and the approving officer signed the lower part of the device request memo, which stated that *Officer A* drew the device. Officer B then passed the completed device request memo to the designated officer of the Support Unit, who then entered 'Officer A' as the 'Receiving Officer' in the device register according to the information on the lower part of the device request memo. The LEA stated in the further report that the designated officer of the Support Unit first brought the device register to the device issuing officer for signature, which was inconsistent with the prevailing procedures that he should first approach the drawing officer. The device issuing officer then spotted the discrepancy

in the name of the receiving officer and instructed Officer B to bring the device to him for inspection. After confirming the discrepancy, the device issuing officer instructed Officer B to rectify the discrepancy and they both signed the 'issued' entry in the device register after rectification.

4.42 The device issuing officer, the approving officer and Officer B were severely counselled in April 2011 for failure to detect the mistake that the name of the drawing officer had been wrongly stated as Officer A instead of Officer B, when signing the lower part of the device request memo. Officer A was also severely counselled in April 2011 for improperly signing the lower part of the device request memo to acknowledge receipt of the device before the device was actually issued. After taking my views into account and reviewing the case, the LEA proposed to give a **verbal warning** to Officer A.

4.43 As regards the approving officer, he assigned Officer A to prepare the device request memo and at about the same time discovered that Officer A was deployed to another operation. I did not understand why the approving officer did not first find out whether Officer A was deployed to another operation before assigning him to prepare the memo. It was also claimed that at the time of signing the device request memo, the approving officer already found that the lower part of the memo was signed by Officer A in advance and briefed the latter it was improper for him to do so. In the circumstances of this case, it was unreasonable and wrong for the approving officer to still sign the device request memo instead of asking a new memo to be prepared particularly when he had assigned Officer B to replace Officer A as the drawing officer. It also exposed the malpractice of Officer A signing the device request memo in advance to

acknowledge receipt of the device before the device was approved for issue and before the device was actually issued. Moreover, the approving officer also made another mistake that he should not have asked Officer B to initial against the amendment on the upper part of the memo since any amendment to the content of the memo which had been signed by him and had not been issued should be made or initialled by him. All these reflected the approving officer's **lax attitude** towards the device request memo. I considered that he should be given a **verbal warning**, instead of just severe counselling, for his failure to cause a new device request memo to be prepared as he assigned another officer to draw the device and knowing that Officer A had improperly signed in advance the lower part of the memo to acknowledge receipt before the issue of the device. Had the approving officer acted properly by instructing a new memo to be prepared, all the mistakes in this case could have been avoided.

4.44 Regarding the discovery of the discrepancy by the device issuing officer, I found that the LEA gave two different versions in the investigation report and the further report. According to the investigation report, when the designated officer of the Support Unit brought the device and device register to the device issuing officer for his inspection and signature, the device issuing officer discovered the discrepancy and therefore he called Officer B to his office to rectify the mistake. In accordance with the procedures prevailing at that time, the designated officer of the Support Unit would bring the device and device register to the device issuing officer only when the device was returned (the step in paragraph 4.39(h) above). However, in an attempt to explain away my query, the LEA stated in the further report that the device issuing officer discovered the discrepancy at the time of signing the 'issued' entry as

described in paragraph 4.41 above (ie the step in paragraph 4.39(e) above). This called into question as to when the device issuing officer discovered the mistake and when he signed the 'issued' and 'returned' entries of the device register. Upon my enquiry, the LEA maintained that the discovery was made at the time when the device issuing officer signed the 'issued' entry and that the initial version that the designated officer of the Support Unit bringing the device to the device issuing officer was a mistake.

Discrepancy Case 3

4.45 In this case, it was noticed that the date of the device request memo the '24th' day of a month was crossed out and amended to the '27th' day. As reported by the LEA, the drawing officer prepared the device request memo on the '27th' day (Monday) but she erroneously put down the date of the device request memo as the '24th' day (the Friday before). The approving officer detected the mistake before the withdrawal of the device and asked the drawing officer to amend it. The device was drawn at 1400 hours on the 27th day.

4.46 The LEA explained in the investigation report that the drawing officer made the mistake probably because her mind was still occupied by the follow up work of a previous case that happened on the 24th day. According to the drawing officer's statement, she prepared the device request memo sometime after 1500 hours on the 27th day. But according to the lower part of the device request memo and the device register, the drawing officer drew the device at 1400 hours on the 27th day. In other words, there was no device request memo to support the withdrawal of the device and that the request memo was a creation after the event. In response to my query, the LEA stated in the further report and attached the

second statement by the drawing officer that she had actually reached the office before 1400 hours on the 27th day for following up the matters relating to the previous working day and for the preparation work for operation on that day although her scheduled duty hours commenced at 1500 hours. She prepared the device request memo before 1400 hours on the 27th day and the device request memo was not a creation after the event. Although the LEA could not provide any documentary evidence to corroborate the drawing officer's story that she returned to work over an hour earlier than her scheduled hours, she persisted in her story that she prepared the request memo before 1400 hours. I do not have any evidence to disprove her story.

Discrepancy Case 4

4.47 It was found that the device register recorded that the device was issued at 1750 hours on the 17th day of a month. The date of the device request memo was date-chopped as '20-month-year' but someone crossed out the '20' and wrote in '17'. Similarly, the lower part of the device request memo stated that the device was withdrawn at 1750 hours on '20-month-year' but someone crossed out the '20' and wrote in '17'. In other words, after the amendments on the device request memo, the date and time of the issue of the device in both the device request memo and the device register were 1750 hours on the 17th day. However, in reply to my enquiry about the reason for the amendments, the LEA claimed that the device was actually issued at 0750 hours on the 20th day instead of 1750 hours on the 17th day. A sequence of events of this case as reported by the LEA is set out in paragraphs 4.48 to 4.50 below.

4.48 A device was to be withdrawn on the early morning of the 20th day. At 0745 hours, the drawing officer prepared the device request memo by filling in the upper and lower parts but leaving the device code and the drawing time blank. The device request memo was then signed by the approving officer and the device issuing officer. Although the operating hours of the Support Unit were from 0845 hours to 1800 hours, as it turned out, a senior officer (ie Officer C) of the Support Unit arrived at the office early at 0750 hours that day. Upon receipt of the device request memo, Officer C handed the device to the drawing officer. Out of his own initiative, Officer C recorded the device code and the time of issue as '1750' hours (instead of 0750 hours) in the lower part of the device request memo, which should have been completed by the drawing officer in accordance with the prevailing practice. The drawing officer then brought the device to the device issuing officer for checking and both signed on the lower part of the memo without noticing that the time of drawing was mistakenly entered as '1750' hours. After that, the drawing officer brought the device and the device request memo to the approving officer for signature, who also did not notice the mistake in the drawing time in the lower part of the memo when he signed against the 'To' entry. The drawing officer then put the device request memo onto the device register for follow up entry.

4.49 At 0912 hours, the designated officer of the Support Unit reported for duty. He retrieved the memo from the device register and made the entry of the issue on the device register. He found the drawing time of 1750 hours on the 20th day unreasonable. He therefore entered the date and time on the device register as the 17th day (ie the last working day which was a Friday) and 1750 hours and accordingly amended the device

request memo. He did all these without making reference to his supervisors or seeking clarification with the drawing officer. Subsequently, he logged the device request memo in the file.

4.50 On the early morning of the following day, the drawing officer returned the device to the Support Unit. He signed in the entries as the receiving and returning officer in one go but he was unaware of the mistake on the device register. The designated officer then brought the device register and the device to the device issuing officer for his signature on the 'issued' and 'returned' entries on the device register. The device issuing officer also signed the entries without noticing the error in the device drawing date and time.

4.51 I was very sceptical about this case. The device request memo and the device register signed by the drawing officer and the device issuing officer all recorded that the device was issued at 1750 hours on the 17th day. But the LEA claimed that the device was issued by Officer C of the Support Unit at 0750 hours on the 20th day, without any documentary proof. It was not even supported by the attendance record of Officer C. The only argument in support of its claim was that the drawing officer was on leave on the 16th and 17th day and all officers concerned recalled that the device was drawn at 0750 hours on the 20th day.

4.52 I also found the explanation given by the designated officer of the Support Unit in amending the drawing date from the 20th day to the 17th day unconvincing. As the designated officer with duty hours up to 1800 hours, on the 17th day, he would have physically handed the device to the drawing officer on that day had it in fact happened and he should have known whether he had issued the device to the drawing officer at 1750

hours on that 17th day. It was also improper for him to amend the date of the request memo without seeking approval or clarification from the relevant officers. Moreover, I noticed that he did not ask the drawing officer and the device issuing officer to sign the device register on the 20th day before he logged the device request memo in the file, which was not in line with the prevailing practice and procedures at the material time.

4.53 I queried why both the drawing officer and the device issuing officer signed on the device register to signify that the device was issued at 1750 hours on the 17th day. The LEA stated that both officers only checked the 'returned' entry in the device register but did not check the 'issued' entry when they signed against the respective entries of the device register, which I considered totally unacceptable. As regards the drawing officer, he should be quite alert when he saw the device register which recorded that he withdrew the device on the 17th day as he was on leave that day and yet he still signed on it. If as claimed, the device was drawn by the drawing officer at 0750 hours on the 20th day, then the official record that the device was issued at 1750 hours on the 17th day was false. As such, the drawing officer and the device issuing officer should not have signed the device register signifying that the false record was true and correct. Falsification of records is a very serious matter. It was a dereliction of duty for which they should be warned.

4.54 The LEA did not propose any disciplinary action against the drawing officer because it considered that he committed the mistakes in one case only. I could not agree with this view. In fact, there were two chances at which the drawing officer could discover the mistake: (i) when he signed the lower part of the device request memo on the 20th day; and (ii)

when he signed the device register on the following day. The drawing officer should at the very least be **verbally warned** for signing a false record. The action of severe counselling, which was non-disciplinary in nature, was not sufficient.

4.55 As regards the device issuing officer, in addition to the mistake stated in paragraph 4.53 above, I noted that he had also signed the 'issued' entry of the device register signifying that the date of approval of the device request memo was the 17th day instead of the 20th day. He thus had the additional failure of not checking that the date of approval as shown in the device register was wrong. Taking into account his mistakes in this case and his other mistake in Discrepancy Case 5 below, I considered that he should be given a **written warning**, instead of a verbal warning as proposed by the LEA.

4.56 The LEA accepted my suggestions on the disciplinary awards for the officers. This is another case showing the **lax attitude** of the officers concerned in the discharge of their duties. While it is true that they were not performing ICSO duties, the device withdrawal and registration system are designed for the purposes of having tight control over devices capable of being used for covert surveillance so that they will not be abused for unlawful or unauthorized purposes. The lax attitude of the LEA officers will have the effect of defeating or at least damaging that control.

Discrepancy Case 5

4.57 I observed that in the device register, the date and time of the issue of device originally entered as the 17th day of a month and '1855' hours were crossed out and replaced by the 20th day and '1855' hours.

4.58 As advised by the LEA, the drawing officer was instructed to withdraw a device at 1845 hours on the 20th day. The drawing officer then prepared the device request memo for signature by the approving officer and the device issuing officer (ie the same device issuing officer as in Case 4 above). The date of the device request memo was the 20th day and the lower part of the memo stated that the device was issued at 1855 hours on the 20th day. After drawing the device, the drawing officer passed the signed memo to the designated officer of the Support Unit, who worked overtime until 1930 hours on that day, for making entries into the device register. The designated officer entered the date and time of the issue of device as the 17th day and '1855' hours in the device register. The date of issue was wrong but the time of issue was correct. He also wrongly entered the 17th day under the column 'Name & Rank of Senior Approving Officer (with date of approval)' in the device register. The designated officer then noticed the mistake in the date of issue of the device entered by him in the device register and amended it to the 20th day. Later, the designated officer told the drawing officer the mistake in the date of issue of device and the latter signed her name on the 'issued' entry in the device register and also against the amendments made by the designated officer. On the following day, the drawing officer returned the device and signed on the 'returned' entry in the device register. The designated officer then brought the device register to the device issuing officer for

signature. The device issuing officer appended his signature on both the 'issued' and 'returned' entries of the device register without detecting the discrepancy on the date of approval entered.

4.59 I found that the explanation given by the designated officer of the Support Unit as to why he had made the mistake illogical and unreliable. He first explained in April 2011 that he copied the date of issue from the last entry in the device register, which was the one relating to Case 4 above which he had arbitrarily amended the date of issue from the 20th day to the 17th day. However, in his explanation in November 2011, he alleged that he had copied the time of issue from the device request memo. It was illogical that he copied the date of issue of device from the last entry in the device register, then copied the time of issue of device from the device request memo, and then copied the date of approval from the last entry in the device register (which also showed the 17th day). In response to my query, the designated officer further explained that his mind was preoccupied by his workload relating to the matters about the 17th day which led to subsequent erroneous recording of the date of issue of the device in the register.

4.60 Regarding the wrong date of approval entered in the device register, the designated officer claimed that he thought that the material day was the 17th day instead of the 20th day. However, such mistake was not detected by the device issuing officer when he signed both the issuing and receiving entries in the device register as he claimed that he focused on the amendment made by the designated officer. In this case, the device issuing officer also committed a mistake in failing to detect the wrong date of approval.

Other observations

4.61 The designated officer of the Support Unit, who was the same officer in all of the above five cases, committed various mistakes. The unauthorized amendment on the device request memo by him in Discrepancy Case 4 was most serious. He was severely counselled in April 2011. After taking my views into account and reviewing the case in November 2011, the LEA proposed that a **written warning** be given to him.

4.62 In all the above five cases, I found that the enclosure number and full file reference were not entered in the device request memos and the device register under the column 'Ref. of Request Memo'. The LEA concluded that the designated officer of the Support Unit committed the mistakes as at the material time, it was his responsibility to enter the full file reference and the enclosure number in the device request memo and the device register.

4.63 For all the device request memos in Discrepancy Cases 1 to 5 above, none of the device issuing officers signed the upper part of the device request memo with date. Nor did the approving officers sign the lower part of the request memo against the 'To' entry with date. This could not be explained by sheer coincidence. The LEA did not follow the requirement stipulated in my letter to the Security Bureau and copied to all the LEAs in 2007 that the officer withdrawing the device, the endorsing officer and the senior approving officer should all sign with date. Upon my enquiry, the LEA stated that it had issued an instruction in September 2011 requiring officers concerned to append the date and time against

his/her signature in the device request memo and the device request memo had also been revised accordingly.

4.64 I noted that the approving officer appearing in the device request memo was entered as the endorsing officer in the device register whereas the device issuing officer appearing in the request memo was entered as the approving officer in the device register in these cases. I considered this phenomenon unsatisfactory and might cause confusion. I **recommended** to the LEA that the request memo should be amended to make it clear who the endorsing officer was and who the approving officer was so that there would not be inconsistency between the request memo and the records on the device register.

C. Missing entry in device register

4.65 An LEA reported to me in March 2011 that while a surveillance device was returned to the device registry, no entry for the return of the device was made in the relevant non-ICSO device register. In examining the case, I noted that the entries made on the device register did not follow the format stipulated in my letter to the Security Bureau and copied to the LEAs in 2007. The required format is that an 'Issued' entry is immediately followed by a 'Returned' entry such that if the return entry is blank, it shows and draws attention to the fact that the device has not been returned. Had such format been adopted by the LEA, in a situation like the present case, the so-called missing entry would unlikely occur and even if it occurred, it would have been discovered easily. However, the device register in question did not follow the required format. For example, an 'Issued' entry is not necessarily followed by a 'Returned' entry but may be followed by another 'Issued' entry, making it difficult to

relate one entry to another and to check whether a device has been returned. In response to my query, the LEA explained that the officers concerned might have overlooked the design of pairing up 'Issued' and 'Returned' in my letter and remedial action had been taken by arranging the 'Issued' and 'Returned' rows in a paired up manner in the device register in advance.

4.66 In the course of my examination of the above incident, the LEA informed me that it had issued an instruction on the issue and return of non-ICSO devices and other related matters, and had tightened up the procedure on the return of devices in a situation when the receiving officer (ie the officer who is responsible for the control and safe custody of the devices) is unavailable. Under the new arrangements, the receiving officer may delegate the device inspection and proper lock-up of the device to the endorsing officer (ie the team leader of the operation). A remark will be made by the endorsing officer in the device register to record the date and time when the device was handed over to him, and also the date and time when the receiving officer was verbally notified of the return of the device. When the receiving officer is available, he will inspect the device at his earliest opportunity, and sign on the device register to confirm the return of the device as he has been orally notified.

4.67 While the enhancement measures were steps in the right direction, I advised the LEA that to avoid confusion, the name of 'the Receiving Officer' referred to in the instruction issued by the LEA and in other related documents should be altered to read 'the Device Controller'. Also, the procedure on the return of devices, amongst others, should be improved in the following manner:

(a) The endorsing officer should sign on the device register as the receiving officer since he has received the device back from the returning officer (ie the officer who is responsible for the drawing and returning of the device) and recorded the date and time of his receipt of it on the device register. He signs to verify the entries made by him personally into the device register because he has the advantage of actually receiving the device handed over to him. By requiring him to sign, he is made responsible for the entries which have been made by him contemporaneously when the events (the date and time when the device is returned and when the receiving officer is verbally informed) occur.

(b) When the receiving officer (advised to be called 'the Device Controller'), who is in charge of the locked cabinet holding the devices and has overall control over the issue and receipt on return of the devices, is next available and checks the device register, he should countersign, with date and time, the entries made by the endorsing officer if he finds the entries correct. Otherwise, he should seek clarification and explanation from the returning officer and/or the endorsing officer to resolve any doubts before he countersigns.

D. Alleged input problem of the DMS

4.68 In examining the device registers for the month of January 2011 submitted by an LEA at the end of February 2011, it was noticed from the 'Remarks' column in one of the entries recording the issue of a surveillance device for general observation at public place (ie overt

surveillance not requiring a prescribed authorization) that there was an input problem of the DMS resulting in its failure to record the return of a surveillance device at the time when it was returned. After a searching review, I found that the DMS did not have any input problem but in fact there had been a mix-up of devices withdrawn under two different device request memos. It appeared to me that there was no full and frank disclosure of the true cause of the incident.

Facts of the case

4.69 The device register, generated by the DMS, recorded that on 8 January 2011, a camera issued earlier the day was returned at 1644 hours on the same day. According to the 'Receiving Officer' column of the device register, the officer who received the returned device at 1644 hours was the sub-administrator of the device registry ('Sub-administrator') but the 'Remarks' column of the device register stated that the officer who received the returned device was the storekeeper of the device registry ('Storekeeper'). The 'Remarks' column stated:

> 'At 1644 hours on 8.1.2011, there is an input problem of the DMS. The Sub-administrator … is responsible for inputting retrospective record on 25.1.2011. At 1644 hours on 8.1.2011, the Storekeeper (Receiving Officer) received the device from Officer W (Returning Officer).'

Our first enquiry of March 2011

4.70 By a memo of March 2011, we requested the LEA to clarify:

(a) Who indeed was the officer receiving the returned device at 1644 hours on 8 January 2011, the Sub-administrator or the Storekeeper?

(b) When did the input problem occur and when was it rectified?

(c) Why was there no similar problem regarding the return of two other devices at the identical 1644 hours on the same day by Officer W to the Storekeeper?

The LEA's first memo of July 2011

4.71 By a memo of July 2011, signed by an Assistant Head of Department, the LEA replied that the 'Remarks' were entered by the Sub-administrator on 25 January 2011 to show that he had made a retrospective entry into the DMS about the return of a device which the system failed to record at the time when the device was actually returned to the registry due to an input problem of the DMS.

4.72 According to the LEA, on 8 January 2011 at 0813 hours, a camera bearing a device code 006 ('camera 006') was withdrawn from the device registry pursuant to a device request memo for the purpose of general observation. At 1644 hours on the same day, camera 006 was returned by Officer W to the device registry together with two other devices (issued earlier under a different device request memo). As usual, the Storekeeper scanned the barcode of the devices using the scanner of the

DMS. However, when he came to process camera 006 as the last of the three items to receive, the system failed to capture the return despite the fact that there was no problem with the return of the other two devices just handled. He then logged out from the system and logged in again to retry the whole return process for camera 006. The DMS then appeared to return to normal function. When the Storekeeper finished the return process with the system, camera 006 was locked up in a cabinet inside the registry.

4.73 On 12 January 2011, another request for withdrawing a camera was received. Camera 006 was taken out from the equipment cabinet for fulfilling the request. When camera 006's barcode was scanned into the DMS for withdrawal, the DMS showed that its status was 'ISSUED' which meant that the device had been issued and not yet returned. Under such circumstances, camera 006 was not issued and was deposited back into the cabinet.

4.74 On 13 January 2011, an enquiry was initiated by the section concerned, and the Sub-administrator was informed of the incident subsequently (14 January 2011). After verification with officers concerned and a female engineer who did not belong to the LEA ('the engineer') about the incident, it was believed that there might be an input problem at the time when the Storekeeper scanned the barcode of camera 006 into the system at 1644 hours on 8 January 2011 and he was not aware that such problem still existed after he logged out and re-logged into the system for a retry at that time. After the enquiry, the Sub-administrator was satisfied that camera 006 had actually been returned to the device registry at the material time and he therefore, by virtue of his role as the

sub-administrator, inputted back the return record of camera 006 into the DMS on 25 January 2011 and added a remark, as that stated in paragraph 4.69 above, for record purpose. However, as it was the Sub-administrator who made the retrospective record, the DMS automatically recognized him as the 'Receiving Officer' and hence his name appeared in that column on the device register.

4.75 The LEA stated that the input problem occurred when the Storekeeper received camera 006 from Officer W at 1644 hours on 8 January 2011. The matter was rectified by the Sub-administrator through making the retrospective entry onto the DMS on 25 January 2011 as described above.

4.76 The LEA further stated that during a meeting on 18 February 2011 with the engineer to discuss making enhancement to the DMS, the above incident was brought up for discussion. No conclusive findings could be made of the reason why the input problem occurred for camera 006 but not the other two devices returned to the registry in the same batch at the same time.

Our second enquiry of November 2011

4.77 By a memo of November 2011, we raised further questions:

(a) In the first try, how did the Storekeeper know that the DMS failed to capture the return of camera 006?

(b) When the Storekeeper retried the whole return process, what had made him believe that the system had returned to normal and had captured the return of camera 006?

(c) If as claimed, the input problem still existed after the Storekeeper re-logged into the system for a retry, how to explain the situation that the DMS was normal at 1703 hours on 8 January 2011 and beyond?

The LEA's second memo of January 2012

4.78 By a memo of January 2012, the LEA replied that:

(a) When the Storekeeper scanned the barcode of camera 006 the first time at 1644 hours, the DMS did not capture the return of the device and a warning message was displayed on the screen. (The LEA did not state in this reply the content of this message that was displayed on the screen.)

(b) When the Storekeeper retried the whole return process again, the system appeared to work properly by displaying a specific screen showing the particulars of camera 006 which made him believe that the system had captured the return of the device.

(c) After verification with the officers and discussion with the engineer, it was believed that there could be an input problem unnoticeable to the Storekeeper when he scanned the barcode of camera 006 to capture the return of the device into the DMS at about 1644 hours on 8 January 2011.

(d) The incident had been examined by the engineer and discussion had been held with her to explore if it could be caused by system bugs in the DMS or hidden errors in the

barcode of the device. However, no conclusive finding could be made as regards the exact cause of the problem.

Our third enquiry of March 2012

4.79 Upon analyzing the various entries in the device register, we found it strange that Officer W was tasked to return camera 006. We extracted the relevant information from different entries and came up with the following two tables for making enquiries with the LEA:

Table 1: Devices issued under device request memo No. 1 for general observation at public place in industrial area

Surveillance Device	Approving Officer	Withdrawing Officer and time	Returning Officer and time
Device 001	Senior Officer (1)	Officer A / 0805 hrs	Officer W / 1644 hrs
Device 002			Officer W / 1644 hrs
Camera 003			Officer Y / 1703 hrs

Table 2: Devices issued under device request memo No. 2 for general observation at public place in rural area

Surveillance Device	Approving Officer	Withdrawing Officer and time	Returning Officer and time
Device 004	Senior Officer (2)	Officer B / 0813 hrs	Officer Y / 1717 hrs
Device 005			Officer Y / 1717 hrs
Camera 006			**Officer W / 1644 hrs** (according to the retrospective entry)
Device 007			Officer Y / 1717 hrs

4.80 The three devices issued for the operation in Table 1 were endorsed by Senior Officer (1) and withdrawn by one single officer. Officer W appeared to be the returning officer of devices issued for this operation.

4.81 On the other hand, the four devices issued for the operation in Table 2 were endorsed by Senior Officer (2) and withdrawn by one single officer. Officer Y appeared to be the returning officer of devices issued for this operation.

4.82 Logically, Officer Y should be asked to return camera 006 and Officer W to return camera 003 but not vice versa. We asked the LEA to explain this strange phenomenon.

4.83 In addition, we also asked the LEA whether the Storekeeper scanned the barcode of the three devices returned by Officer W in one

single return process at 1644 hours on 8 January 2011, and what warning message was displayed on the screen when the DMS did not capture the return of camera 006 at 1644 hours.

Verification with the engineer

4.84 While making the above enquiry of March 2012 with the LEA, in parallel, my office also sought clarification with the engineer to verify the claim of the LEA. It was revealed that on 17 January 2011, the engineer was informed by the Sub-administrator that camera 006 was returned at about 1644 hours on 8 January 2011 with two other devices but its status still remained as 'ISSUED' in the DMS after a few days (the status of the two other devices was correct). The engineer attended the LEA's premises, and upon checking the DMS server, she found logs indicating that three devices were scanned at about 1644 hours on 8 January 2011, the third of which had been issued under a different device request memo from that authorizing the issue of the two previously scanned devices. She was able to locate logs confirming the return of the first two devices on 8 January 2011 and also of some others on and after that day, but unable to locate any such log relating to the successful return of the third one, ie camera 006. She conducted further system searches and confirmed that there was no log indicating that camera 006 had been returned on or after 8 January 2011. Nor was she able to locate an error log indicating any system abnormality on or after 8 January 2011. On the same day (17 January 2011), she informed the Sub-administrator of the results of her system searches, specifically mentioning that camera 006 had been issued under a device request memo different from that relating to the two previously scanned devices. She explained that the DMS design

would not permit all three devices to be returned under reference to a device request memo relating only to the first two devices, and that a separate return transaction would need to be made for camera 006 under reference to its own device request memo. She added that an error message would have appeared at the time to alert the user to this restriction.

4.85 The engineer also informed me that the LEA had never told her that the Storekeeper had attempted to log out from the DMS and then to log back into the system on 8 January 2011 to retry the return process for camera 006.

The LEA's third memo of 30 April 2012 with an investigation report

4.86 By a memo dated 30 April 2012, the LEA provided an investigation report of April 2012 responding to our queries of March 2012. It provided the following information:

(a) The three devices in Table 1 were issued to Team 1 for operation in Kowloon, of which Officer W was a member.

(b) The four devices in Table 2 were issued to Team 2 for operation in the New Territories, of which Officer Y was a member.

(c) Both teams departed the same office at the same time at 0830 hours on 8 January 2011 but headed for different districts using different cars. There was no exchange of officers or equipment at field. Despite this, camera 003 and camera 006 were subsequently found to have changed hands. (The LEA did not tell when, how and by whom this was found. Nor

was there any explanation as to why the matter was not disclosed in the LEA's previous memos of July 2011 and January 2012 to my office.)

(d) It was believed that cameras 003 and 006 had been mixed up accidentally between 0813 hours and 0830 hours before both teams departed the office ('the mix-up'). Thus Officer W of Team 1 returned camera 006 (instead of camera 003) together with other two devices at 1644 hours to the device registry whereas Officer Y of Team 2 returned camera 003 at 1703 hours and other three devices at 1717 hours in one go. (The LEA did not state whether the mix-up was known when the devices concerned were returned to the device registry by Officer W at 1644 hours and/or by Officer Y at 1703 hours and 1717 hours. If so, which officers knew it and whether the matter was subsequently reported upwards to a senior officer or the management?)

(e) The Storekeeper scanned the barcode of the three devices returned by Officer W in a single return process. He first scanned the barcode of device 001, then the barcode of device 002 and lastly the barcode of camera 006. When the barcode of camera 006 was scanned, a warning message popped up on the screen which stated:

> 'The device was issued under different authorization as previous devices. Please return it next batch.'

The Storekeeper then completed the returning procedures in the DMS for the two devices 001 and 002 and logged out the DMS. After that, he logged in the DMS again and completed the returning procedures for camera 006.

My tentative findings

4.87 There had been a mix-up of cameras 003 and 006 shortly after issue. According to the investigation report, when Officer W of Team 1 was instructed by his supervisor to return the three devices after operation, he was not aware that one of the devices to be returned was camera 006 instead of camera 003. Hence, when the Storekeeper scanned the three devices in one single return process at 1644 hours on 8 January 2011 (the first two issued under device request memo No. 1 and the third issued under a different device request memo No. 2), the DMS did not accept the return of the third device, ie camera 006. A warning message popped up on the screen which clearly gave the reason as to why the system refused to accept the return of camera 006 (see paragraph 4.86(e) above). At this point of time, the Storekeeper and probably Officer W should have known that there was a mix-up of cameras 003 and 006. Officer W should have informed his team leader about the mix-up.

4.88 According to the said investigation report, Team 2 returned to office at 1700 hours on 8 January 2011 after operation. Officer Y of Team 2 was instructed to return the four devices to the device registry. The DMS recorded that camera 003 was returned at 1703 hours whereas the other three devices were returned at 1717 hours. The investigation report did not explain why there was a difference of 14 minutes. Apparently, as camera 003 was issued under device request memo No. 1

and the other three devices were issued under device request memo No. 2, the Storekeeper had to process the return of these four devices in two separate return processes, which might explain the difference of 14 minutes. At this point of time, probably Officer Y also knew that there was a mix-up. He should have informed his team leader or supervisor of the mix-up.

4.89 The Storekeeper knew that the system did not accept the return of camera 006 at 1644 hours because it was issued under a device request memo different from that for the previous two devices. He should have informed the Sub-administrator (or whoever conducting the investigation) of this reason during the investigation of the incident on or after 13 January 2011, if not immediately on 8 January 2011 (the occurrence of the incident) or 12 January 2011 (the discovery of the status of camera 006).

4.90 Even if the Storekeeper did not so inform the Sub-administrator, the Sub-administrator should have known the true reason when the engineer informed him on 17 January 2011 of her findings. The Sub-administrator should then realize that there was no input problem of DMS at 1644 hours on 8 January 2011. He should not have stated in the retrospective entry in the DMS that there was an input problem of DMS at 1644 hours.

4.91 What should be asked was whether the Storekeeper was telling the truth when he claimed that he retried the returning process for camera 006 and the system displayed a specific screen showing the particulars of the device which made him believe that the system had captured the return of the device. All of the LEA's memos of July 2011, January 2012 and 30 April 2012 did not state what investigation the LEA had conducted on this point before it jumped to the conclusion that there was an input problem.

In fact, the LEA did not tell the engineer that there was a retry for the return of the camera. If there was such a retry, it was dubious why the LEA withheld such information from the engineer which was crucial in determining whether there was indeed an input problem as alleged.

4.92 The findings of the engineer were that there was no log indicating that camera 006 had been returned on or after 8 January 2011. There was also no error log indicating any system abnormality on or after 8 January 2011. Given such findings and the fact that there was no abnormality of the DMS system at 1644 hours, at 1703 hours, at 1717 hours and throughout the day of 8 January 2011, the logical conclusion is that the Storekeeper was not telling the truth about the retry for the return of camera 006. Either there was no retry at all or he had not completed the retry, for whatever reason of his own.

Wrong representations by the LEA

4.93 It is clear from the evidence of the engineer who was independent of the LEA that the DMS did not have any input problem on 8 January 2011. The rejection by the DMS system to accept the return of the camera at 1644 hours was not due to any input problem per se but the system design that it did not accept the return in one batch of devices issued under different device request memos. The LEA should have known the real cause by 17 January 2011 after being informed of the findings by the engineer. But the LEA still pretended that there was an input problem of the DMS in its memos of July 2011 and January 2012 to my office, both signed by the same Assistant Head of Department. The memo of 30 April 2012, also signed by the same Assistant Head of Department, did not take the opportunity to disabuse us that in fact there

was no input problem. The memos of the LEA were misleading in representing that it was also the belief of the engineer who had examined the incident that there was an input problem, although no conclusive findings could be made as to why the input problem occurred.

4.94 Even if, which is not accepted, the LEA had misunderstood the term 'input problem' as including the inability to record the return of the camera in the register when it was attempted to be returned together with the two other devices at 1644 hours on 8 January 2011, this misunderstanding should have been dispelled and cleared by 17 January 2011 after the LEA was informed of the engineer's findings. The LEA should have there and then informed my office of the misunderstanding instead of retaining it as an excuse for not disclosing the truth to us.

4.95 The way the LEA handled this case was most unsatisfactory. It smacks of concealing the true facts in an attempt to cover up something. There is, to say the least, prima facie evidence that the LEA made representations to my office knowing them to be false or misleading.

4.96 In May 2012, I requested the head of the LEA to submit a full investigation report to me on the mix-up, the incident regarding the return of camera 006 on 8 January 2011, the inquiry that had been conducted by the Section or the Sub-administrator, the reason why false representations were made in the Assistant Head of Department's memos that there was an input problem on 8 January 2011 regarding the return of the device, and any disciplinary actions proposed to be taken against the officers concerned.

4.97 By a letter of 7 June 2012 to me, the head of the LEA admitted that there was indeed a mix-up of the two devices. He explained that there was no ulterior motive behind the mix-up, nor was there any deliberate attempt to hide or obscure the incident. He also reassured me that the department had no intention whatsoever to conceal or withhold any information for the purpose of covering up the matter in their replies to my office. On the matters relating to the alleged input problem and whether there were any false representations made by any individual officers, the LEA will conduct a full inquiry.

E. Loss of surveillance device

4.98 An LEA first reported to me in July 2011, followed by an investigation report in December 2011 that a surveillance device and its associated accessories were reported lost after they were withdrawn for a non-ICSO surveillance operation. It was suspected that the subject device might have accidentally fallen off from a vehicle when an officer hurriedly got off the vehicle to provide urgent operational support to other officers. The investigation concluded that the officer concerned should be held accountable for the loss of the subject device and associated accessories. The proposed disciplinary action to be taken against the officer would be for the loss of government properties as a result of his negligence. It was intended that the officer would be given a written admonishment. He would also be required to reimburse the cost of replacement of the lost items. I agreed with the proposed disciplinary award and that the disciplinary action arising from such circumstances did not fall within the ambit of section 49(2)(d)(viii) of the ICSO.

F. Discrepancies regarding the time of making retrospective entries of the issue of devices for non-ICSO purposes in the relevant register of the DMS, the manual records and the DMS audit log

4.99 In December 2011, an LEA submitted an incident report on a possible irregularity to me. On a certain day, the DMS was undergoing system maintenance and accordingly manual records were made for the issue and return of devices on that day. After maintenance, retrospective entries were made in the DMS. However, discrepancies were found regarding the input time of making the retrospective entries in the DMS recorded in:

(i) the 'Remarks' column in the device register of DMS,

(ii) the manual records which were made, and

(iii) the DMS audit log.

4.100 The incident report arose from our queries on the contents entered in the 'Remarks' column of the non-ICSO device register, which concerned retrospective inputs into the DMS occasioned by system maintenance as regards certain entries (involving several surveillance devices) on a certain day. We raised queries as to who made the retrospective inputs and who entered the remarks, the procedure of such retrospective inputting and whether there is any control mechanism in place to guard against abuse and ensure that the information input in such retrospective entries is true and correct. In the course of preparing a reply to these queries, the LEA retrieved the relevant manual records and DMS audit log for examination.

4.101 As a result of the examination of the relevant register of the DMS, the DMS audit log and the manual records, the LEA discovered that a number of discrepancies existed in the relevant documentation regarding the time of making retrospective input on three of the devices. The time differed for more than two hours, as set out below:

Surveillance devices	'Retrospective input' time as shown in		
	the 'Remarks' column of the register of DMS	manual records	DMS audit log
Device (a)	1613 hours	1610 hours	1829 hours
Device (b)	1614 hours	1610 hours	1833 hours
Device (c)	1615 hours	1610 hours	1831 hours

4.102 The LEA decided to conduct an investigation into the said discrepancies. In March 2012, it submitted an investigation report to me. I have not yet completed the review on this case.

G. Missing records on the issue of 69 surveillance devices for non-ICSO purposes

4.103 In mid December 2011 when submitting the regular monthly return of device registers consisting of five folders with a total of about 1,800 pages to me, a department briefly reported an incident where 69 surveillance devices were withdrawn from a device store for non-ICSO purpose through the DMS but when these devices were returned later that day, the return was rejected by the DMS because no corresponding issue records could be retrieved from the system. The device issuing officer suspected that he might have failed to press the 'Confirm' button to

confirm the issue of the surveillance devices. The department concluded that there was no ill intent on the officers concerned and no foul play was detected.

4.104 By a letter of 23 December 2011, I raised queries on this case and requested the head of department to cause an investigation to be conducted and to submit a full investigation report to me. I pointed out that it was unhelpful that I was not provided with a set of the relevant pages of the device registers which compelled me to sort out the entries regarding the 69 items that were scattered among 300 odd pages in the relevant folder. I also reminded the department that in future it should report any incident or irregularity by a separate memo or letter instead of lumping it with regular returns.

4.105 In February 2012, the department submitted a full investigation report to me. However, this full report did not answer my query as to how one officer (the withdrawing officer) was able to collect all the 69 surveillance devices concerned single-handedly when he withdrew them. By a letter of 13 March 2012, among other things, I asked the head of department to let me have an answer to this question with minute details, together with an answer as to how the officer was able later to collect and return the 69 devices to the device store single-handedly. The reply came on 23 March 2012 but the answer was without any minute detail as I requested. I was constrained to write again on 15 May 2012 to say that I was still unable to build up a full picture of what happened on the day when the incident occurred and reiterated my request for minute details. It was only by a letter of 1 June 2012 from the head of department that I could

make out what exactly happened. It was only until then that I was satisfied that nothing untoward took place.

My review and findings

4.106 The incident arose out of the failure on the part of the device issuing officer to press the 'Confirm' button to complete the issue of the 69 surveillance devices when they were issued. This fact was borne out by the audit log of the DMS, which was retrieved during investigation but not available to the officers at the time of the event. Moreover, the device issuing officer reported the matter to his team leader and a senior officer of another team (who was responsible for the management and operation of the device store) upon the failure to making entries of the return of the devices into the DMS. I therefore accept the department's conclusion that there was no ill intent on the part of the officers concerned and no foul play was detected.

4.107 In response to the device issuing officer's inability to record the return of the 69 devices in the DMS, the senior officer instructed the device issuing officer to make retrospective entries in the 'remarks' column of the device register in the DMS to explain the situation that it was probably due to the failure to press the 'Confirm' button for issue, which was done. The senior officer also decided that there was no need to report the incident separately to the department's Registry for ICSO matters ('ICSO Registry') because copies of the device registers with the retrospective entries, which were self-explanatory, would duly be sent to the ICSO Registry for compilation of the monthly return for me. I queried the propriety of this decision not to report the matter to the ICSO Registry straightaway. The retrospective entries were made because the senior

officer thought that the device issuing officer's failure to press the 'Confirm' button was a probable cause. The device issuing officer himself only suspected that he might have failed to press the 'Confirm' button and even he could not be definite about it. Moreover, no DMS audit log was available at the time to put the matter beyond doubt. The senior officer's decision not to report the matter immediately to the ICSO Registry was also based on his believed probable cause. I consider that such belief of his, albeit formed after making some inquiries, did not justify his or excuse him from not reporting at once such an important incident to the ICSO Registry. How about if the believed probable cause was wrong? How about if there was some defect with the DMS or there was a bug that needed to be fixed without delay? A speedy reaction was necessary in the circumstances. I informed the department accordingly.

4.108 The department proposed to give a **verbal advice** (disciplinary in nature) to each of the following officers:

(a) the device issuing officer for the need to exercise due care and vigilance when operating the DMS;

(b) the senior officer for the need to report any incident of an unusual nature to his supervisory officers and to consult his supervisory officers and/or the ICSO Registry whenever in doubt; and

(c) the team leader for the need to report any unusual incident to his own commanding officer instead of leaving it to the senior officer who was merely a more experienced colleague.

I considered the proposed disciplinary actions appropriate.

Advice on importance of keeping track of devices

4.109 In view of the frequent errors and mistakes relating to the handling of surveillance devices and documentation in some of the LEAs, I wrote a short paper entitled 'Important Remarks and Advice on Keeping Track of Devices' for the LEAs concerned so as to enhance their officers' understanding of the object of the system of recording and its requirements. I reiterated the importance of maintaining clear, contemporaneous and accurate records on the movement and use of ICSO and non-ICSO devices (ie capable devices), for avoiding and exposing any misuse or unauthorized use of surveillance devices. I also requested the LEAs concerned to convey my remarks and advice to all senior officers who should in turn explain to all junior officers of the same and impress upon them of their responsibilities under the Ordinance and the need for strict compliance with the device control requirements designed and determined by me.

[This page is left blank.]

CHAPTER 5

LEGAL PROFESSIONAL PRIVILEGE AND JOURNALISTIC MATERIAL

Obligations of the LEAs regarding LPP cases

5.1 During this report period, there was a surge of the number of reports of cases involving information that might be subject to legal professional privilege ('LPP').

5.2 Paragraph 120 of the Code of Practice ('COP 120') provides that the LEA concerned should notify me of operations that are likely to involve LPP information or where LPP information has been obtained inadvertently. Thus, not only cases where LPP information has been obtained, but also cases in which it may be obtained and those that are assessed to have the likelihood of obtaining it will have to be reported to me.

5.3 Regarding each of such cases, there are procedures required to be followed at different stages of the operation. When making an application for a prescribed authorization, the LEA applicant is obligated to state his assessment of LPP likelihood in his affidavit or statement in writing supporting his application (as required by paragraph (b)(ix) of Part 1, paragraph (b)(x) of Part 2 and paragraph (b)(x) of Part 3 of Schedule 3 to the Ordinance). After such assessment, whenever there is anything that transpires which may affect the assessment, which is considered as a material change of circumstances, the LEA has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report. In the

REP-11 report, the LEA has to provide the details of all relevant circumstances, including as to why the assessment has altered, how it has come about to consider that LPP information has been obtained or may likely be obtained, the details of the likely LPP information that has been obtained, and what steps its officers have taken or propose to take to prevent infringement of the right to communications that are protected by LPP. In order to apprise myself promptly with timely information on this important matter, I directed the LEAs to give me a similar notification of each of such occurrences as if under COP 120. This resulted in the increase of the number of LPP reports from them.

5.4 The panel judges continued to be very cautious in dealing with cases that might possibly involve LPP information being obtained by an LEA. When it was assessed that there was such likelihood and if they granted the authorization or allowed it to continue, they would impose additional conditions. These additional conditions obliged the LEA to report back when the likelihood was heightened or when there was any material change of circumstances so that the panel judge would reconsider the matter in the new light. These additional conditions were stringent and effective in safeguarding this important right of individuals to confidential legal advice.

My requirements to the LEAs

5.5 To enable the LEAs to know what they should do and what they should preserve to facilitate my review of LPP cases, I formally put forth a set of reporting and preservation requirements to them in May 2010. These requirements can be found in paragraphs 5.5 to 5.18 of my Annual

Report 2010. Some of these requirements are set out here and I shall refer to them when describing some of the LPP cases or irregularity cases in this chapter and Chapter 7.

5.6 In essence, when an LEA encounters a call with LPP likelihood, heightened LPP likelihood or LPP information, the LEA is required to submit an REP-11 report to the panel judge on this call. I shall refer to this call as a 'Reported LPP Call' irrespective of whether LPP information has indeed been obtained. I require the reporting officer of the REP-11 report to disclose in the REP-11 report the number of times the Reported LPP Call has been listened or re-listened to, the respective date and time and duration of each such listening or re-listening and the identity of each of the listeners. In addition, the reporting officer should state in the REP-11 report whether, other than the Reported LPP Call, there are any calls between the telephone number involved in the Reported LPP Call and the subject's telephone number under interception, irrespective of whether such calls are intercepted before or after the Reported LPP Call. If there are such 'other calls', the reporting officer is also required to state whether they have been listened to and if so, for how long and the identity of the listener(s). In order to provide such information, the reporting officer should consult the relevant audit trail report ('ATR') that records accesses to the intercepted calls together with the corresponding call data when preparing the REP-11 report.

Journalistic material cases

5.7 There is no provision in the Ordinance requiring an LEA to report to the panel judge or me when obtaining information which may be

the contents of any journalistic material ('JM') through interception or covert surveillance. The Ordinance only requires an applicant to set out, at the time of applying for a prescribed authorization, the likelihood that any information which may be the contents of any JM will be obtained by carrying out the interception or covert surveillance sought to be authorized (provided in the same paragraph (b)(ix) of Part 1, paragraph (b)(x) of Part 2 and paragraph (b)(x) of Part 3 of Schedule 3 to the Ordinance referred to above concerning LPP). Save for these provisions, there is no reporting requirement at all in the Ordinance on JM cases.

5.8 Prior to 28 November 2011, there was also no provision in the Code of Practice requiring an LEA to report JM cases to me. However, I requested the LEAs that similar arrangements for LPP cases should also be made in respect of cases where JM is involved or likely to be involved. I made a similar recommendation in Chapter 9 of my Annual Report 2010. Eventually, paragraph 120 of the Code was amended on 28 November 2011 to formalize the requirement that I should be notified of cases where information which may be the contents of any JM has been obtained or will likely be obtained through interception or covert surveillance operations.

5.9 In 2011, I received two reports on obtaining of JM through interception. They are described in paragraphs 5.85 to 5.98 below.

LPP reports received in 2011

5.10 Reports on LPP involvement were made to me generally under three sets of circumstances. Where at the time of the application it was assessed that the operation sought to be authorized would likely obtain information which might be subject to LPP, a report pursuant to COP 120

('a COP 120 report') would be made to me. Similarly, where the assessment of likely LPP involvement was made at the application for renewal of a prescribed authorization, a COP 120 report was called for. Moreover, wherever there was a change of circumstances relating to LPP involvement, an REP-11 report would be made to the panel judge or a similar report would be made to the authorizing officer, which also called for a COP 120 report to be made to me. It can be seen that therefore on not infrequent occasions, even in a single case relating to one subject of an investigation, a number of COP 120 reports on LPP involvement might be made to me from time to time by the LEA carrying out the investigation. Since all the reports related to one single subject, it does not seem reasonable to assign a number to each of these COP 120 reports for counting them as that many LPP cases, because the figures might lead one into thinking that they concern more than one LPP case. I consider it logical and proper to use a subject as the basis for counting each LPP case. For the purpose of this annual report, therefore, the following counting system is adopted, namely, insofar as there is more than one COP 120 report relating to the same subject, all the reports are counted as only one LPP case. If, for instance, another subject, albeit under the same investigation, was involved, all the COP 120 reports relating to that other subject are counted as another distinct LPP case. Applying this counting system, in this report period, there were altogether 101 COP 120 reports made to me that amounted to only 37 LPP cases.

5.11 Among those 37 LPP cases, there were 33 cases with the subsequent submission of REP-11 report and/or discontinuance report to the panel judges on change of LPP risk.

5.12 Those 33 cases included:

(a) two cases of obtaining information subject to LPP where the interception operation was discontinued by the LEA of its own volition (described as LPP Case 2 and LPP Case 3 below);

(b) one case which the LEA classified as heightened likelihood of obtaining LPP information and the panel judge allowed the prescribed authorization to continue with additional conditions imposed. Upon review, I considered that the case should be classified as 'LPP information having been obtained' (described as LPP Case 1 below);

(c) 19 cases of heightened likelihood of obtaining LPP information where the panel judges allowed the prescribed authorizations to continue subject to additional conditions imposed to guard against the risk of obtaining LPP information; and

(d) 11 cases of heightened likelihood of obtaining LPP information where the LEAs discontinued the interception operations of their own accord.

5.13 In my review of these cases, I checked all the relevant documents and records including the prescribed authorization, the REP-11 report(s), the determination by the panel judge, the listener's notes, the written summaries, the call data, the ATRs, etc. Apart from focussing on checking the veracity of what was reported in the REP-11 report about the call involving LPP or LPP likelihood (ie the Reported LPP Call), I also checked whether the LEA had complied with the additional conditions

imposed by the panel judge, whether the LPP information or likely LPP information had been screened out from the written summaries passed on to investigators, whether there were calls between the same telephone numbers preceding the Reported LPP Call that should have been but had not been reported to the panel judge, and whether there was any listening or re-listening to the intercept product after the discontinuance or revocation of the prescribed authorization.

5.14 In this connection, I wish to highlight that there is a serious limitation in the performance of my review function. As mentioned in paragraphs 5.20 to 5.25 of my Annual Report 2008, my power to listen to intercept products was doubted after the submission of my Annual Report 2007 to the Chief Executive in June 2008. The fact has been that there is no express provision in the Ordinance empowering me or my staff to listen to intercept products. In view of this and in order not to be perceived as acting above the law, since then and up to now, when I reviewed LPP (and JM) cases, I did not listen to the recording of intercept product. I will maintain the same position pending a decision by the Administration on whether I should have such a power and if so, an amendment to the Ordinance to that effect. A further discussion of this matter can be found in Chapter 9 of this annual report.

5.15 Since I had not listened to the recording of the intercept product in my review of LPP cases in 2011, no finding could be made as to the veracity of the gist of the conversation in the Reported LPP Call as stated in the REP-11 report. Similarly, no finding could be made as to whether the calls preceding the Reported LPP Call (notably the 'other calls' referred to in paragraph 5.6 above) also had LPP information or likely LPP

information or increased LPP likelihood that ought to have been reported to the panel judge in the first instance, or whether there were any communications subject to LPP other than those reported.

Outstanding LPP cases of 2010

5.16 In 2010, there were four LPP cases which were found to have breached the additional conditions imposed by the panel judges in the prescribed authorizations. They were LPP Cases 6, 7, 8 and 9 in Chapter 5 of my Annual Report 2010. I had completed the review of the non-compliance in these four cases in 2011. Details of my review and findings can be found in Outstanding Case (i), Outstanding Case (ii), Report 3 and Report 1 respectively in Chapter 7 of this annual report.

My review of LPP cases of 2011

5.17 In my description of the cases below, I shall start first with cases where LPP information had been obtained (ie LPP Cases 1 to 3 in chronological order), followed by others which only involved heightened likelihood of obtaining LPP information.

LPP Case 1

5.18 An LEA made a COP 120 report to me on an interception with heightened likelihood of obtaining LPP information. Upon review of the case, I was of the view that LPP information had been obtained and that the case had not been handled properly.

Facts of the case

5.19 At the time of the issue of the prescribed authorization, it was not envisaged that there would be likelihood of obtaining LPP information through interception. Hence, no additional LPP conditions were imposed in the prescribed authorization. Interception then started. One day, a junior listener listened to a call ('Call 1') which revealed that the Subject would approach a Mr Y of a solicitors' firm ('Mr Y') regarding a date of appearance in a court case of another person X. In the conversation, the Subject requested the receiver to provide him with the telephone number of Mr Y and the receiver did so. The junior listener then noticed that a subsequent call ('Call 2') was made by the Subject to the telephone number of Mr Y. The junior listener refrained from listening to Call 2 but reported the matter to her supervisor, a female Senior Listening Officer, who in turn reported it to a Chief Listening Officer. Judging from the contents of Call 1, the Chief Listening Officer considered that Call 2 was likely made for clarification of a pending court date. He instructed the Senior Listening Officer to listen to Call 2 so as to clarify if it really contained LPP information.

5.20 The Senior Listening Officer then listened to both Call 1 and Call 2. After listening, she briefed the Chief Listening Officer of the content of Call 2 which was on matters relating to the pending court appearance. The Chief Listening Officer considered that the call did not contain any LPP information. Nevertheless, in view of the heightened likelihood of obtaining LPP information, the Chief Listening Officer decided that an REP-11 report on the matter should be submitted to the panel judge. After considering the REP-11 report, the panel judge

allowed the prescribed authorization to continue with additional conditions imposed. The LEA then notified me of this case under COP 120.

My concerns and advice to the LEA

5.21 Shortly after receipt of the COP 120 report from the LEA, I wrote to the head of the LEA expressing my serious concern over two matters, namely, (i) the information received from Call 2 was considered by the LEA as not amounting to LPP information, and (ii) the Senior Listening Officer was tasked to listen to Call 2 for the purpose of discerning whether it contained LPP information.

5.22 Regarding (i), I drew the attention of the head of the LEA to a part of the definition of LPP as stated in the guidelines for listeners issued by the LEA.

5.23 According to the tenor of the two calls as stated in the REP-11 report, the Subject was either the client or the representative of the client (ie the other person X) in his conversation with Mr Y in Call 2, asking Mr Y questions related to the court appearance scheduled on a future date. The reference to the court appearance indicated that the other person X was involved in a criminal case (legal proceedings). Upon the Subject's inquiry, Mr Y advised the Subject on the possible effect of that pending court appearance. The conversation in Call 2 was therefore clearly a piece of LPP information in that it was a communication in connection with legal proceedings.

5.24 Regarding (ii), I considered that it was wrong to task the Senior Listening Officer with listening to Call 2 so as to clarify if the call really contained LPP information. With reference to the additional LPP

conditions imposed by the panel judge, the purpose of the condition that limits the access to intercept products to be undertaken only by officers at specified rank (ie senior listeners) is to avoid the risk of obtaining LPP information since listeners at a more senior rank should have a better understanding than their junior colleagues of what may constitute LPP information and more readily appreciate the risk of obtaining LPP information. The limitation of access to intercept products to senior listeners is not to let them discern whether indeed a piece of conversation involves LPP information, but rather to rely on them to avoid obtaining LPP information.

5.25 I requested the head of the LEA to provide an advice as soon as possible to all its senior listening officers and those of higher ranks to heed what I stated on these two matters in the above paragraphs.

5.26 Two days later, the LEA discontinued the interception operation on the ground that it was not productive. The prescribed authorization was duly revoked by the panel judge.

My inspection visit to the LEA

5.27 At a subsequent inspection visit, I examined the application documents, the REP-11 report, the discontinuance report and the transcripts in respect of the prescribed authorization. It was found that what was stated in the transcripts in respect of Call 1 and Call 2 tallied with the gist of the conversations as stated in the REP-11 report concerned.

5.28 It was noted that the Senior Listening Officer listened to Call 2 under instruction of the Chief Listening Officer. She did not put on hold monitoring once LPP information surfaced but continued till the end of the

call. Judging from the gist of conversation as stated in the REP-11 report, I considered that the Senior Listening Officer should have put on hold the monitoring when the Subject started to ask the receiver specific information relating to the pending court appearance. Did the Chief Listening Officer expressly instruct her to listen to Call 2 in its entirety? I requested the LEA to conduct an investigation into the matter and inform me of the outcome, which the LEA duly did.

The LEA's investigation report

5.29 According to the LEA's investigation report, in view of the contents of Call 1, both the Senior Listening Officer and the Chief Listening Officer suspected that Call 2 was likely made for clarification of the date of the pending court appearance. As they regarded such information as 'open data' readily available from the open record of the Judiciary, both officers considered that it would not be LPP information no matter whether the receiver of Call 2 was a professional legal adviser. In order to assess if the likelihood of obtaining LPP information had been heightened, the Chief Listening Officer instructed the Senior Listening Officer to listen to Call 2. When giving the instructions, the Chief Listening Officer reminded the Senior Listening Officer to put on hold monitoring immediately should any LPP information surface.

5.30 The Senior Listening Officer considered that the contents of Call 2 did not amount to any LPP information not only because such contents only touched upon 'open data', but also because the identity of the receiver of the call, who had not been addressed throughout the conversation, could not be ascertained. It remained unknown whether the receiver was really a representative of a solicitors' firm. After listening to

Call 2, she briefed the Chief Listening Officer on the contents of the call. The Chief Listening Officer also considered that no LPP information had been obtained.

5.31 The LEA management considered that both officers had made a less than accurate assessment in respect of the likelihood of obtaining LPP information from Call 2. In hindsight, the LEA considered that, for a more prudent approach, it was not advisable to listen to Call 2 from the outset.

5.32 Judging from the definition of LPP as contained in the above quoted guidelines for listeners and also my advice given in the inspection visit, the LEA considered that Call 2 contained 'likely' LPP information and the Senior Listening Officer should have put on hold monitoring, as a more prudent measure, at the early part of the call.

5.33 The LEA considered that knowing the receiver being known as a representative of a solicitors' firm and the mentioning of a pending court date in Call 1, the Chief Listening Officer should have made a reasonable deduction that Call 2 was likely related to LPP matters. He should have taken a more prudent approach in assessing the need to listen to Call 2. With hindsight, the Chief Listening Officer might still report what had been divulged in Call 1 to the panel judge without listening to Call 2 in full. He should be held responsible for making a less than accurate assessment of the nature of Call 2 when he instructed the Senior Listening Officer to listen to Call 2. This resulted in the obtainment of 'likely' LPP information. He also failed to consider that Call 2 contained 'likely' LPP information.

5.34 In the opinion of the LEA, the Senior Listening Officer failed to appreciate the surfacing of 'likely' LPP information in Call 2 and hence failed to put on hold monitoring at an appropriate timing. She should be held responsible for making a less than accurate assessment for listening to Call 2 and the subsequent obtainment of 'likely' LPP information for the call.

5.35 The LEA was of the view that the making of the less than accurate assessment by the two officers was not out of any ulterior motive but due to an honest judgment made out of a knowledge gap on the definition of LPP information by the two officers.

My findings

5.36 I had conducted a review including examination of the relevant documents. Call 2 was the only intercept product between the Subject and the telephone number of Mr Y. It was listened to by the Senior Listening Officer in its entirety and no other listeners listened to this call.

5.37 I was in agreement with the conclusions and most of the opinions expressed in the LEA's investigation report, except the LEA management's view that Call 2 only contained 'likely' LPP information. I maintained my view that Call 2 contained LPP information after the Subject had started to ask the receiver specific information about the pending court appearance, and the Senior Listening Officer should have put on hold monitoring. The reason is that when the specific information was given, the connection between the conversation and the court proceedings should properly be considered as being established and thus whatever Mr Y

said in response to the question would qualify as privileged information between a legal adviser and a client or representative of a client.

5.38 The bases for the Senior Listening Officer and the Chief Listening Officer that no LPP information was obtained from Call 2, namely, (i) that the conversation only involved the court appearance and other general case information and (ii) that the information amounted to 'open data' rather than LPP information, were entirely groundless. A legal adviser might well advise his client on a lot of things, including a court appearance and other general case information. Moreover, he might well advise his client by giving him 'open data' or 'matters of general knowledge'. Both officers were wrong to consider that no LPP information had been obtained from the Senior Listening Officer's listening to the entirety of Call 2.

5.39 The Senior Listening Officer relied on the fact that the identity of the receiver of Call 2 could not be ascertained to say that it remained unknown whether the receiver was really a representative of a solicitors' firm. She considered that it 'could not be ruled out' that the name and title of the receiver as mentioned in Call 1 might not represent that he was truly a legal adviser. Such reliance on her part was to say the least dangerous in face of the facts that the telephone number of Mr Y was revealed in Call 1, that that was the telephone number called by the Subject in Call 2, and that it was disclosed in Call 1 that the Subject would like to seek information about a court appearance from Mr Y. I also considered that the Senior Listening Officer had adopted a wrong approach towards dealing with possible LPP information. The proper and appropriate approach is to avoid obtaining LPP information. It is to be noted that the

LEAs and the panel judges are operating on a one-sided situation where the subject has never had and will never have a say on the LPP aspect (or indeed on any matter), which accentuates the need for LPP protection. Even in an *inter partes* case when a party refuses to disclose the content of a document on the ground of LPP, only the judge and not the opposite party should be allowed to examine the content for deciding if the LPP claim is justified. The proper approach, adopting the 'could not be ruled out' formula from the Senior Listening Officer, is that when it could not be ruled out that LPP information might be obtained, and not when it could not be ruled out that LPP information would certainly be obtained, monitoring should be put on hold.

5.40 The wrong approach or attitude on the part of the Senior Listening Officer should be denounced by the LEA as being improper or imprudent. I **recommended** that further and better training on the meaning of LPP information and on the proper and prudent attitude to take in handling possible LPP-related matters should be provided to all officers dealing with ICSO-related matters.

5.41 On the other hand, the conduct and approach of the junior listener were proper, cautious and prudent and should be an example for all other listeners tasked with listening duties on intercept products.

5.42 As I had not listened to the audio recording of the intercept products archived in the LEA, no finding could be made as to:

(a) the veracity of the gist of the conversations of Call 1 and Call 2 as stated in the REP-11 report; and

(b) whether apart from Call 2 there were any communications subject to LPP in the calls that had been listened to by the LEA officers.

Disciplinary actions

5.43 After receipt of my findings, the LEA proposed to give a **verbal advice** (disciplinary in nature) to the Chief Listening Officer and the Senior Listening Officer to take more prudent approach in handling ICSO-related duties especially when LPP materials are likely to be involved. I considered the disciplinary actions appropriate.

5.44 The LEA had also followed up my recommendation by providing further and better training to its officers dealing with ICSO-related duties on the meaning of LPP information and the proper procedures in handling situations involving possible LPP information.

LPP Case 2

5.45 An LEA reported to me, pursuant to COP 120, a case of obtaining of LPP information.

5.46 At the time of the grant of the prescribed authorization for interception, it was not assessed that there would be LPP likelihood. As the interception progressed, one day, a listener listened to a call made from phone number (i) to the Subject's telephone number under interception. The caller conveyed to the Subject an advice given by a lawyer ('the LPP call'). Considering that LPP information had been obtained, the listener reported the matter up the chain of command. In view of the obtainment of LPP information and the fact that the interception operation was not

productive, the LEA decided to discontinue the operation under section 57 of the Ordinance. A discontinuance report citing the above two grounds of discontinuance was submitted to the panel judge who duly revoked the prescribed authorization. About a week later, ie on a day at end of July 2011, the LEA notified me of this incident by letter under COP 120.

5.47 Normally, when an LEA encountered LPP information in the course of interception, it would submit an REP-11 report on material change of circumstances, reporting the obtaining of LPP information to the panel judge. In the REP-11 report, the LEA is required to state whether apart from the LPP call being reported to the panel judge, there were any other calls between the telephone number involved in the LPP call and the Subject's telephone number under interception and if so, whether these other calls had been listened to by any of its officers and whether LPP information was involved. If the LEA decides not to continue with the operation, the REP-11 report would be accompanied by a discontinuance report.

5.48 In my review of the present case, I observed that no REP-11 report was submitted to the panel judge and that the discontinuance report, though stating that LPP information had been obtained, did not mention whether other than the LPP call, there were any calls between the Subject's telephone number and phone number (i). This was contrary to the practice in two previous similar cases of this LEA where both an REP-11 report and a discontinuance report were submitted.

5.49 I also noted that one of the grounds of discontinuance was that the interception operation was not productive. As the interception had been conducted for about one month, why did the LEA not discontinue it

earlier if it had not been productive? Since what time had the interception become non-productive?

5.50 On the day following my receipt of the COP 120 report from the LEA, I wrote to the head of the LEA requesting a reply to my observations and questions in the two preceding paragraphs. I also sought information on the number of 'other calls' between the Subject's telephone number and phone number (i) involved in the LPP call and whether these 'other calls' contained information subject to LPP.

No REP-11 report

5.51 By a letter of 20 September 2011 from the head of the LEA ('the September letter'), the LEA replied that it would henceforth adhere to my requirement that where the discontinuance of an operation is related to an LPP call (or a call with such likelihood) having been listened to, both an REP-11 report and a discontinuance report would be submitted to the panel judge, and that the existence or otherwise of 'other calls' would be reported in the REP-11 report.

Operation not being productive

5.52 In the September letter, the head of the LEA explained that in the present case, the surfacing of the LPP call had caused the officer-in-charge to review the operation. The officer-in-charge was of the view that the intelligence so far obtained through interception was not proportional to the potential risk of inadvertently obtaining LPP information. Hence, the operation was considered not productive enough to justify its continuance.

Number of 'other calls'

5.53 In the September letter, the head of the LEA stated that the transcript and available records of this case had been examined and it was revealed that there were eight 'other calls' between the subject's telephone number and phone number (i). These eight 'other calls' had previously been listened to by the LEA listeners. None of them involved LPP information.

5.54 At the meeting of my inspection visit to the LEA in October 2011 ('October inspection visit') to check the transcripts in this case, a responsible officer of the LEA provided details of the eight 'other calls' to us. In response to our enquiry as to what the 'available records' stated in the September letter were, the LEA officer clarified that the 'available records' that had been examined included data that had been archived ('the archived data'). This clarification was duly recorded in the notes of meeting of the October inspection visit, which were drafted by the LEA and forwarded to us on 31 October 2011.

5.55 However, on 1 November 2011, when we checked the archived data for the same period, we found that there were 26 'other calls' between the subject's telephone number and phone number (i) prior to the LPP call, instead of eight 'other calls' as claimed by the LEA. Our further checking against the ATR indicated that all these 26 'other calls' had been listened to by the LEA listeners prior to the LPP call.

5.56 By a letter of 4 November 2011, I requested the head of the LEA to explain the discrepancy regarding the number of 'other calls' (eight

calls as reported by the LEA versus 26 calls as revealed from our checking of the archived data).

5.57 By a letter of 18 November 2011, the head of the LEA clarified that the eight 'other calls' stated in his September letter were revealed by his officers examining the transcripts and that the 'available records' were in fact the ATR. His officers did not examine the data that were still available in the computer server because by the time the officers conducted the examination in response to my inquiry, the majority of the data of the operation had automatically been erased from the computer server. Considering this fact and the fact that access to the data had been suspended after the operation was discontinued, the examining officers had not attempted to check the remaining data in the computer server. Nor had they checked those data that had been preserved and archived because they could not have access to the archived data unless with my consent. As regards the explanation given by the responsible officer at the meeting of my October inspection visit, the head of the LEA stated that it was the intention of the responsible officer to inform me that the data in the period concerned were archived and would be available for my examination. The responsible officer did not mean that the archived data had been examined as part of the 'available records' mentioned in the September letter.

5.58 In the said letter of 18 November 2011, the head of the LEA stated that only the eight 'other calls' were recorded in the transcript. As regards the additional 18 other calls spotted by me which had been listened to by the LEA listeners before listening to the LPP call, there was no corresponding record in respect of these calls made in the transcript. The

respective listeners could not remember what happened exactly but opined that most likely they had considered the contents of those additional 18 other calls not relevant to the investigation and therefore decided not to make any entry in the transcript.

5.59 In December 2011, I wrote to the head of the LEA stating that the notes of meeting of the October inspection visit were drafted by his officers. These notes stated that the 'available records' which had been examined included data that had been archived. If what was stated in his current letter of 18 November 2011 regarding the 'available records' was true, it was necessary for the LEA to amend the notes of meeting of the inspection visit to reflect this. Two days later, the LEA added a post-meeting note to reflect the clarification on the 'available records' as stated in the head of the LEA's letter of 18 November 2011. I also added a post-meeting note to state clearly that '*the original version was as uttered by the LEA in the meeting, but the LEA now realizes it is wrong*'.

5.60 The head of the LEA concluded that this was a case of misunderstanding arising from ambiguity in communication. I took a different view. It was a misstatement made by the responsible officer at the inspection meeting carelessly and without first verifying the truth of its content. The matter was unsatisfactory and had wasted the time and effort of all concerned. In response, the head of the LEA agreed that the matter was unsatisfactory and stated that the officer concerned had been reminded of the importance of verifying the accuracy of information before passing the same to me or my office.

5.61 I considered that the handling of this case by the LEA was unsatisfactory. First of all, there was no REP-11 report to the panel judge

at the time of submission of the discontinuance report to the panel judge although in two previous similar cases, both an REP-11 report and a discontinuance report were submitted. Second, there was no genuine and conscientious effort to check the number of 'other calls'. The LEA provided a figure of eight which was neither here nor there. The examining officers did not attempt to check the data that were still available in their computer. Nor did they attempt to seek my consent to access the archived data in order to provide a correct figure. When providing the figure of eight in the September letter, there was no qualification that it was but a tentative figure or one still subject to verification. Third, when we asked what available records had been examined to come up with the figure of eight 'other calls', we were misled to believe that all the available records including the archived data had been examined.

5.62 As I had not listened to the audio recording of the intercept products archived in the LEA, no finding could be made as to:

(a) the veracity of the gist of the conversation of the LPP call as recorded in the discontinuance report;

(b) whether the contents of the 26 'other calls' that had been listened to by the LEA's listeners contained LPP information; and

(c) whether other than the above, there were any communications subject to LPP in the intercept products that had been listened to by the LEA officers.

5.63 In connection with this LPP case (and LPP Case 4 below), I made the following recommendations:

(a) In addition to the discontinuance report under section 57 of the Ordinance, an REP-11 report should have been submitted to the panel judge reporting the obtainment of LPP information. I **recommended** that both REP-11 report and discontinuance report should be submitted to the panel judge in cases where the discontinuance of operation was related to the listening to LPP calls or suspected LPP calls or related to heightened LPP likelihood.

(b) The ATR attached to the notification letter to me under COP 120 covered the period only up to the date of revocation of the prescribed authorization. This was not adequate. I **recommended** that when reporting LPP cases to me under COP 120, the ATR attached to the notification letter should cover the period up to the date of notification or up to certain weeks after disconnection, as applicable.

5.64 My recommendations were accepted and implemented by the LEA.

5.65 Regarding the unsatisfactory handling of this case as stated in paragraph 5.61 above, in June 2012 I have written to the head of the LEA to seek his view as to what actions he proposes to take against the officers concerned for the improper handling of this case. I am awaiting his reply.

LPP Case 3

5.66 In this case, at the time of the grant of the prescribed authorization for interception, it was not assessed that there would be LPP likelihood. One day, a listener listened to a call and found that there was likelihood that LPP information might be obtained. The LEA reported the call to the panel judge who allowed the prescribed authorization to continue but with additional conditions imposed to guard against the risk of obtaining LPP information. A few days later, another call was intercepted and listened to by another listener. After listening to a part of the call, the listener formed the view that LPP information was obtained. The matter was reported through the chain of command to a senior officer who decided to discontinue the interception operation in view of the obtainment of LPP information and the fact that the value of continuation of the operation was considered not proportional to the risk or drawback of obtaining further LPP information. The LEA reported the incident of obtaining of LPP information to the panel judge by way of an REP-11 report and a discontinuance report. The panel judge duly revoked the prescribed authorization.

5.67 The LEA reported both occasions to me under COP 120.

5.68 I had conducted a review and no irregularity was found. However, as I had not listened to the audio recording of the intercept products, no finding could be made as to:

(a) the veracity of the gist of the conversation of the relevant calls as stated in the REP-11 reports; and

(b) whether there were any communications subject to LPP in the intercept products that had been listened to by the LEA officers.

LPP Case 4

5.69 This is one of the cases categorized under paragraph 5.12(d) above. The prescribed authorization for interception was originally assessed not to have LPP likelihood. Hence, no additional conditions were imposed in the prescribed authorization. However, within a week after the start of the interception, there were three occasions where likelihood of obtaining LPP information was heightened. On the first two occasions, the panel judge allowed the prescribed authorization to continue but with additional LPP conditions imposed. On the third occasion, the LEA discontinued the interception operation in view of the further heightened likelihood of obtaining LPP information and the fact that the interception operation was not productive in the past several days. The prescribed authorization was duly revoked by the panel judge.

5.70 The LEA reported each of the three occasions to me pursuant to COP 120. According to the LEA, no LPP information had been obtained since inception of the interception.

The first occasion

5.71 Regarding the LPP call ('LPP Call-1') on the first occasion, I found nothing untoward after conducting a review.

The second occasion

5.72 Regarding the second occasion, the REP-11 report stated that apart from the LPP call ('LPP Call-2') being reported to the panel judge, there were two 'other calls' made between the Subject's telephone number and the telephone number involved in LPP Call-2. However, our checking of the data revealed that there was one additional 'other call' intercepted before LPP Call-2 which was omitted in the REP-11 report, and that this 'other call' had been listened to in part by an LEA listener. I sought explanation from the LEA on the omission of this 'other call' in the REP-11 report.

5.73 The LEA explained that the omission was due to the oversight of the listener who drafted the REP-11 report. When the draft report was submitted to the reporting officer of the REP-11 report for checking the correctness of the contents of the draft report, the reporting officer also failed to detect the omission. Regarding the contents of the omitted call, the listener could no longer recall but believed that the call contained no relevant information and therefore she did not make any entry in the transcript.

5.74 The LEA was of the view that since data would be preserved for my checking, it was unlikely that the officers concerned would conceal the call intentionally. The omission was merely an oversight. The LEA proposed that both officers be given a **verbal advice** (disciplinary in nature) for the need to exercise due care and vigilance in performing ICSO duties. I considered the proposed disciplinary actions appropriate.

The third occasion

5.75 Regarding the third occasion, it is to be noted that additional LPP conditions were in force at the time.

5.76 I examined the discontinuance report and the ATR. It was revealed in the discontinuance report that on this third occasion, after listening to a call between the Subject and a phone number (n) which was subsequently considered to possibly lead to heightened LPP likelihood ('LPP Call-3'), the listener continued to listen to five further calls before she finally reported the matter to the supervisor who eventually decided to discontinue the interception operation. In my view, the listener's act seemed to be non-compliant with the additional conditions imposed by the panel judge.

5.77 LPP Call-3 and the five further calls are listed below:

	Duration of the call	Duration of listening	
LPP Call-3	1027 seconds	Part of the call (21 seconds).	The call was made to phone number (n).
Further Call 1	45 seconds	Part of the call (16 seconds).	
Further Call 2	142 seconds	Part of the call (20 seconds).	The call was made to phone number (n).
Further Call 3	109 seconds	Part of the call (86 seconds).	
Further Call 4	82 seconds	Whole of the call.	
Further Call 5	53 seconds	Whole of the call.	

5.78 We enquired with the LEA on why the listener continued to listen to five further calls after listening to LPP Call-3, including Further Call 2 which was made to the same phone number (n) as LPP Call-3, and why the calls after Further Call 2 were listened to. We also enquired about the contents of Further Call 2.

5.79 The LEA explained that on the day of the incident, the listener was required to clear a number of outstanding intercepted calls. Upon listening to LPP Call-3 for 21 seconds, the listener formed the opinion that it was not related to any criminal activities and decided not to carry on listening to this call. The listener at that particular time had not thought about any heightened likelihood of obtaining LPP information. She then continued to listen to five further calls including Further Call 2. She considered that none of these calls were relevant to the Subject's criminal activities and that there was no likelihood of obtaining LPP information. After she finished listening to the last further call, she thought about what she had heard from LPP Call-3 and Further Call 2 and started to have a feeling that the Subject might contact the lawyer whose name was mentioned in the conversation in LPP Call-3. She therefore considered the need to err on the safe side to put on hold monitoring and report to her supervisor at this stage.

5.80 The LEA further stated that on the day in question, the listener started listening to LPP Call-3 at 1004 hours and finished listening to the last further call at 1013 hours. The LEA considered that it was not unreasonable for the listener to have made such a mental review / deduction in the nine minutes of her listening duty that day. As regards the contents of Further Call 2, the LEA stated that there was no record of

them in the transcript as the listener considered the contents irrelevant and that due to the lapse of time, the listener could no longer recall them.

5.81 As I had not listened to the audio recording of the intercept products archived in the LEA, I was not able to reach a decision on:

(a) whether the listener's explanation for listening to five further calls after listening to LPP Call-3 as described in paragraph 5.79 above should be accepted; or

(b) whether the listener had complied with the additional LPP conditions imposed by the panel judge in the prescribed authorization.

5.82 For the same reason, no finding could be made as to the veracity of the gist of the conversations of the relevant calls as stated in the relevant REP-11 reports and discontinuance report for the first, second and third occasions, and whether there were any communications subject to LPP in the calls listened to by the LEA officers.

5.83 In this case, there was also no submission of an REP-11 report to the panel judge on the third occasion. The LEA only submitted a discontinuance report under section 57 to the panel judge. I made the same recommendation to the LEA as per paragraph 5.63 above.

The other 29 LPP cases

5.84 I also completed the review of the other 29 LPP cases reported to me under COP 120. For five of these cases (involving eight prescribed authorizations), there were a total of 893 instances of non-compliance with

the Revised Additional Conditions imposed by the panel judge in the prescribed authorizations. Please see Report 8 in Chapter 7 of this annual report. As for the remaining 24 LPP cases, I found nothing untoward.

JM reports received in 2011

JM Case 1

5.85 At the time of the grant of the prescribed authorization, it was already assessed that interception of the communications of the Subject might result in obtaining of JM. When granting the prescribed authorization, the panel judge imposed a set of restrictive conditions, differentiating between detection of JM relevant to the investigation and JM not relevant to the investigation, and requiring the LEA to report to the panel judge upon detection of any JM.

5.86 One day, a call between the Subject and a journalist was intercepted. A listener listened to part of the call and reported the matter up the chain of command. After being apprised of the matter, the officer-in-charge of the interception unit considered that no JM had been obtained but instructed a senior listener to re-listen to the call in its entirety in order to assess whether the contents of the remaining part of the call contained any JM and if so, whether the JM would be relevant to the investigation. After listening, the senior listener briefed the officer-in-charge who considered that as the Subject did not furnish any information to the journalist during the call, no JM had been obtained.

5.87 Some time later, another journalist called the Subject. The call was listened to by the senior listener. After being briefed of the

contents of this second call, the officer-in-charge considered that no JM had so far been obtained.

5.88 The following day, the Subject was arrested. A decision was made to discontinue the interception operation. Prior to the submission of the discontinuance report to the panel judge, the LEA noticed that there were articles published in some newspapers referring to the contents of the two calls mentioned above. Having been apprised of the contents of the articles published in the newspapers, the officer-in-charge considered that the contacts between the Subject and the journalists during the two calls might amount to possible JM in view of the fact that the contacts were published in the newspapers. He instructed that an REP-11 report be submitted to the panel judge to report on the matter, together with the discontinuance report. The panel judge first noted the REP-11 report and remarked therein that the authorization was not revoked. The panel judge then noted the discontinuance report and duly revoked the prescribed authorization.

5.89 The LEA notified me of this incident.

5.90 In both the LEA's REP-11 report to the panel judge and the notification to me, the LEA stated that the contacts between the Subject and the journalists during the two calls 'might amount to possible JM'. However, in the relevant weekly report form to me, the LEA classified the case as the one where 'JM has been involved or obtained through interception' while the Panel Judges' Office stated that no JM had been obtained. Upon our enquiry, the Panel Judges' Office pointed out that in the REP-11 report, there was no reference that actual JM had been intercepted and the reporting officer only referred to communications that

'might amount to possible JM'. In view of this, I advised the LEA that it should be mindful of the need for consistency in reporting and ensure no disparity in the assessment it made. If the LEA considered that JM had been obtained, it should be more definite and expressly say so in the REP-11 report instead of saying 'might' or 'possible'.

My review and findings

5.91 Pending revision of the Ordinance regarding the legitimacy or propriety of my listening to the products derived from telecommunications interception, I had not listened to the intercept products in this case. My review was confined to the examination of documents. I found nothing untoward.

5.92 However, as I had not listened to the intercept products, no finding could be made as to:

(a) the veracity of the contents of the two calls as stated in the REP-11 report; and

(b) whether, apart from the above two calls, there were any other communications 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.

5.93 Although there were inconsistencies in the reporting and assessment of this JM case by the LEA in various documents as mentioned above, based on the contents of the two calls and the subsequent publication in the newspapers of the contacts between the Subject and the journalists via these two calls, as reported in the REP-11 report, I

considered that JM had been obtained through interception pursuant to the prescribed authorization.

JM Case 2

5.94 This case involved the obtaining of JM through interception pursuant to a prescribed authorization. The LEA sought to continue the interception operation but the panel judge revoked the prescribed authorization resulting in 10 minutes of unauthorized interception after the revocation of the prescribed authorization. The LEA subsequently reported the incident to me by two letters, one on the obtaining of information that was 'likely to involve JM' and the other on the unauthorized interception of 10 minutes.

5.95 At the time of application for and issue of the prescribed authorization, it was not envisaged that the interception operation would likely involve JM. As interception progressed, on a certain day the Subject made a call lasting 45 seconds. After ascertaining that the receiver of the call was the intended receiver, the Subject identified himself and stated the details of an arrest action that had just taken place and the value of seizures. On the second day, an LEA listener listened to the call initially for 29 seconds. Two odd minutes later, she re-listened for another 15 seconds. The listener explained that as the beginning portion of the call was inaudible, she rewound the recording to the beginning to re-listen for 15 seconds. After the re-listening, it became clear to her that the Subject was calling a newspaper and the receiver might be a reporter. The listener then informed her supervisor who caused a check of the newspapers of that day (the second day) and found that there were articles reporting the said arrest action in certain newspapers. The LEA then

submitted an REP-11 report to the panel judge stating that 'JM might have been inadvertently obtained through interception'. In the REP-11 report, the LEA requested to continue with the interception. On the basis of the information contained in the REP-11 report, the panel judge considered that actual JM had been obtained from the interception and the conditions for the continuance of the prescribed authorization were not met. The panel judge revoked the prescribed authorization. After being notified of the revocation, the LEA immediately arranged for the disconnection of the facility which was completed 10 minutes after the revocation of the authorization.

My review and findings

5.96 I conducted a review by examining the relevant records, except the audio recording of the intercept products. My findings were:

(a) The call was intercepted on the first day lasting 45 seconds. It was listened to by the LEA listener on the second day, the first time for 29 seconds and the second time for 15 seconds. The ATR prevailing at that time could not show which part of the call the listener had listened to and whether the re-listening was, as claimed, starting again from the beginning.

(b) The LEA was of the view that JM might have been inadvertently obtained through interception. It submitted an REP-11 report to the panel judge on the third day.

(c) The panel judge revoked the prescribed authorization upon considering the REP-11 report and the LEA acted swiftly in

effecting the disconnection of the facility which was completed 10 minutes after the revocation of the authorization.

(d) The interception after revocation of the prescribed authorization and before the disconnection of the facility was conducted without the authority of a prescribed authorization, and was unauthorized. The unauthorized interception lasted 10 minutes.

(e) No call was intercepted during the 10 minutes of unauthorized interception.

5.97 As I had not listened to the audio recording of the intercept products, no finding could be made as to the veracity of the contents of the call as stated in the REP-11 report and whether apart from that call, there were any other communications which might have contained JM in the intercept products listened to by the LEA.

5.98 It was stated in the REP-11 report and the LEA's notification letter to me that JM might have been inadvertently obtained through interception. However, in his 'Reasons for Revocation', the panel judge stated that from the REP-11 report, actual JM had been obtained from the interception. Judging from the information as stated in the REP-11 report, I was also of the opinion that JM had been obtained by the LEA through the call. I had no sufficient evidence to determine whether it was obtained through inadvertence or otherwise.

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 carried out by officers of the LEAs. Under section 44, upon receiving an application, the Commissioner shall, save where the circumstances set out in section 45 apply, carry out an examination to determine:

(a) whether or not the suspected 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 an LEA 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 and initiate the procedure for awarding payment of compensation to him/her 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. Section 45(3) defines relevant criminal proceedings as 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. Please see paragraphs 9.16 to 9.21 in Chapter 9 for a discussion and recommendation on section 45(2) and (3).

The procedure

6.3 The procedure involved in an examination can be briefly described below. The Commissioner's office will make enquiries with the particular LEA who, as the applicant alleges, has carried out either interception or covert surveillance or a combination of both against him/her 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 had been granted by any panel judge for the particular LEA to carry out any such activity, and if so the grounds for so doing. 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 various channels will be compared and counterchecked to ensure correctness. Apart from the information

given above, I consider it 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 that may prejudice the prevention or detection of crime or the protection of public security.

The applications under section 43

6.4 During the report period, a total of 20 applications for examination were received, among which two were subsequently not pursued by the applicants. Of the remaining 18 applications, two alleged interception, two suspected covert surveillance and 14 claimed a combination of interception and covert surveillance. Since none of the 18 applications came within the ambit of the exceptions covered by section 45(1), I carried out an examination provided for in section 44 in respect of each case.

6.5 After making all necessary enquiries, I found all these 18 cases not in the applicants' favour. I accordingly notified each of the applicants in writing of my finding relating to him/her, with 16 of such notices issued during the report period and two thereafter. By virtue of section 46(4) of the Ordinance, I was not allowed to provide reasons for my determination or to inform the applicants whether or not the alleged or suspected interception or covert surveillance had indeed taken place.

Applications affected by section 45(2)

6.6 As described in paragraph 6.7 of my Annual Report 2010, there were still four applications for examination brought forward from 2009 that were subject to section 45(2) and were therefore put in abeyance

pending the final determination or final disposal of the relevant criminal proceedings.

6.7 During the report period, I started processing the examination in respect of these four applications after having been satisfied that their relevant criminal proceedings had been finally determined or finally disposed of. The examinations of these four cases have now been completed and a notification of my findings not in favour of the applicants was duly given.

Notification to relevant person under section 48

6.8 Section 48 obliges me 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 any 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. Section 48(6) also 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 the relevant person is negligible.

6.9 Consideration of the application of section 48 may arise under a number of situations. For 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 view an unauthorized interception. It

gives rise to the necessity of considering whether I should, as obliged by section 48 of the Ordinance, give a notice to the relevant person of the wrong interception and invite him/her to make written submissions to me in relation to my assessment of reasonable compensation to be paid to him/her by the Government.

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

(a) the duration of the interception and/or covert surveillance;

(b) the number of the communications that had been intercepted or the extent of the conversations and activities that had been subject to covert surveillance;

(c) the total duration of the communications, conversations or activities that had been intercepted or subject to covert surveillance;

(d) the sensitivity of the communications, conversations or activities;

(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, conversations

or activities having knowledge of the contents, whether such persons would remember or likely remember their contents, and whether such persons know the relevant person and the other participants to the communications, conversations or activities.

6.11 The written submissions made by the relevant person, which may involve any or all of the above factors, will be considered for making the assessment. It may also be necessary to listen to or examine the materials intercepted or subject to covert surveillance, but extreme care must be exercised if that step is to be taken because anyone from my office or I listening to or examining the intercept or surveillance product would certainly increase the extent of the intrusion into the relevant person's privacy.

Notice issued under section 48 in the report period

6.12 During the report period, I gave a notice to three relevant persons pursuant to section 48(1) of the Ordinance for covert surveillance conducted by an LEA without the authority of a prescribed authorization. I informed the relevant persons of the right to apply for an examination in respect of the unauthorized covert surveillance. At the time of the writing of this report, I have not yet received any response from the relevant persons.

Elaboration on the application requirements

6.13 From the initial applications or letters of complaint made to me in the past five 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 cause delay in the process of the application and generate 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 under section 46(4), I am not permitted to disclose reasons for my determination or to inform the applicants whether or not the alleged or suspected interception or covert surveillance had indeed taken place.

6.14 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, Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption.

6.15 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 there was no suspicion of any surveillance device being used. There were also complaints of the complainant being implanted in the brain or another part of the body a

device that could read his/her mind or incessantly talked to him/her or urged him/her to do something or impersonated him/her to speak to other people. There were other cases which related to the complainants being tracked and hurt by some kind of rays or radio waves emitted by a device. All these again do not form a proper basis for an application for me to initiate an examination, the reason being that the devices suspected to be used do not fall within the kind or type of devices under the Ordinance the use of which would constitute a covert surveillance.

6.16 Regarding requirement (b), some applicants or 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.

6.17 The above information concerning the relevant provisions of the Ordinance, application requirements and procedure as well as the consent form on the use of personal data have been provided on the website of the Commission to enable the applicants or prospective applicants to have ready reference and to facilitate their properly lodging an application for examination with me under section 43 of the Ordinance. We have, however, still found the lack of understanding of the ambit of an application for examination and my functions relating thereto in a number of applicants. For improving the situation, consideration is being given to providing the necessary information in print by way of a pamphlet or leaflet for the consumption of those interested.

Statutory prohibition against disclosure of reasons for determination

6.18 Section 46(4) expressly provides that in relation to an application for examination, I am not allowed to provide reasons for my determination, or give details of any interception or covert surveillance concerned, or in a case where I have not found in the applicant's favour, indicate whether or not the suspected interception or covert surveillance has taken place.

6.19 It is hoped that the public will understand that this statutory prohibition against me is designed to forbid the disclosure of any information which might prejudice the prevention or detection of crime or the protection of public security, preventing any advantage from being obtained by 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 carry out my duties and functions under the Ordinance with the utmost good faith and sincerity.

[This page is left blank.]

CHAPTER 7

REPORTS OF NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS AND FINDINGS

Reporting of irregularities

7.1 By virtue of section 54, 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 is obliged to submit to me 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 any provision of: (i) the ICSO, (ii) the Code of Practice, or (iii) any prescribed authorization or device retrieval warrant concerned.

7.2 The section 54 obligation only applies where the head of the department considers that there may have been a case of non-compliance. It is his opinion, not mine nor anyone else's, that counts. In order to avoid any argument whether such an obligation arises, I required the LEAs to report to me cases of irregularities or even simply incidents. My requirement is to ensure that these matters, albeit arguably not non-compliance, must also be reported for my consideration and scrutiny so that any possible non-compliance will not escape my attention. Such reports are *not* made under section 54 of the Ordinance.

7.3 Some cases of non-compliance, irregularity or incident were discovered by my staff and me upon our examination of the documents and information provided to us during our inspection visits or otherwise, and I

requested the LEA concerned to investigate the matter and submit a report to me on the non-compliance or irregularity, as appropriate.

7.4 When reporting non-compliance or irregularity, normally the LEAs would adopt a two-step approach. They would first submit an initial report to notify me of the occurrence of the incident, to be followed by a full investigation report after they have conducted in-depth investigation into the case. For the cases discovered by us, however, an initial report would be unnecessary, although sometimes the LEAs may still submit an initial report such as in Outstanding Case (i) and Report 3 below. The LEAs used to submit the full investigation report several months after the initial report or my request, as the case may be.

Cases brought forward from Annual Report 2010

7.5 In my Annual Report 2010, I mentioned two cases where initial reports had been received from the departments in December 2010 but their full investigation reports were still pending at the time when the Annual Report 2010 was submitted to the Chief Executive in June 2011. The review of these two cases has now been completed and they are described in the various paragraphs referred to below:

Outstanding Case (i) : Listening to a call made to a prohibited telephone number [Paragraph 7.234 of Annual Report 2010], dealt with in paragraphs 7.8 to 7.13 below; and

Outstanding Case (ii) : Listening to two prohibited calls [Paragraph 7.235 of Annual Report 2010], dealt with in paragraphs 7.14 to 7.30 below.

Cases occurring or discovered in 2011

7.6 In 2011, my office and I received a number of reports of non-compliance or irregularities from the LEAs. Besides those relating to the use of surveillance devices for non-ICSO purposes that are specifically covered in Chapter 4 of this annual report, the rest are dealt with in this chapter, as follows:

Report 1 : Unauthorized access to a call when monitoring was supposed to be put on hold, dealt with in paragraphs 7.50 to 7.92 below;

Report 2 : Four cases of listening to intercept products by officers below the rank specified in the LPP additional conditions of the prescribed authorizations after such conditions were lifted, dealt with in paragraphs 7.93 to 7.114 below;

Report 3 : Listening to calls made to or from prohibited numbers on five occasions, dealt with in paragraphs 7.115 to 7.123 below;

Report 4 : Unauthorized interception of 10 minutes after revocation of the prescribed authorization by the panel judge upon receipt of REP-11 report on obtaining of journalistic material, dealt with in paragraph 7.124 below;

Report 5 : Incorrect statement found in the affirmation in support of an application for Type 1 surveillance, dealt with in paragraphs 7.125 to 7.138 below;

Report 6 : Issue of devices pretending to be for ICSO purpose, dealt with in paragraphs 7.139 to 7.158 below;

Report 7 : Unauthorized interception of a wrong facility, dealt with in paragraphs 7.159 to 7.188 below;

Report 8 : 893 instances of non-compliance with the Revised Additional Conditions imposed by panel judges in prescribed authorizations for interception, dealt with in paragraphs 7.189 to 7.237 below; and

Report 9 : Retention by an LEA officer of documents suspected to be related to interception operations, dealt with in paragraphs 7.238 to 7.244 below.

7.7 Reports 2, 3, 7 and 8 were submitted under section 54 of the Ordinance whereas Reports 1, 4, 5, 6 and 9 were submitted *not* under section 54 of the Ordinance.

OUTSTANDING CASES FROM 2010

Outstanding Case (i): Listening to a call made to a prohibited telephone number [Report 6, paragraph 7.234 of Annual Report 2010]

7.8 The non-compliance in this case was discovered by me in December 2010 during review of the LPP Case 6 mentioned in paragraphs

5.68 to 5.69 of Chapter 5 of my Annual Report 2010. It was a breach of the additional condition imposed by the panel judge in the prescribed authorization to guard against the risk of obtaining LPP information.

7.9 Briefly, at the time of the issue of the prescribed authorization, it was not envisaged that the interception operation would likely involve LPP information. As the interception progressed, the department considered that there would be such likelihood and reported it to the panel judge on two occasions. The panel judge allowed the prescribed authorization to continue but imposed a set of additional conditions on each occasion. One of the additional conditions was that the department should refrain from listening to calls made to or from certain specified telephone numbers ('the prohibited numbers'). When I inspected the relevant documents including the listener's notes and audit trail reports ('ATRs') during an inspection visit to the department in early December 2010, I discovered that the listener had partially listened to a call from the subject's facility to a prohibited number, which was non-compliant with the additional condition. The listener listened to the call for 35 seconds, which was about one-third of the length of the call. After my discovery, the department submitted an initial report to me in late December 2010 pursuant to section 54 of the Ordinance.

7.10 As after several months I still had not received the full investigation report, by an e-mail in May 2011, my Secretariat urged the department to submit the investigation report on this case, and that on another non-compliance case, as soon as possible. The department replied in writing that the investigation report on this case would be submitted to me 'upon conclusion' of the investigation. Unsatisfied with such a reply,

I instructed my Secretariat to write to the department, this time quoting me that I wished to know when the department would be able to conclude the investigation and submit the investigation report to me, and that I did not wish to wait indefinitely for the conclusion of the investigation. Eventually, the department submitted a full investigation report to me on 30 June 2011.

The department's investigation

7.11 According to the investigation report, the listener was aware of the terms of the prescribed authorization, the additional conditions imposed and the prohibited numbers stipulated therein. At the time of listening to the call in question, the listener failed to realize that the call was in fact a call made to a prohibited telephone number specified in the additional conditions. He admitted that it was his oversight in causing the non-compliance and he only became aware of the non-compliance when he was enquired about the case by the department after my discovery. With reference to his own scribbled notes, the listener recalled that he had partly listened to the call and considered that its content was irrelevant to the investigation of the crime and therefore he did not listen to the call in its entirety. The ATR showed that the listener had listened to the call partly for 35 seconds. Having considered that the listener had actually recorded in his listener's notes the prohibited number and the content of the part of the call he had listened to, the department was inclined to believe that the listener had no intention to conceal from others about his listening to the call. The department considered that the listener should be given a **verbal warning** for his negligence and lack of vigilance in performing his

listening duty. Remedial measures were also taken to help listeners differentiate prohibited number(s) from others.

My review and findings

7.12 I conducted a review of this case through the inspection of documents and other related preserved materials, except the intercept product archived in the department. Apart from this call, other calls made between the subject's facility and the prohibited numbers stipulated in the additional conditions of the prescribed authorization were not listened to by this listener or any other officers of the department. I made the finding that the non-compliance in this case was due to the listener's negligence in performing his listening duty. The disciplinary action proposed to be taken against him was appropriate.

7.13 As I had not listened to the intercept product archived in the department, no finding could be made on the veracity of the content of the part of the call that the listener had listened to and recorded in the listener's notes.

Outstanding Case (ii): Listening to two prohibited calls [Report 7, paragraph 7.235 of Annual Report 2010]

7.14 The non-compliance in this case was reported to me by the LEA, which was the LPP Case 7 mentioned in paragraphs 5.70 to 5.71 of Chapter 5 of my Annual Report 2010. It involved two officers who breached the additional condition imposed by the panel judge in the prescribed authorization by listening to two calls (one officer one call) made with a telephone number the listening to which was prohibited. The LEA submitted an initial report to me in late December 2010, followed by

a full investigation report in July 2011 pursuant to section 54 of the Ordinance.

7.15 I reviewed this case in 2011 after receipt of the full investigation report. In my review of the non-compliance, I also found an irregularity, namely, the non-disclosure of the full name of the subject to the panel judge throughout the validity of the fresh and renewed authorizations although the full name of the subject was known to the LEA as early as the first day of interception under the fresh authorization.

Facts of the case

7.16 At the time of the issue of the prescribed authorization in early November 2010 and at the time of its renewal in early December 2010, it was assessed that there was no LPP likelihood. In about mid December 2010, calls were intercepted which led to a change in the assessment of LPP likelihood and the submission of an REP-11 report to the panel judge on the material change of circumstances. The panel judge imposed additional conditions in the prescribed authorization, one of which was prohibition against listening to any call between the subject facility and a specified telephone number ('the prohibited number').

7.17 After the imposition of the additional conditions, one day, a call was intercepted between the subject facility and the prohibited number ('Call 1'). It was listened to by a listener ('Listener A') in its entirety for 18 seconds.

7.18 On a subsequent day, another call between the subject facility and the prohibited number was intercepted ('Call 2'), lasting about one minute. It was listened to by Listener B initially for 22 seconds.

Wondering whether the call involved LPP information, Listener B re-listened to it for 12 seconds when he suddenly realized that Call 2 was made to the prohibited number, ie a prohibited call. He immediately reported the matter to his supervisor ('Supervisor C'). Upon checking of the ATR, Supervisor C found that Listener A had also listened to a prohibited call (Call 1) a few days before.

7.19 The LEA subsequently decided to discontinue the operation on the ground that useful intelligence had been obtained. It submitted an REP-11 report to the panel judge to report on the listening to the two prohibited calls, together with a discontinuance report to discontinue the interception operation. The panel judge duly revoked the prescribed authorization.

The LEA's investigation

7.20 According to the LEA's investigation report, before Listeners A and B took up the listening duty under the renewed prescribed authorization, Supervisor C had briefed them of the additional conditions imposed by the panel judge, in particular the prohibition against listening to calls made with the prohibited number. A flagging system was also in place to facilitate listeners to differentiate the prohibited number from others.

7.21 Listener A and Listener B took turn to listen to calls intercepted under the prescribed authorization. During Listener A's turn, nine calls were intercepted between the subject and the prohibited number. Listener A managed to screen out eight by not listening to them. When asked why he listened to the remaining one (ie Call 1), Listener A claimed

that he was unaware of his listening to Call 1 until it was discovered by Supervisor C by examining the ATR. He was unable to recall the contents of Call 1 as he had not made any record in the transcript. He believed that this call was irrelevant to the subject's criminal activities and did not contain any LPP material.

7.22 In the course of investigation, the LEA also found that Listener A had skipped a considerable number of intercepted calls without listening to them. These calls were not made to or from the prohibited number and as a listener, he had the responsibility to listen to them. He skipped these calls without good reason. This was not the first time he was found to have skipped calls which he ought to have listened to. In a former case where he was tasked by his supervisor to re-listen to 51 outstanding calls, he similarly omitted 10 of them.

7.23 Listener B was newly posted to the section. Listening to intercept products was not among his core duties. He performed listening duty only when required. He had never undergone any induction training on the operation of the listener's workstation. Nor had he performed any listening duty prior to this incident. Before commencing his first listening duty on the day in question, Listener B was coached in the morning by Listener A on the operation of the workstation for listening to intercept products. However, owing to his inexperience, he mismatched the data and failed to screen out Call 2 resulting in his listening to it partially for two times. Call 2 was the first prohibited call encountered during his turn of listening. After discovering the mistake, he immediately reported it to Supervisor C and did not listen to any subsequent prohibited calls.

7.24 The LEA's investigation report concluded that there was no evidence to suggest any ill intent or deliberate defiance of the additional condition on the part of both listeners. The respective prohibited calls were listened to by them inadvertently. The LEA was satisfied that neither Call 1 nor Call 2 contained any LPP material. It had no intention to re-listen to them to verify this. When I later asked the basis on which it was considered that Call 1 did not contain LPP information, the LEA replied that in view of the duration of the call, being 18 seconds, and the fact that no record was made in the transcript, it considered that the likelihood of Call 1 containing LPP information was low.

7.25 The LEA proposed to take the following disciplinary actions against the officers concerned:

(a) Listener A should be **verbally warned** for his negligence in causing the inadvertent listening to a prohibited call and for his lack of diligence in performing listening duties by skipping a considerable number of calls which he ought to have listened to but he did not.

(b) Listener B should be **verbally advised** (disciplinary in nature) for the need to exercise care and vigilance when handling interception operations with LPP likelihood. In determining this award of punishment, the LEA had taken into account that Listener B was a newcomer, inexperienced and unfamiliar with the interception system, that he discovered the mistake by himself and reported to his supervisor promptly, and that he frankly admitted his fault from the beginning.

(c) Given her supervisory accountability, Supervisor C should be **verbally advised** (disciplinary in nature) for the need to provide proper training and guidance to her subordinates in performing ICSO related duties and to monitor the performance of her subordinates more closely.

7.26 The LEA also implemented remedial actions including developing enhanced measures to screen out calls involving prohibited numbers, more frequent checking of the ATRs by supervisors to ensure no listening to prohibited calls or early discovery of such, and developing a standard training package for listeners.

My review

7.27 In my review of this case, I examined the application documents for the prescribed authorizations, the transcripts, the ATRs, the REP-11 reports and other preserved materials. I did not listen to the recording of the intercept products.

The non-compliance: Listening to prohibited calls

7.28 I had no evidence that Listener A deliberately committed the mistake but given his experience, there was no excuse for his failing to screen out the prohibited Call 1, particularly as he was able to screen out other calls made with the prohibited number. Apart from listening to a prohibited call which was a breach of the condition, he also failed to perform his listening duty in a responsible manner as he had skipped, without good reason, a considerable number of calls. There was dereliction of duty on his part. No trust could be placed on him as a listener especially taking into account his unsatisfactory performance as a

listener in a former case where he was assigned to listen to 51 outstanding calls but he had omitted 10 of them [Note 9]. He was totally unreliable and should not be assigned any duties related to ICSO. I considered that he should be given a higher level of disciplinary award than a verbal warning in the present case. The LEA accepted my view and a written admonishment for 'Neglect of Duty' was issued to Listener A. He was also relinquished of his listening duties by being posted away to another section shortly after the discovery of the incident.

7.29 As regards Listener B, I considered that the proposed verbal advice was also too lenient. A breach of a condition of a prescribed authorization, constituting a non-compliance with a relevant requirement of the Ordinance, is a serious matter, albeit the breach was committed inadvertently and without ill intent or ulterior motive. In a letter to the head of the LEA, I drew his attention to the award proposed by another department in a similar non-compliance case, which was a verbal warning to be given to a listener who had on one occasion listened to a prohibited call partially for 35 seconds. Appreciating my concern on the possible disparity of punishment to officers committing similar mistakes in different LEAs, the LEA subsequently changed the disciplinary action against Listener B to verbal warning.

7.30 The incident disclosed that the LEA lacked proper induction training for newly appointed listeners and refresher training for existing listeners. A standard training package for listeners had yet to be

---

Note 9 The former case referred to was Report 3 in Chapter 7 of Annual Report 2010, see paragraphs 7.127 to 7.129 thereof. The punishment of the listener for omission to listen to 10 calls in that former case was originally proposed to be a verbal advice but it has subsequently been changed to a verbal warning after it is known that he had the habit of omitting calls.

developed by the LEA. I questioned why Supervisor C was singled out for not providing the necessary training to Listener B if the lack of induction training was a general phenomenon applicable to all interception units of the LEA. Having considered the facts that the section did not have any instruction on training nor hold any formal induction training for its listeners, the LEA agreed that Supervisor C should not be held entirely responsible for the incident. The disciplinary verbal advice proposed for Supervisor C would thus be withdrawn. The LEA would prepare a standard training package for listeners.

Other irregularity: Non-disclosure of the full name of the Subject to the panel judge

7.31 In the course of reviewing this non-compliance case, I also found an irregularity, that is, the non-disclosure of the full name of the Subject to the panel judge.

7.32 In this case, at the time of the application for the fresh authorization in early November 2010, the LEA did not know the name or alias of the Subject. The Subject was referred to as an 'unknown male' in the affirmation in support of the application for the fresh authorization. As the Subject was an unknown male, no declaration could have been made in the affirmation to set out 'if known', whether there had been any previous application in the preceding two years against the Subject, as required by Part 1(b)(xi)(A) of Schedule 3 to the Ordinance. When the LEA made an application for the renewal of the authorization in early December 2010, it was mentioned in the affirmation in support of the renewal application that the Subject was known by a partial name. For a renewal application, the Ordinance does not require a declaration of

whether there has been any previous application against the subject in the preceding two years (see section 11 and Part 4 of Schedule 3 to the Ordinance). The affirmation supporting the renewal application did not so declare.

7.33 At my inspection visit to the LEA in August 2011 when the transcripts of this interception operation were examined, it was noticed that on the first day of the interception under the fresh authorization, the full name of the Subject was already mentioned in the intercept product and duly recorded in the transcript. For ease of understanding, I shall refer to this full name of the Subject in pseudonym as 'CHAN Tai Man' (陳大文). The transcripts also recorded that in subsequent intercept products, the Subject was sometimes addressed as 'CHAN Tai Man', sometimes as 'Tai Man' (大文) and sometimes as 'Mr Chan' (陳先生).

7.34 Notwithstanding that the full name of the Subject had been obtained on the first day of interception under the fresh authorization, no REP-11 report was submitted to the panel judge to report the full name. When the LEA submitted an application for renewal of the authorization one month later, 'Tai Man' instead of the full name of the Subject was mentioned in the renewal application.

7.35 At the inspection visit, I queried why no REP-11 report was submitted to the panel judge to report on the full name of the Subject and why the full name of the Subject was not mentioned in the renewal application. An officer of the LEA explained that as the identity card number of the Subject (with that full name) was not revealed during the operation, his identity could not be confirmed. He was therefore <u>not</u> considered as 'fully identified'. I was told that the identity of the Subject

was finally confirmed when he was arrested in a raid on his known address after the discontinuance of the operation. I felt the non-disclosure of the full name of the Subject in this case highly suspicious and requested the LEA to conduct a full investigation of the case.

7.36 At the end of November 2011, the LEA submitted an investigation report on the non-disclosure of the Subject's full name. According to the investigation report, not until a subject had been fully identified, the name of the subject would not be used in any of the ICSO applications relating to the subject. As a subject might be called by different names or aliases in an interception operation, LEA investigators would refer to the subject with only one name/alias, ie the most commonly used name or alias. When the name 'CHAN Tai Man' first surfaced from the interception, there was nothing to verify whether this was the true identity of the subject; hence the officers concerned did not consider an REP-11 report necessary. Checking by the LEA found that there were several persons bearing the same name. Considering that the Subject had remained unidentified, when making the application for renewing the authorization, the applicant only used the most commonly called name 'Tai Man' in the interception operation but did not mention other names or aliases that had surfaced in the operation. The Subject had remained unidentified when the interception operation was discontinued in late December 2010. After the interception operation was discontinued, the LEA raided three known haunts, and the Subject was located in the vicinity of one of the places and his identity was then confirmed. However, as no evidence of criminal activity was found in those raids, the Subject was released afterwards.

7.37 The LEA's investigation report concluded that there was no foul play in the incident and that there was no evidence to show that the identity of the Subject was being concealed on purpose throughout the ICSO applications. It was not uncommon that the subject of an interception was addressed by different aliases throughout the operation at different times. The LEA considered that information of these unverified names or aliases bore little effect on the proportionality and necessity tests applied by the applicants and the relevant authority. Hence, from an operational point of view, it might seem more appropriate to refer to an unidentified subject by a single commonly used alias in an ICSO application, for example, 'Tai Man' instead of 'CHAN Tai Man' in the present case. The same practice would be adopted in future ICSO applications.

7.38 I do not agree with the above views and practice of the LEA which I consider will jeopardize the full and frank disclosure of all relevant information in an ICSO application. If only one alias and not all other aliases are used in an interception application, how can the 'if known' requirement under Part 1(b)(xi)(A) of Schedule 3 to the Ordinance be satisfied? The practice may even be seen as an excuse for not complying with the requirement. This is particularly so in the present case where there was no declaration on the 'if known' requirement in the application for the fresh authorization, no declaration on the 'if known' requirement in an REP-11 report because there was simply no REP-11 report submitted to the panel judge on the name of the Subject, and no declaration in the application for renewal of the authorization because the Ordinance does not require such declaration in a renewal application. More importantly, the practice might also be abused to disguise an unlawful interception through

the use of switched identity. I consider that the LEA should disclose to the panel judge all the aliases of the subject known to the department. Moreover, when an additional alias of the subject of an interception authorization has been known or the identity of a previously unidentified subject has been confirmed, an REP-11 report has to be submitted to report this change of circumstances and the REP-11 report should also deal with the 'if known' requirement under Part 1(b)(xi)(A) of Schedule 3 to the Ordinance.

7.39 The fact that no REP-11 report was submitted to the panel judge and there was no mention of the knowledge of anyone (neither the applicant nor the department) regarding previous applications in respect of the Subject in this case arouses the suspicion that the LEA had made an attempt, which was successful, in getting round the 'if known' requirement in Part 1(b)(xi)(A) of Schedule 3 to the Ordinance.

7.40 I could not understand the logic explained by the LEA as to why the full name of the Subject was not disclosed in the renewal application. There was no conflict in how the Subject was addressed. He was sometimes addressed as 'CHAN Tai Man', sometimes as 'Tai Man' and sometimes as 'Mr Chan'. Even if the identity card number of the Subject was not known, it only affected the LEA's ability to state the identity card number. It could not have disabled the LEA from stating the Subject as 'CHAN Tai Man' in the application for renewal. It is ridiculous if the Subject was addressed as 'Tai Man' for, say, seven times in the intercept product and as 'CHAN Tai Man' for, say, three times in the intercept product, then 'Tai Man' was taken as the name or alias of the

subject in the ICSO application whereas the name 'CHAN Tai Man' was disregarded.

7.41 Moreover, full and frank disclosure is of paramount importance for the reliable operation of the ICSO. I was of the view that the LEA should disclose to the panel judge all the aliases of the subject known to the LEA with a 'if known' declaration. In cases where officers encounter difficulties in determining what should be regarded as an alias or what needs to be reported, they should err on the safe side and report to the panel judge all names or aliases. From one angle, it would be unwise to leave any judgement to be made by LEA officers; from another angle, this will rid them of the risks of making a mistake of judgement.

7.42 I also found that there was discrepancy in the information provided to me regarding the arrest or otherwise of the Subject. At my inspection visit to the LEA in August 2011, I was told that the Subject was arrested in a raid on his known address. But the investigation report of November 2011 stated that he was located in his known haunt or in its vicinity and was released afterwards. I observed that the investigation report did not use the word 'arrested'.

7.43 Indeed, the fact of the Subject's non-arrest whets my suspicion that his full name was not disclosed timeously in the ICSO application documents because he was purposely allowed to avoid or escape apprehension.

7.44 In February 2012, I conveyed my above views to the head of the LEA. I also sought clarification with the LEA on whether the Subject in this case had been arrested or not and the reason for the discrepancy in

the verbal reply given in the inspection visit and the written investigation report.

7.45 In March 2012, the head of the LEA replied to me that in this case, he agreed that the full name of the Subject instead of the partial name of the Subject should have been used in the renewal application. Officers responsible for handling interception operations have been reminded to include the full name of the subject, if known, rather than just a partial name, in the ICSO applications even if the subject has not been fully identified.

7.46 Regarding the alleged arrest of the Subject in this case, the head of the LEA confirmed that the Subject was not arrested but was released at scene after being searched. The officer providing the incorrect information to me at the inspection visit in August 2011 that the Subject had been arrested might have misunderstood the information given to him by his colleague over the phone. The true facts were later rectified when the investigation report was compiled. The head of the LEA had reminded the relevant officers of the need to provide accurate information to me.

7.47 On my suspicion that the non-reporting of the full name of the Subject in the ICSO application was to allow him to avoid or escape apprehension, the LEA confirmed that a thorough investigation had been conducted and there was no suspicion of any corrupt behaviour in the whole incident.

My findings and recommendation

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

Listening to prohibited calls

(a) Listener A listened to a prohibited call in its entirety for 18 seconds and Listener B listened to another prohibited call partly for two times totalling 34 seconds. They had breached the additional LPP condition imposed by the panel judge which prohibited the listening to calls made between the subject facility and the prohibited number.

(b) There was no evidence of bad faith or ulterior motive on the part of the two listeners.

(c) The revised disciplinary actions against Listener A (written admonishment) and Listener B (verbal warning) were appropriate.

(d) Given the circumstances of this case, while it might not be appropriate to take disciplinary action against Supervisor C for the mistakes made by her two subordinates, I considered that she should be reminded to give proper guidance to her subordinates in performing ICSO-related duties and to monitor the performance of her subordinates more closely. The reminder should be administrative in nature.

Non-disclosure of the full name of the Subject

(e) The full name of the Subject should have been disclosed to the panel judge even if the Subject was not fully identified at the material time.

(f) I was of the view that the LEA should disclose to the panel judge all the hitherto unknown names and aliases of the subject known to the LEA when any such name or alias crops up, with a corresponding 'if known' declaration.

Unverified information

(g) Regarding the alleged arrest of the Subject which turned out to be untrue, this was another occasion when information was provided to me without first verifying the truth of its content, which was unsatisfactory.

7.49 As I had not listened to the recording of the intercept products archived in the LEA, no finding could be made as to:

(a) whether Call 1 listened to by Listener A did not contain information subject to LPP as claimed by the LEA;

(b) the veracity of the gist of the conversation of Call 2 listened to by Listener B as stated in the REP-11 report to the panel judge; and

(c) whether there was any switched identity or ulterior motive by not disclosing the full name of the Subject to the panel judge even though the full name had been obtained on the first day of interception.

CASES OCCURRING OR DISCOVERED IN 2011

Report 1: Unauthorized access to a call when monitoring was supposed to be put on hold

7.50 The irregularity in this case was discovered by me in February 2011 during review of an LPP Case of 2010 (ie LPP Case 9 mentioned in paragraphs 5.73 to 5.75 of Chapter 5 of Annual Report 2010). The listener was found to have accessed a call when monitoring should have been put on hold pending submission of an REP-11 report to the panel judge and a determination by the panel judge on the continuation or otherwise of the prescribed authorization. According to the ATR, the listener had accessed the call for 15 seconds. When interviewed by me at the inspection visit in February 2011, the listener stated that she had not listened to any call during the period when monitoring was put on hold. She suspected that there was 'accidental access' when she was preparing the draft REP-11 report at her listening workstation. The accidental access might have been caused by the documents being laid over onto the keyboard of her workstation ('**the first explanation**'). However, I found that the 'accidental access' was not disclosed in the REP-11 report to the panel judge, which cast doubt on whether the reporting officer of the REP-11 report (the supervisor of the listener) had checked the ATR before submitting the REP-11 report to the panel judge. If the reporting officer had checked the ATR before submitting the REP-11 report, such 'accidental access' would have been discovered and reflected in the REP-11 report. I requested the department to submit an investigation report and a statement from the listener on the matter.

7.51 In mid July 2011, the department submitted an investigation report not under section 54 of the Ordinance as the department considered that the access was 'accidental' and did not amount to any non-compliance. The investigation report also attached a statement from the listener. While still claiming 'accidental access', the listener provided in the statement another explanation on the cause of the accidental access ('**the second explanation**') which was different from the one given orally to me in the interview in February 2011.

7.52 As the investigation report was silent on the role and responsibility of the supervisor of the listener in the incident, at my request, the department submitted a supplementary report at the end of August 2011.

The department's investigation

7.53 In November 2010, the panel judge imposed additional LPP conditions on the prescribed authorization.

7.54 At about 1630 hours on a day in December 2010 (Day 1), the listener (a female officer) listened to a call ('Call 1') and considered that there was heightened likelihood of obtaining LPP information. She immediately reported the matter to her supervisor ('the Supervisor'). The Supervisor then immediately instructed all the listeners of the operation, including her, to put on hold monitoring of the operation pending the submission of an REP-11 report to the panel judge. He also tasked one of the officers to remove the access rights of all the listeners concerned, including the female listener, to the operation. Due to the lapse of time,

the Supervisor could not recall to whom he had assigned such task. Nor could any of the officers in the unit remember performing such task.

7.55 Later on the same day (Day 1), the Supervisor instructed the female listener to prepare a draft REP-11 report for his consideration and signature.

7.56 On Day 2, shortly after 0800 hours, the female listener started to prepare the draft REP-11 report. She granted herself access right to the operation in order to allow herself to check the data for the purpose of preparing the REP-11 report. After obtaining the relevant data for compilation of the REP-11 report, she exited from the system and removed her access right. Later, at 1146 hours, she printed an ATR covering the period between 0000 hours and 2359 hours of Day 1.

7.57 At about noon, the female listener submitted the draft REP-11 report, the ATR printout (covering Day 1 only) and other documents to the Supervisor for perusal. The Supervisor also granted himself the access right to the operation in order to verify the contents of the draft REP-11 report prepared by the female listener. After checking, he logged out from the system and removed his access right to the operation.

7.58 On Day 3, the Supervisor submitted the REP-11 report to the panel judge who allowed the prescribed authorization to continue.

7.59 At my inspection visit in February 2011, the department was notified of my discovery that the female listener had at 08:22:39 hours on Day 2 accessed a call ('Call 2') for 15 seconds when monitoring should have been suspended. The department was requested to submit an investigation report with a statement from the listener.

7.60 The department's investigation report stated, with reference to the statement from the female listener, that on Day 2 morning, the female listener did not intend to listen to any intercepted call and therefore did not wear a listener's headphone. She only checked the data for the purpose of compiling the REP-11 report. After obtaining the relevant data, she proceeded to exit from the system. She might have accidentally clicked the 'play' button when she tried to click the 'exit' button to log off from the system (ie the second explanation). As she was not wearing a headphone at the time, she did not know of the playback of Call 2. After waiting for a short while that there was no response from the system for her to exit, she clicked the 'exit' button again. Such action enabled her to exit the system and ended the playback simultaneously. This explained why the playback of Call 2 was just for 15 seconds. She claimed that she was unaware of this access until being questioned at my inspection visit in February 2011. The department considered that the explanation given by the female listener in her statement was a possible and acceptable explanation.

7.61 The department further stated that the accidental access on Day 2 was not reported in the REP-11 report submitted to the panel judge on Day 3 because the female listener and the Supervisor were not aware of the access as they only checked the ATR of Day 1 but not that of Day 2. Being the designated listener for the interception operation in question, the female listener would not expect any monitoring activities by any person, including herself, after 2359 hours on Day 1, hence she considered it sufficient to print an ATR covering Day 1 only. The Supervisor similarly did not feel the need to check the ATR of Day 2 for the reasons that the monitoring had already been suspended on Day 1, that he had directed no further access to the intercepted calls of the operation and that he had

tasked one of the officers to remove access right of all the listeners concerned to the operation. Therefore, it was not unreasonable for him to presume that there was no monitoring activity after 2359 hours of Day 1.

7.62 While the department considered that it was not unreasonable for the female listener and the Supervisor not to check the ATR of Day 2 before submitting the REP-11 report on Day 3, the department also took the view that in such circumstances, the supervisory officers of interception operation should have taken a more prudent approach and checked the ATR up to the latest moment before submitting the REP-11 report to the panel judge.

7.63 The department's investigation concluded that although there was no concrete evidence to prove or disprove the female listener's version of the accidental access, the circumstantial evidence was quite strong to support her claim that the incident was highly likely just an accidental wrong touch of buttons and she was unaware of it until being questioned in February 2011. Otherwise, it would be unreasonable for the female listener, being well aware of the suspension of the monitoring and having a pressing task to compile the REP-11 report that morning, to have listened to a single call for 15 seconds (the call lasted 117 seconds) out of more than 50 outstanding calls since the suspension of the monitoring.

7.64 Regarding the classification of this case, the department pointed out that the female listener asserted that she had not put on a headphone at the time in question and hence had not listened to the intercepted call. Accordingly, the inadvertent access to Call 2 without physical listening after suspension of the monitoring should not be regarded as a case of non-compliance under section 54 of the ICSO, but

rather an incident of irregularity to be reported under section 53 of the ICSO for which the female listener should be held accountable.

7.65 Subject to my view, the department considered that the female listener should be **verbally advised** (disciplinary in nature) to be more cautious when performing a listener's duties. In coming to this view, the department had taken into account the following:

(a) the female listener had endeavoured to give an account of what she might have done at the particular time of incident;

(b) though the actual circumstances of the inadvertent access could not be fully ascertained, the incident was believed to be an unintentional act due to a momentary lapse on the part of the female listener;

(c) Call 2 was later listened to by the female listener after the panel judge allowed the authorization to continue and no LPP information had been obtained; and

(d) this was the first time the female listener was found at fault in performing listening duties.

7.66 The department considered that the Supervisor had duly followed the departmental instructions in checking the contents of the REP-11 report before submission. It did not propose any disciplinary action against the Supervisor.

7.67 As an improvement, the department had issued a reminder to its officers that when preparing reports for the panel judge, the officers

involved should examine the latest records, with a view to providing accurate and up-to-date contents for the panel judge's consideration. It had also tightened up the checking mechanism by requiring senior supervisory officers of interception units to conduct a daily check of the ATRs for early detection of irregularities, if any.

My review

Explanation given by the female listener was unsustainable

7.68 The female listener's access to Call 2 ended at **08:22:54** hours on Day 2. To verify the explanation given by the female listener in the investigation report, I requested the department to provide documentary proof of the exit time of the female listener. In November 2011, the department provided the log-in and exit times of the female listener on Day 2, as follows:

Log-in	**Exit**
08:19:12	08:24:29
08:24:58	08:36:51
08:37:09	19:14:22

Given the exit time at **08:24:29** hours, the department admitted that the cause (ie the second explanation) given in the female listener's statement and the investigation report would no longer stand. In her statement, she stated that she exited the system and forced the playback to stop. As the record showed that she only exited the system at 08:24:29 hours, it could

not explain why the 'inadvertent' access ended at 08:22:54 hours which was one and a half minutes before she exited the system.

7.69 The department maintained that though the cause of the 'inadvertent' access remained unknown, the circumstantial evidence suggested that the 'inadvertent' access to the intercepted call on the morning of Day 2 was not a deliberate act and was without wilful intent or ulterior motive. To illustrate this point, the department stated that the female listener had no intent to perform any listening on the morning of Day 2 and that the ATR showed that apart from the access to Call 2, she had not made access to other calls on that morning until she listened to another interception at 1707 hours on that day.

7.70 I pointed out to the department that the ATR system prevailing at the time of this incident had certain incapability in recording access by listeners to intercept products. Such incapability was known to listeners. So, a listener could take advantage of such incapability of the ATR system to access intercept products without being recorded by the ATR system. If a listener had done so, the department and I would not have known. If, as claimed, the female listener in the present case had no intention to perform any monitoring activity on Day 2, it was dubious that she remained logged in the system for the rest of the day till 19:14:22 hours.

Removal of access right to the operation

7.71 The Supervisor claimed that he had on Day 1 afternoon instructed one of the officers to remove the access rights of all the listeners concerned, though he could not recall the officer to whom he had given such instructions. I made the following enquiries with the department:

(a) Was the access right of the female listener removed on the afternoon of Day 1? Presumably yes, as the department's supplementary report stated that the female listener granted herself access right to the operation on the morning of Day 2 (see paragraph 7.56 above).

(b) As the Supervisor had instructed on Day 1 that the access rights of all the listeners of the operation including the female listener be removed (paragraph 7.54 above), did the female listener seek the approval of the Supervisor before she granted herself access right to the operation on the morning of Day 2? If she did not seek such approval, why didn't she? Had she violated any departmental rule or procedures?

(c) Was the Supervisor's access right to the operation removed on the afternoon of Day 1 by one of the officers upon his instructions given that afternoon, as it was said that the Supervisor granted himself the access right to the operation on Day 2 for checking the data for preparation of the REP-11 report?

7.72 It was upon this further probe that the department checked the log of the system and found that on Day 1 and up to about 0940 hours on Day 2, no one had logged in the system to grant or remove anyone's access right. There was also no record of the female listener and the Supervisor granting or removing their access rights on Day 1 and Day 2 as claimed. Such findings mean that:

(a) Either the Supervisor had not assigned any officer to remove the access right to the operation on Day 1 or the officer who was so assigned had not performed the task on that day or at all.

(b) As no one had removed the access right on Day 1, the allegation that the female listener granted herself access right to the operation on the morning of Day 2 was wrong. Similarly, the allegation that she removed her access right to the operation after the checking of data for compilation of the REP-11 report was also wrong as she had remained logged in the system for virtually the whole day.

(c) The claim that the Supervisor granted himself the access right on Day 2 was also wrong because records showed that his access right had not been removed.

7.73 The department stated that as the Supervisor had instructed the female listener to prepare a draft REP-11 report, it would imply that she could make access to the necessary information for such purpose. Hence, the department did not consider that the female listener had violated any departmental rule or procedure.

Checking of the ATR before submission of the REP-11 report

7.74 The female listener printed the ATR at 1146 hours on Day 2 but it covered only the period from 0000 hours to 2359 hours on Day 1. By not printing an ATR up to the moment of printing, it could hide the fact that the female listener had accessed an intercepted call on Day 2 after a

decision to suspend monitoring of the operation was made. The act of not printing an ATR up to the latest moment aroused such suspicion.

7.75 In the REP-11 report to the panel judge to seek continuation of the prescribed authorization, the Supervisor stated that 'monitoring of the interception operation has been suspended' and 'no LPP information was obtained'. If the Supervisor had not checked the ATR up to the latest moment, how could he say in the REP-11 report that monitoring of the interception operation had been suspended? How could he say in the REP-11 report that no LPP information was obtained? If someone had listened to the intercept product during the period of suspension and such product contained LPP information, then it would be wrong for the Supervisor to state that no LPP information was obtained.

7.76 In my previous letter of 28 May 2010 to this department on the reporting requirement of LPP cases, I requested (and the department accepted) that when making REP-11 report to the panel judge on LPP-related matters, the reporting officer should report in the REP-11 report whether, other than the reported LPP call, there were any calls between the telephone number concerned and the subject's telephone number(s) under interception irrespective of whether such calls were intercepted **before or after** the reported LPP call. If there were such other calls, the reporting officer should also report whether they had been listened to and if so, the identity of the listener(s). For these purposes, the reporting officer should check the relevant ATR when preparing the REP-11 report. [These requirements can also be found set out in paragraphs 5.11 to 5.12 in Chapter 5 of Annual Report 2010.]

7.77 In the present case, I found that the REP-11 report only reported such other calls intercepted before Call 1 (the reported LPP call) but omitted to report one other call intercepted **after** Call 1. I enquired with the department why the female listener and the Supervisor did not report this other call and check the ATR to see if this other call had been listened to right up to the moment of completing the compilation of the REP-11 report? Why did the two officers not follow the requirement made in my letter of 28 May 2010 which the department had agreed to follow? If the two officers had followed my requirement in reporting such other call, there would be no excuse of their not printing the ATR up to the latest moment on Day 2.

My letter of January 2012 to the head of department

7.78 I provided my frank and searching observations and comments in my letter of January 2012 to the head of department. I pointed out that despite the inadvertent access claimed by the department, not a scintilla of fact was provided to support the description of the access as 'accidental'. The first explanation was disowned by the female listener herself upon her giving the second explanation in her witness statement. The second explanation was nullified by the log in / exit information retrieved from the system. Indeed the log in and log out time evidenced that the female listener had throughout the day maintained her log in position accessible to the intercept product for a considerable time, only with a few intermittent exits for short whiles. Next, when the Supervisor said that he had given instructions to an officer to remove the access right of all the listeners concerned (including the female listener's access right), she changed her story to say that she granted herself the access right on the morning of Day

2 because she was tasked by the Supervisor to compile the REP-11 report – she was impliedly given the right to access the intercept product for the compilation. But again, this explanation was rejected by the technical proof that there had never been any removal of anyone's access right at all. Nor did this claim of implied right of access justify her staying in the access position for a considerable time even after she had finished compiling the REP-11 report.

7.79 I further pointed out that while the conclusion in the department's investigation report and the supplementary report was that the matter was an 'accidental' access caused by inadvertence and there was no evidence of any ulterior motive or wilful intent, I could not think of a plausible ulterior motive for the short access for 15 seconds either. However, the strange phenomenon of the Supervisor giving instructions for removing the access right when compared with the global forgetfulness of all the officers of the unit of such instructions having been given, the fact that no such removal was made, the undeniable fact that the ATR was checked by the female listener for accesses only restrictively short of the moment of finalizing the REP-11 report for submission to the panel judge, and in particular the discrepancies in the different unsustainable or invalid stories mentioned above, coupled with the eventual lack of any provable explanation, led me to draw the inference that there was a concealment of the actual cause of the event. From the same matters, I would also draw the inference that the need for the concealment must have arisen from the ineffectiveness of the procedure imposed by the department for the work in the interception unit or alternatively the lax attitude of the officers in the interception unit in complying with the procedure or in carrying out ICSO

work inside the unit, or in the further alternative the attempt to hide the untold ulterior motive of the perpetrator.

7.80 As the statements from the female listener and the Supervisor were all wrong, I queried why the department was not able to make verification before it submitted the investigation report and supplementary report to me.

7.81 I also could not agree with the department's stance that the female listener had not violated any additional condition imposed by the panel judge. She asserted that she had not put on a headphone at the time in question and hence had not listened to the intercepted call. Accepting this (ie accessing without listening) would be to allow an inroad to disable the effect of the ATR system which is used to control and to check access to intercept product. Apart from a truly 'accidental' access, the playing of the recorded conversation must have been caused by negligence if not a deliberate act. The female listener's punishment should be seen in this light. The proposed punishment of verbal advice was too lenient.

7.82 Regarding the Supervisor, the department had not proposed any punishment against him. However, his statement of his directing an officer to remove access right sometime on the afternoon of Day 1 was proven either wrong or not being carried out by any officer. His representation in the REP-11 report that access had been suspended (since Day 1) had not been verified by himself when submitting the report to the panel judge. This was a **lax practice.** He did not query the female listener for not providing an ATR up to the current moment and did not use his best endeavours to verify what was stated in the REP-11 report as to the status of listening / access given that there was a void time of over 11 hours

(from 2359 hours on Day 1 to 1145 hours on Day 2) unsupported by the ATR obtained by the female listener. He failed in his supervisory functions.

7.83 I invited the head of department to make further submissions on my above views and reconsider the action to be taken against the two officers.

Further submissions by the department

7.84 In response, the head of department replied as follows:

Unsustainable explanations given by the female listener

(a) The first explanation given by the female listener at the inspection visit in February 2011 was only her speculation at the time. She later considered that the second explanation was a more plausible one. The investigators of the investigation also considered the second explanation a reasonable hypothesis of what might have happened.

(b) During the investigation, the availability of the log-in / exit time on the system was not thought of and hence this piece of information, which was not readily available, had not been obtained. Otherwise, the second explanation would have been rebutted at that time.

(c) There was room for improvement in their investigation process and officers concerned had been reminded to ensure a

thorough and detailed investigation was done with respect to each and every ICSO reported incident.

(d) Due to the lapse of time, the female listener could no longer recall why she logged in the system for the whole of Day 2.

No removal of access right to the operation

(e) Both the female listener and the Supervisor were only trying to recollect what they might have done based on their vague memories and normal practice. Their account of the granting and removal of access right was confusing, revealing that the administrative supervision in this area was unsatisfactory.

Checking of ATR before submission of the REP-11 report

(f) The Supervisor was relying on the belief that the female listener had put on hold monitoring after her report of the LPP call (Call 1) in question. Though not an accurate assessment, the Supervisor assumed that no other listeners would have accessed the intercept products concerned since the female listener was the designated listener for the operation at that time.

(g) Regarding the omission to report one other call intercepted after the LPP call, the practice of the unit to which the female listener and the Supervisor belonged was that they only reported such other calls intercepted before the LPP call. The unit was not aware of the requirement to report other calls made after the LPP call. This was because the department's

internal order valid at the time had not specified clearly that 'other calls' both before and after the LPP call had to be checked and reported.

(h) When further questioned by me on why another section of the same department was aware of the requirement to report calls made before and after the LPP call, the head of department replied that the wording in the department's internal order was not specific enough, thus leading to different interpretation by different sections. The department had reminded the officers responsible for issuing internal orders to be more vigilant in issuing orders and relevant guidelines in future.

7.85 After making further investigation, the head of department considered that on balance of probability, the access was indeed an accident albeit the true cause remained unknown. The unauthorized access lasted 15 seconds only and if it was an intentional access, one would expect the duration to be much longer. A deliberate cover up by the female listener of the access on Day 2 was unlikely because officers handling ICSO-related matters knew that the relevant ATR would be subject to in-depth examination by me.

7.86 The head of department accepted that there was certain degree of negligence on the part of the female listener in respect of the accidental access including her prolonged logged-in of the system as well as the failure to remove her own access right after suspension of the monitoring according to normal practice. The department recommended raising the level of disciplinary action against her to **verbal warning.**

7.87 As for the Supervisor, the head of department considered that his administrative supervision could be strengthened and he should personally ensure that the access right had been properly removed. The department recommended a **verbal advice** be given to the Supervisor for him to enhance his supervisory function in overseeing the conduct of interception operations. The verbal advice is disciplinary in nature.

My findings

7.88 The female listener committed the mistake of accessing a call during the period of suspension in breach of the Supervisor's instructions and one of the additional LPP conditions of the relevant prescribed authorization, which was non-compliance with a relevant requirement of the ICSO. Without any concrete evidence one way or another, I could not make a finding whether her access was accidental or otherwise. What reduced the severity of her non-compliance was that the access only lasted 15 seconds. The female listener also failed to check the ATR for the day on which she compiled the draft REP-11 report. Had she checked the ATR up to the completion of her draft, she would have discovered her 'accidental' access and would not be liable for failing to make full and frank disclosure in the REP-11 report she drafted for submission to the panel judge. For these failures, I agreed that a verbal warning was an appropriate disciplinary award.

7.89 As far as the Supervisor is concerned, he failed to ensure that the access right had been properly removed for suspending the monitoring and that the REP-11 report (that drafted by the female listener for him) contained all necessary and material information for the panel judge's consideration. He similarly failed to check the up-to-date ATR when

signing the report for submission to the panel judge. I agreed with the proposed verbal advice against the officer.

7.90 The incident had revealed several inadequacies in the procedures which the department subsequently introduced remedial measures to rectify the situation.

7.91 As I had not listened to the recording of the intercept product, no finding could be made on the veracity of the gist of Call 1 as reported in the REP-11 report and whether Call 2 did not contain LPP information as claimed by the department.

7.92 One other matter should be mentioned before I leave this case. There was a dispute as to when my staff and I were informed of the second explanation. A senior LEA officer maintained that he had given me the second explanation at an inspection meeting in February 2011 next following the inspection meeting referred to in paragraphs 7.50 and 7.51 above. That was not in accordance with our memory and the notes of that meeting as drafted by the LEA staff did not show that the second explanation had been given. The dispute dragged on for some time, remained unresolved and was eventually dropped.

Report 2: Four cases of listening to intercept products by officers below the rank specified in the LPP additional conditions of the prescribed authorizations after such conditions were lifted

7.93 The report was submitted by the LEA at my request. The four cases were non-compliance with the condition of the prescribed authorizations.

Background of my request

7.94 In Report 3 of Chapter 7 of my previous annual report (Annual Report 2010), I reported my review of a non-compliance case occurring in July 2010. In that case, the interception authorized by the prescribed authorization was assessed to have LPP likelihood because the subject had been arrested for an offence unrelated to the crime under investigation. The panel judge imposed an additional condition in the prescribed authorization such that listening to intercept product could only be undertaken by officers not below a certain rank ('the specified rank'). The LEA accordingly assigned specified rank officers to listen to the intercept product of that operation. After the subject's court case in relation to the other offence had been concluded, the panel judge lifted the additional condition. According to the LEA, its practice was that after the lifting of the additional condition, the designated specified rank listener would still finish listening to the outstanding calls intercepted before the lifting of the additional condition ('pre-lifting calls') whereas calls intercepted after the lifting of the additional calls ('post-lifting calls') would be listened to by listeners below the specified rank. However, in this July 2010 case, after the lifting of the additional condition, a junior supervisor below the specified rank listened to 51 pre-lifting calls which had hitherto not been listened to. As these calls were intercepted at a time when the additional condition was still in force, the listening to them by the junior supervisor who was below the specified rank was a breach of the additional condition imposed by the panel judge, hence non-compliance under the Ordinance. My findings of that case can be found in paragraphs 7.130 to 7.135 of Chapter 7 of Annual Report 2010.

7.95 Prompted by the occurrence of the non-compliance in this case, in February 2011, I requested the LEA to conduct checks on all sections of the department involved in telecommunications interception with additional conditions imposed and later lifted to see if there was any similar mistake (paragraph 7.130(c) of Annual Report 2010 refers).

Four other cases of non-compliance

7.96 The LEA had completed the examination and submitted an investigation report to me in December 2011, pursuant to section 54 of the Ordinance. It found that there were four other similar cases of non-compliance where after the lifting of the additional condition, listeners below the specified rank listened to pre-lifting calls, as follows:

Non-compliance	Occurrence	No. of pre-lifting calls listened to	Total duration of listening
First case	June 2008	2 calls	73 seconds
Second case	May 2009	1 call	3 seconds
Third case	August 2009	5 calls	107 seconds
Fourth case	February 2010	1 call	6 seconds

7.97 Due to the lapse of time, all intercept products, transcripts, etc of the operations concerned had already been erased or destroyed. In the circumstances, the four non-compliance cases were investigated by the LEA based on the examination of ATRs as well as evidence of the officers concerned.

The first case (June 2008)

7.98 At the time of the grant of the prescribed authorization, it was noted that the subject was involved in a court case. The panel judge imposed the additional condition restricting the listening to officers not below the specified rank. The subject was subsequently acquitted in court and the additional condition was lifted at 1543 hours on a day in June 2008. At about 1720 hours on the same day, a woman officer below the specified rank ('Officer A') listened to **two calls,** intercepted about three hours before the lifting of the additional condition, for a total of **73 seconds.** Records showed that these two calls had already been listened to by a specified rank listener before the lifting of the additional condition. Officer A, who had retired in December 2008, was unable to provide any reason for her listening to these two calls. The LEA suspected that she might have forgotten that the two calls were subject to the additional condition or mixed them up with other calls intercepted after the additional condition had been lifted.

The second case (May 2009)

7.99 At the time of the grant of the prescribed authorization, the subject was on bail for a case unrelated to the prescribed authorization. The panel judge imposed the additional condition in the prescribed authorization. When the subject answered bail, he was released unconditionally. The panel judge lifted the additional condition at 1604 hours on a day in May 2009. After the lifting of the additional condition, a woman officer below the specified rank ('Officer B') listened to **one call** intercepted at 1601 hours before the lifting of the additional condition.

She listened to this call for **three seconds.** Records showed that the designated listener at the specified rank had not listened to this call.

7.100 When enquired by the LEA, Officer B provided two possible causes:

(a) She might want to re-listen to a post-lifting call intercepted at 1606 hours but selected wrongly the pre-lifting call of 1601 hours and failed to notice that it was obtained before the additional condition was lifted at 1604 hours.

(b) She might have mixed up the time when the additional condition was lifted, say, 1600 hours and, therefore, listened to the call of 1601 hours in the belief that it was not a call restricted to specified rank listener.

The third case (August 2009)

7.101 The prescribed authorization was imposed with the additional condition because the subject was on bail for a case unrelated to the prescribed authorization. The subject was later released unconditionally. The panel judge lifted the additional condition on a day in August 2009. The following day, a listener below the specified rank ('Officer C') listened to **five calls** for a total of **107 seconds.** These five calls were intercepted about two hours before the lifting of the additional condition. The designated listener at the specified rank had not listened to these five calls.

7.102 When asked to give an explanation, Officer C believed that he was too focused on the monitoring of the operation and for a momentary

lapse, failed to notice that the five calls concerned were obtained during the period when listening was restricted to listeners at the specified rank only.

The fourth case (February 2010)

7.103 The subject had been arrested in connection with a case unrelated to the prescribed authorization. The panel judge imposed the additional condition in the prescribed authorization. After the subject's case had been disposed of, the panel judge lifted the additional condition at 1008 hours on a day in February 2010. Later that day, a listener below the specified rank ('Officer D') listened to **a call** intercepted before the lifting of the additional condition, for **six seconds.** The designated listener at the specified rank had not listened to this pre-lifting call.

7.104 Judging from his listening pattern on the day in question, Officer D suspected that when he was examining calls intercepted after the lifting of the additional condition, he found a need to review a previous call without noticing that it was a call intercepted before the lifting of the additional condition to which he was not allowed to listen.

The LEA's investigation

7.105 The LEA had asked the four non-specified rank officers if they had been briefed that listening to the intercept product obtained before the lifting of the additional condition was restricted to specified rank officers and of the time when the additional condition was lifted. Officer A was unable to give any comment due to the lapse of time. Officer B believed that she had been so briefed. Officers C and D admitted that in normal circumstances, they would be so briefed.

7.106 The LEA considered that the pre-lifting calls mentioned above were listened to by the four non-specified rank officers inadvertently and that they did not report such inadvertent listening to their supervisors because they were not aware at the time that they were listening to calls restricted to specified rank officers. There was no evidence to suggest any ill intent or deliberate defiance of the additional condition by the officers concerned.

7.107 At the material time, though supervisory officers might conduct random checks on the ATRs, there was no internal order requiring the supervisory officers of the interception units to examine all ATRs for cases with additional LPP conditions imposed. Hence, the incidents remained undetected until the current review.

7.108 Since the intercept products, transcripts, etc of the interception operations concerned had been destroyed in accordance with normal procedure, it was unknown if the pre-lifting calls listened to by the four non-specified rank officers contained any LPP information. However, as all these calls were obtained after the subject's case had been cleared in court or after the subject's unconditional release, the LEA believed that the chances of these calls containing LPP information should be low.

7.109 The LEA considered that the four officers were culpable for the non-compliance with the additional condition imposed in the respective prescribed authorizations. It proposed the following disciplinary actions against three of the officers:

(a) a **verbal advice** be given to **Officer B** for listening to one pre-lifting call for three seconds;

(b) a **verbal warning** be given to **Officer C** for listening to five pre-lifting calls for a total of 107 seconds; and

(c) a **verbal advice** be given to **Officer D** for listening to one pre-lifting call for six seconds.

7.110 The LEA considered that Officer A who had listened to two pre-lifting calls for a total of 73 seconds should also be liable to disciplinary action. However, as she had retired from the service in 2008, no disciplinary action could be taken against her.

My review and finding

7.111 It is to be noted that the LEA's practice was that even after the lifting of the additional condition, the designated specified rank listener would still finish any outstanding calls intercepted before the lifting of the additional condition. Save for the first case, in all the other three cases, the designated specified rank listeners of the respective interception operations did not listen to the pre-lifting calls listened to by Officers B, C and D. It led one to surmise if the true cause was that the designated specified rank officers had deliberately left the unfinished pre-lifting calls to the non-specified rank officers. I asked the LEA for an explanation, in particular why the five pre-lifting calls in the third case were not listened to by the designated listener at specified rank.

7.112 The LEA stated that there could be some valid reasons for a listener not listening to some of the intercepted calls. Due to the lapse of time and the absence of relevant records, the LEA could not ascertain why the designated specified rank listeners in the three respective operations did not listen to the outstanding calls which were intercepted before the

additional condition was lifted. Nor did the designated listeners recall the reasons.

7.113 After conducting a review, I made a finding that the listening to the pre-lifting call or calls by the four officers below the specified rank was in breach of the additional condition imposed in the respective prescribed authorizations which restricted the access to these calls to listeners not below the specified rank. There was no evidence of bad faith or ulterior motive, and the proposed disciplinary actions were appropriate.

7.114 The intercept products of the four cases had been destroyed. As I had not listened to the nine pre-lifting calls in question, no finding could be made on whether they contained information subject to LPP.

Report 3: Listening to calls made to or from prohibited numbers on five occasions

7.115 The non-compliance in this case was discovered by my office in March 2011 during a review of an LPP case (ie LPP Case 8 mentioned in paragraph 5.72 of Annual Report 2010). The panel judge had imposed additional conditions such that calls made between the subject facility and certain telephone numbers as specified ('the prohibited numbers') were prohibited from listening to in order to guard against the risk of obtaining LPP information. In our review of the LPP case, we found that between November and December 2010, there were five occasions on which the listener had listened to calls made to or received from three of the prohibited numbers, contravening the aforesaid additional condition. Details of the five prohibited calls that had been listened to are as follows:

Non-compliance	Call	Date of listening	Duration of listening
First	The call was made with Prohibited No. **(x)**, lasting 39 seconds.	18.11.2010	Whole of the call.
Second	The call was made with Prohibited No. **(x)**, lasting 145 seconds.	18.11.2010	Part of the call (7 seconds).
Third	The call was made with Prohibited No. **(y)**, lasting 31 seconds.	29.11.2010	Part of the call (14 seconds).
Fourth	The call was made with Prohibited No. **(x)**, lasting 94 seconds.	29.11.2010	Part of the call (17 seconds).
Fifth	The call was made with Prohibited No. **(z)**, lasting 106 seconds.	30.12.2010	Part of the call (37 seconds).

7.116 As a result of the discovery, the department reported the incidents to me under section 54 of the Ordinance in March 2011 by way of an initial report. When my Secretariat urged the department in May 2011 to submit the investigation report on this case and Outstanding Case (i) referred to above as soon as possible, the department replied that the investigation report would be submitted to me 'upon conclusion' of the investigation. In early June 2011, upon my instructions, my Secretariat notified the department that I wished to know when the investigation report would be submitted to me and that I did not wish to wait indefinitely for the conclusion of the investigation. The department replied that it anticipated that the investigation report would be ready for submission by 22 July 2011. However, by a memo of 20 July 2011, the department stated that it anticipated that three more weeks would be required to complete the report

and sought my agreement to an extension of time for the submission to 12 August 2011. By a letter of 21 July 2011 to the head of department, I drew his attention to the handling of this case and expressed my surprise at the request for extension of time as the original estimate of the submission date of 22 July 2011 was made by the officer concerned and not imposed by me. It was after all this exchange of correspondence that eventually on 29 July 2011, the department submitted a full investigation report to me under section 54 of the Ordinance.

The department's investigation

7.117 According to the department's investigation report, the listener had been provided with a copy of the additional conditions imposed by the panel judge with the prohibited numbers stated therein. The listener was unaware of her unauthorized listening to the five calls until she was enquired about the matter by the department after our discovery. When she was referred to her own listener's notes made in respect of the five occasions, she could not recall or determine whether she had actually listened to the five calls or whether the five calls were considered as irrelevant after listening. She could not recall what had exactly happened on those occasions but she accepted full responsibility for the non-compliance on the five occasions. She considered that her performance had been affected by the heavy workload assigned to her and the complex nature of the interception operation involving multiple targets and over 10 different prohibited numbers.

7.118 The department considered that the non-compliance was attributable to the negligence of duty and lack of vigilance on the part of the listener. The listener was especially culpable for the Fifth

non-compliance which occurred after the introduction of a flagging system to help listeners differentiate the prohibited numbers from others. That said, the department found the listener had acted prudently on other occasions. There were another 50 occasions when calls were made to or originated from prohibited numbers and on all those occasions the listener had refrained from listening to them. It was also noted that with the exception of the First non-compliance, the listener had only listened to part of the prohibited calls in the other four incidents of non-compliance. There was no record or note in the listener's notes of the contents of all the five prohibited calls. The department also found that the workload of the listener was heavy at the material time in light of the frequent traffic on the facilities under interception. Having taken into account all circumstances, the department recommended that a **written warning** be given to the listener for her listening to the five prohibited calls inadvertently due to negligence of duty and lack of vigilance.

My review and findings

7.119 I conducted a review by examining the original of the listener's notes kept by the listener and other relevant documents and made enquiries with the department about the listener's practice of listening and note-taking. In my review, I did not listen to the recording of the intercept products.

7.120 My findings were:

(a) The listener listened to a total of five calls made to or received from three prohibited numbers as detailed in paragraph 7.115 above. Among these five calls, she only listened to the

entirety of the first call. For the other four calls, she listened to them partly.

(b) The listener was culpable for the five incidents of non-compliance. The Fifth non-compliance was particularly inexcusable as the flagging system was functioning properly at that time.

(c) I had examined the listener's notes in respect of the five occasions of non-compliance and seven other occasions randomly selected out of the 50 occasions involving the same prohibited numbers in respect of which the listener had not accessed as stated in paragraph 7.118 above. It was found that for all these prohibited calls, the listener had written down in her notes under three separate columns (i) the time of the intercepted calls, (ii) the corresponding telephone numbers and (iii) blank. According to the department's investigation report, the listener could not recall or determine whether she had actually listened to the five prohibited calls or whether these five calls were considered irrelevant after listening. I considered it meaningless if a listener could not discern from his or her notes whether a call had been listened to but considered irrelevant or it had not been listened to. This would only serve to provide the listener with an excuse when being challenged. I **recommended** that the department should look into the practice of listening and note-taking in respect of its listeners and work out improvement measures in this area.

(d) There was no evidence of bad faith or ulterior motive on the part of the listener. The proposed disciplinary action of written warning was appropriate.

7.121 Regarding the delay in the submission of the full investigation report to me involving the waste of time and effort in the exchange of correspondence on the matter (as described in paragraph 7.116 above), I made a **recommendation** to the department that if any of its officers fails to comply with the time-line set by me in my request for documents or information or report, it should be dealt with as a disciplinary matter. This was necessary because no sanction is provided for in the Ordinance for any failure to comply with my request for information or document within the time specified by me under section 53 of the Ordinance. The intention is more for deterrence than for punishment, and hopefully when the recommendation is accepted by all the LEAs and made known to officers handling ICSO-related matters, delay will be avoided and time and effort of all concerned will be saved.

7.122 In May 2012, the department replied that it would ensure compliance by its officers with the time-line set by me and would consider taking disciplinary action for any failure by its officers to do so without reasonable cause or explanation.

7.123 Regarding my recommendation on the need for improvement measures in the practice of listening and note-taking by its listeners, the department replied that it had issued standard operating procedures for its listeners with principles and guidance on note-taking when performing listening duties.

Report 4: Unauthorized interception of 10 minutes after revocation of the prescribed authorization by the panel judge upon receipt of REP-11 report on obtaining of journalistic material

7.124 This is the JM Case 2 described in Chapter 5 of this annual report. Please refer to paragraphs 5.94 to 5.98 for details. The continued interception of 10 minutes after the prescribed authorization had been revoked was without the authority of a prescribed authorization, amounting to non-compliance with the requirement of the Ordinance.

Report 5: Incorrect statement found in the affirmation in support of an application for Type 1 surveillance

7.125 The investigation arose out of the discovery of a mistake in the description of a prescribed authorization of 2009 ('First PA'). The First PA authorized Type 1 covert surveillance to be conducted on meetings between Subject 1 and Subject 2 but in the affirmation in a subsequent application for prescribed authorization to conduct Type 1 covert surveillance on meetings between Subject 2 and Mr A ('Second PA'), the First PA was described as authorizing Type 1 covert surveillance to be conducted on meetings between Subject 1, Subject 2 and Mr A ('the Incorrect Statement').

7.126 Historically, pursuant to the First PA, three covert surveillance operations had been carried out in early 2009. The first two covert surveillance operations were made against Subject 1 and Subject 2 in meeting. However, the third covert surveillance operation ('Third CS') was carried out on a meeting between Subject 2 and Mr A, in the absence of Subject 1. That was outside the terms of the First PA and was thus

unauthorized. The non-compliance in the Third CS, which was discovered in 2010 when the department answered my probing questions on the use of surveillance devices, had been dealt with in a separate case described under Report 4 of Chapter 7 of my Annual Report 2010 [Note 10].

7.127 In response to the questions raised by me on the non-compliance in the Third CS, the department discovered in May 2011 yet another irregularity, that is, the wrong description of the terms of the First PA in the affirmation in support of the application for the Second PA as mentioned in paragraph 7.125 above. Given the fact that the Third CS was unauthorized, the way in which the Incorrect Statement came into being gave rise to the suspicion that the Incorrect Statement was made with intent to cover up the non-compliance in the Third CS. The department reported the discovery of the Incorrect Statement to me in May 2011, followed by an investigation report in August 2011 *not* under section 54 of the Ordinance as the department did not consider the mistake a case of non-compliance.

The department's investigation

7.128 The First PA was discontinued after the carrying out of the Third CS and revoked by the panel judge. A couple of days later, the department received intelligence that there would be another meeting between Subject 2 and Mr A. The officer-in-charge of the operation ('OC Operation') thus prepared another application for Type 1 covert

---

Note 10 For details of the non-compliance in the Third CS and my review findings, please see paragraphs 7.163 to 7.211 and paragraphs 7.216 to 7.225 under Report 4 of Chapter 7 of Annual Report 2010. The officer-in-charge of the operation and his supervisor were each given a written warning for the non-compliance in the Third CS. The Reviewing Officer who failed to detect the non-compliance when reviewing the case was also given a written warning.

surveillance to cover the coming meeting. In the affirmation ('the Affirmation') in support of this second application, the OC Operation described (i) the terms of the First PA, and (ii) the outcome of the covert surveillance operations that had been carried out pursuant to the First PA, including the Third CS. Regarding (i), he made the Incorrect Statement that the First PA authorized meetings between Subject 1, Subject 2 and Mr A. Regarding (ii), he stated that the Third CS was on a meeting between Subject 2 and Mr A.

7.129 The OC Operation then submitted the draft application documents to his supervisor ('the Supervisor') who acted as the applicant and affirmant. The Supervisor failed to notice the Incorrect Statement in the Affirmation when he vetted the draft application documents. The Assistant Head of Department also failed to notice the Incorrect Statement when approving the making of the application to the panel judge for Type 1 covert surveillance. The Supervisor later submitted the application to the panel judge who granted the authorization as sought, ie the Second PA. Covert surveillance was carried out pursuant to the Second PA.

7.130 After the conclusion of the covert surveillance, about two weeks later, the OC Operation submitted, through the chain of command, a review folder to the Reviewing Officer (a Senior Assistant Head of Department) for review of the covert surveillance operation conducted pursuant to the Second PA. The Reviewing Officer also did not notice the Incorrect Statement in the Affirmation contained in the review folder and concluded that there was no non-compliance or irregularity.

7.131 The department's investigation report stated that there was no evidence suggesting any bad faith on the part of the OC Operation in

drafting the Affirmation and the Supervisor (being the affirmant and applicant of the application) in affirming the Incorrect Statement. The circumstances suggested that it was a mistake partly arising from the mistaken belief or misimpression of the two officers that the First PA authorized to cover meetings between Subject 1, Subject 2 and Mr A, partly caused by copying from the terms of an earlier prescribed authorization that authorized covert surveillance on meetings amongst the same three persons and pasting the same for the terms of the First PA when drafting the Affirmation, and partly due to the two officers' lack of vigilance in paying sufficient attention to the actual terms of the First PA. As such, it did not appear to the department that the mistake constituted any non-compliance with the requirements of the Ordinance. The department proposed to give a **written warning** to both the OC Operation and the Supervisor for the Incorrect Statement in the Affirmation.

7.132 The Assistant Head of Department, who failed to notice the Incorrect Statement when approving the making of the application to the panel judge, had left the service of the department before the discovery of the mistake in May 2011. Hence, no disciplinary action could be taken against him.

7.133 Regarding the Reviewing Officer, the department pointed out that the review folder of the First PA and the review folder of the Second PA both reached the Reviewing Officer on the same day and the Reviewing Officer conducted the two reviews on the same day. The department considered that on that day, he had two opportunities to detect the non-compliance in the Third CS – one opportunity arising from each of the two reviews. In reviewing the First PA, he failed to detect the

non-compliance despite the ample information contained in that review folder. (He was awarded a written warning for this failure, as stated in paragraph 7.191 of Annual Report 2010). In reviewing the Second PA, he failed to notice the discrepancy between the incorrect information stated in the Affirmation about the terms of the First PA and the words in the First PA itself, ie he failed again to detect the non-compliance in this second opportunity. The review of the Second PA was a separate assignment from the review of the First PA. The Reviewing Officer was found to be lacking vigilance in both assignments and should receive the same level of punishment in both cases. For this reason, the department recommended a **written warning** be given to the Reviewing Officer for the lack of vigilance in the review of the Second PA.

7.134 The department's investigation also exposed that the procedures for vetting and processing affirmations in support of applications for prescribed authorizations required improvement and had taken appropriate administrative and improvement actions in this regard.

My review and finding

7.135 The crux of the investigation related to a possible deliberate concealment of the unauthorized nature of the Third CS. The suspicion of such deliberate concealment arose out of the misdescription of the First PA in the Affirmation in support of the application for the Second PA that might mislead its readers and the readers of various subsequent documents that the First PA authorized covert surveillance operations to be conducted on meetings between Subject 2 and Mr A in the absence of Subject 1, as in the Third CS.

7.136 The suspected concealment or attempt at concealment was examined in the surrounding circumstances to see if there was any evidence in support, apart from the fact that the misdescription would mislead anyone reading the Affirmation that the Third CS was conducted in compliance with the terms of the First PA. It is relevant to point out that around that time, there were other applications prepared or submitted by other officers investigating the case to the panel judge for interception or covert surveillance on the same or other suspects of the same crime. In all these other applications (including one prepared by the Supervisor's another subordinate officer and of which the Supervisor was the applicant), the terms of the First PA and the involved subjects under the Third CS were stated without mistake in the affirmations in support of these applications. Anyone who wished to might freely compare the manner of operation of the Third CS with the terms of the First PA that were all unmistakably set out in these other affirmations. The presence of the correct description of the First PA would enable a careful reader to discover the unauthorized nature of the Third CS. Having conducted a review on the surrounding circumstances, I made the finding that the mere wrong description of the First PA in the Affirmation in support of the Second PA could not reasonably be said to be sufficient evidence of a deliberate concealment of the true terms of the First PA or an attempt in doing so.

7.137 I found the proposed disciplinary actions appropriate except that for the Reviewing Officer. He had been given a written warning for his failure to spot the non-compliance in the Third CS during the review of the First PA. It would therefore be harsh to award another written warning to him for essentially the same mistake, ie failure to spot the

non-compliance in the Third CS during the review of the Second PA. On the other hand, the Reviewing Officer did fail to check the statement in the Affirmation against the words of the First PA with sufficient care, for if he had done the checking and done it carefully, he would have noticed that the statement wrongly represented the terms of the First PA. Although this failure was essentially the same as that pertaining to his failure to realize that the covert surveillance action taken under the First PA was beyond its terms in his review of the First PA, I considered that the proper action to be taken against him would be a **verbal warning** that where any document he is tasked to review contains any reference to the content of another document, the terms and wording of the referenced document should be checked carefully to ensure that its content is represented correctly. I had informed the department of my view accordingly.

7.138 While a wrong statement in the contents of an affirmation which the affirmant has affirmed to be true and correct is a serious matter, the Incorrect Statement being made in this case did not amount to a breach of any of the relevant requirements of the Ordinance. Thus, the department was correct in treating this case as an irregularity and not as non-compliance.

Report 6: Issue of devices pretending to be for ICSO purpose

7.139 The irregularity in this case was reported by the department concerned *not* under section 54 of the Ordinance.

Facts of the case

7.140 On a day in late May 2011, a Senior Officer directed his team members to arrange training with the use of two surveillance devices. The

Senior Officer signed a device request memo for withdrawing the two surveillance devices from the device store for a non-ICSO purpose, ie tactic training. At about 1500 hours, a team member went to the device store and presented the device request memo to the device issuing officer who issued the two surveillance devices to the team member. Although the device request memo stated clearly that the issue of the two devices was for non-ICSO purpose, the device issuing officer made the records of issue in the ICSO Device Register in the Device Management System ('DMS'), instead of the Non-ICSO Device Register in the DMS. As the ICSO Device Register required the filling in of information such as the ICSO No. of the prescribed authorization, the type of the prescribed authorization and the effective period of the authorization with date and time, the device issuing officer made up the necessary information which was false for inputting into the ICSO Device Register.

7.141 At about 1800 hours, the team member returned the two surveillance devices to the device issuing officer, who made corresponding records of return in the ICSO Device Register in the DMS. As the ICSO Device Register required the filling in of columns such as 'the date of reporting discontinuance of the operation' and 'the date and time of revocation of the prescribed authorization', the device issuing officer again made up false information for inputting into the DMS.

7.142 Three days later, the Senior Officer conducted a weekly inspection of the Device Registers and discovered the erroneous entries made by the device issuing officer.

7.143 In early June 2011, the department reported this incident to my Secretariat, with a full investigation report submitted in late October 2011.

The department's investigation

7.144 The investigation report stated that the device issuing officer, out of his own initiative, intended to simulate the training session as a real Type 2 surveillance operation, he therefore told the team member who obtained the two devices from him to treat the case as a Type 2 surveillance operation under the ICSO.

7.145 No one, except the device issuing officer himself, was aware that the issue of the device was wrongly made in the ICSO Device Register in the DMS at the time.

7.146 The device issuing officer had issued surveillance devices for non-ICSO purposes on many occasions, including more than 40 times for training purposes, but no similar occasion of making up dummy information ever happened before. It was difficult to imagine why he made such a mistake this time.

7.147 The device issuing officer explained that he made up the dummy information of a Type 2 surveillance operation with a view to simulating a real surveillance operation for the training so that the participating officers would have a stronger impression. The department found it difficult to accept this logic since the officers on the ground would not see the DMS records. The department considered that the device issuing officer was trying to put up an excuse to explain his wrongdoing.

7.148 The department concluded that the mistake committed by the device issuing officer was caused by his carelessness, negligence and ignorance and that there was no evidence to suggest any ill-intent on his part. Since the device issuing officer had proceeded on pre-retirement

leave in late June 2011, the department considered that it would not serve any meaningful purpose of initiating any disciplinary action against him.

My review

7.149 In response to my enquiries, the department clarified that the device issuing officer was not in charge of the training concerned, that he was not in a position to give instructions to the team member to treat the training as a Type 2 surveillance operation, that he did not tell the Senior Officer of his giving such instructions to the team member, and that the training conducted that day was a tactic training, not a Type 2 surveillance operation.

7.150 I did not agree with the department that the mistake committed by the device issuing officer was caused by his carelessness or negligence. If it was due to his carelessness or negligence that he had used the wrong device register at the beginning when he started to input the data into the DMS, he should have realized that he had made a mistake when he came to inputting such information as 'ICSO No.', 'Type of the prescribed authorization' and 'Effective period of the prescribed authorization with date and time'. He could simply revert to the correct device register instead of 'inventing' and inputting information which he knew to be false into the relevant columns of the ICSO Device Register.

7.151 The device issuing officer deliberately entered false information into the device register and this amounted to falsification of records. He might be ignorant of the serious consequence of his deliberate acts, but he was in no way ignorant of the procedure for the issue of devices for training purposes which he had done for over 40 times.

7.152 It is of paramount importance to maintain clear and accurate record of the movement and use of devices capable of performing covert surveillance under the Ordinance. The use of the device request memo and device register to control the withdrawal of devices capable of carrying out covert surveillance (whether for ICSO purpose or non-ICSO purpose) is part and parcel of the overall procedures for overseeing the compliance by LEA officers with the relevant requirements.

7.153 The inputting of false information into the device register to give the wrong impression that the operation had been authorized under a prescribed authorization is a very serious irregularity which is intolerable and if not properly dealt with, would be copied by others.

7.154 The device issuing officer had only proceeded on pre-retirement leave. He had not yet retired from the service. In view of his deliberate act to falsify the records which was a very serious malpractice, I wrote to the head of department on 3 November 2011 stating my view that disciplinary action should be taken against the device issuing officer.

7.155 The department heeded my views. Formal disciplinary proceedings were subsequently taken against the device issuing officer for one count of 'Neglect of Duty', ie failing his duty as a device storekeeper to keep proper movement records of registered surveillance devices in the appropriate device register of the DMS. The device issuing officer pleaded guilty to the charge and was awarded a '**reprimand**' in May 2012 before retiring from the service.

My findings

7.156 The real reason for the wrongdoing of the device issuing officer was not known. But a serious view and action must be taken because the case involved a falsification of records and copycats must be discouraged.

7.157 No matter what the reason was, the device issuing officer's conduct involved a falsification of records and he failed in his duties to keep proper and correct records of the movement of surveillance devices. The taking of disciplinary action against the offender would surely get the message across that any falsification of records would not be tolerated. The disciplinary action taken against the officer was appropriate.

7.158 My review of this case also exposed certain loopholes in the device issuing procedures such as the device issuing officer could input whatever he liked, there was no confirmation slip to the approving officer of what had been issued, the withdrawing officer was not required to sign to acknowledge receipt of device or view the relevant entries in the DMS at the time of issue to ensure a proper and correct record had been entered, and the device request memo was drafted or presented in such a way that it was easy to abuse or tamper with. The department subsequently took remedial measures to address these deficiencies.

Report 7: Unauthorized interception of a wrong facility

7.159 This non-compliance was due to the inclusion of a wrong telephone number in the application and the obtaining of a prescribed authorization for interception, resulting in the interception of a facility of a person who was not the subject under investigation or in anyway connected

with the investigation, for about eight hours. The interception operation was immediately stopped after discovery of the mistake. The LEA submitted an initial report to me under section 54 of the Ordinance, followed by a full investigation report later.

Facts of the case

7.160 Five officers were involved in this case. They are listed below in order of their seniority:

(i) a senior officer, being the applicant of the application for authorization for interception ('the Applicant'),

(ii) the officer-in-charge of the ICSO registry ('OC Registry') who worked to the Applicant and headed a dedicated application team,

(iii) the officer who was responsible for investigating the crime ('the Operation Officer'),

(iv) the Processing Officer of the dedicated application team under the OC Registry, and

(v) the Assistant Processing Officer of the dedicated application team.

7.161 The LEA was investigating a crime and intended to make an application to the panel judge for an authorization to intercept the communications of a Subject (a male) of investigation over a telephone number of his. The Operation Officer had identified the telephone number '1234 5678' ('Facility X') believed to be used by the Subject.

Before seeking approval to make an application, the Operation Officer submitted the telephone number for verification with different parties. In a document she e-mailed to the OC Registry ('**the First E-mail**'), she entered a wrong digit of the telephone number so that it became '1234 5078' ('Facility Y'). She did not realize that she had made a mistake in this First E-mail.

7.162 The Operation Officer subsequently prepared a verification folder containing a verification form and other supporting documents for submission to the Applicant. The telephone number stated in the verification form was the correct one.

7.163 After receipt of the verification folder, the Applicant passed the folder to his subordinate, the OC Registry for checking. At that time, OC Registry found from another source that Facility Y did not seem to belong to the Subject: it was the telephone number of a shop. The OC Registry informed the Operation Officer over the phone of this finding but without reading out the entire telephone number. During the telephone conversation, both of them only spelt out the first four digits of the telephone number '1234'. The Operation Officer thought that the OC Registry was referring to Facility X. On the other hand, the OC Registry did not realize that the telephone number (Facility X) in the verification form contained in the verification folder and the telephone number (Facility Y) in the First E-mail were different. Neither did she tell the Operation Officer that she was referring to Facility Y in the First E-mail. After discussion, it was agreed between the Operation Officer and the OC Registry that the verification folder should be returned to the Operation

Officer for conducting further checks. The verification folder was thus passed back to the Operation Officer.

7.164 At the same time, the application team started to prepare the draft application documents. As the verification folder had been returned to the Operation Officer, the application team prepared the draft application documents without the verification folder but based on the telephone number (Facility Y) in the First E-mail. After preparing the draft application documents, the Processing Officer of the application team e-mailed ('**the Second E-mail**') to the Operation Officer requesting the latter to confirm if '1234 5078' was the telephone number sought to be intercepted. The Processing Officer also telephoned the Operation Officer requesting the verification folder.

7.165 The Operation Officer did not spot that the telephone number stated in the Second E-mail was wrong. The Operation Officer replied by e-mail ('**the Third E-mail**') stating that further check was being undertaken on '1234 5078'. Again, the Operation Officer did not realize that she was stating a wrong telephone number in this Third E-mail.

7.166 Having been told by the OC Registry that the telephone number belonged to a shop (see paragraph 7.163 above), and after making further checks, the Operation Officer informed the OC Registry over the phone that it had been confirmed that the telephone number was used by the Subject. The Operation Officer told the OC Registry that she suspected that the Subject might have a mistress who operated a shop, which perhaps explained why there was a difference between the information obtained by the OC Registry and that obtained by the

Operation Officer. Again, during this telephone conversation, both officers did not read out the entire telephone number.

7.167 The Operation Officer then re-submitted the verification folder to the Applicant who passed it on to the OC Registry. The OC Registry then forwarded the verification folder to the Processing Officer and the Assistant Processing Officer of the application team.

7.168 Shortly after, the Operation Officer sent an e-mail ('**the Fourth E-mail**') to the Processing Officer, copied to the Applicant and the OC Registry, confirming that '1234 5078' was the telephone number intended to be intercepted and requesting the Processing Officer to proceed with the application for interception on this (wrong) telephone number.

7.169 With the above confirmation and the verification folder back from the Operation Officer, the Assistant Processing Officer of the application team then checked the draft application documents against the documents in the verification folder. The Assistant Processing Officer failed to detect the discrepancy between the telephone number shown on the draft application (which was the wrong Facility Y) and the telephone number shown on the verification form in the verification folder (which was the correct Facility X).

7.170 The draft application documents, together with the verification folder, were then passed to the Processing Officer for further processing and checking before submitting to the Applicant. The Processing Officer similarly failed to detect the discrepancy in the two telephone numbers. The Processing Officer then passed the draft application documents to the Applicant. The Applicant confirmed the application.

7.171 The Processing Officer then printed the application as confirmed by the Applicant and made a final check against the verification folder, again without detecting the discrepancy.

7.172 The following day, the Applicant submitted the application to the panel judge who granted the authorization for intercepting Facility Y (the wrong one).

7.173 On the first day of interception, after a listener had listened to two intercepted calls, it transpired that the line under interception was used by a female, rather than the Subject who was a male. The officer-in-charge of the interception unit then informed the Applicant who caused the OC Registry to conduct a check. It was later discovered that the telephone number authorized for interception was incorrect and different from the one intended to be intercepted as contained in the verification folder. The LEA immediately discontinued the interception and submitted a discontinuance report to the panel judge who revoked the authorization on the wrong number. The LEA later reported the non-compliance to me pursuant to section 54 of the Ordinance.

The LEA's investigation

7.174 The LEA considered that the Operation Officer had a number of occasions to detect the discrepancy between Facility X and Facility Y but she failed on all these occasions. The LEA proposed to give the Operation Officer a **verbal warning** for her inadequate vigilance and alertness.

7.175 The Processing Officer and the Assistant Processing Officer were vested with the primary responsibility to ensure all applications for

interception were accurately presented and in good order. The LEA considered that there was negligence of duty on the part of these two officers when carrying out checking of the application documents against the relevant verification form available to them, in particular the Processing Officer who was the team leader and the gate-keeper. Their failure to detect the discrepancy had taken away the final opportunity to rectify the error before the Applicant made the application to the panel judge. The LEA proposed that a **written warning** be given to the Assistant Processing Officer as member of the application team and a **written warning of dismissal** be given to the Processing Officer as leader of the application team.

7.176 As regards the Applicant and the OC Registry, the LEA considered that they had supervisory responsibility over the failure of their subordinates (the Processing Officer and the Assistant Processing Officer). In the investigation report, however, the LEA did not recommend any disciplinary action against them but deferred to my findings and advice.

My review and findings

7.177 In my review, I examined in detail the verification procedures adopted by this LEA and the role and responsibilities of each officer in the verification and application process.

Culpability of the Operation Officer

7.178 On the culpability of officers concerned, I considered that the proposed punishment to the Operation Officer was too lenient, having regard to the facts that:

(a) she was the creator of the mistake (by creating a wrong telephone number in the First E-mail);

(b) she failed to spot that the telephone number stated in the Processing Officer's e-mail seeking confirmation (ie the Second E-mail) was not the one intended to be intercepted;

(c) she failed to spot that the telephone number stated in her interim reply to the Processing Officer (ie the Third E-mail) was wrong;

(d) she failed to read out the entire telephone number when she confirmed to the OC Registry over the phone that the Subject was the user, which was non-compliant with the departmental procedure (see the procedure referred to in paragraph 7.180 below);

(e) she did not care to find out what had caused the discrepancy between the information obtained by the OC Registry and herself but simply rationalized it with her wild imagination, which was without any factual support, that the Subject might have a mistress who operated the shop (paragraph 7.166 above); and

(f) she confirmed to the Processing Officer to proceed with the application for interception on '1234 5078', again stating a wrong telephone number (ie the Fourth E-mail).

In my view, the Operation Officer was one of the main culprits in this non-compliance and should be given a more severe punishment than a

verbal warning, particularly when compared with the punishments proposed to be awarded to the Processing Officer and the Assistant Processing Officer who were both junior to her.

The OC Registry

7.179 The LEA's investigation report seemed to hold the OC Registry responsible only for the failure of her subordinates, given her supervisory responsibility over the application team. However, according to the responsibilities in dealing with interception applications, this officer had the responsibility of checking the verification form against the supporting documents contained in the verification folder. The correct telephone number (Facility X) was clearly stated in the verification form and the supporting documents in the verification folder. Had the OC Registry exercised due care by first comparing Facility X in the verification folder against Facility Y (the wrong telephone number) in the First E-mail before telephoning the Operation Officer (paragraph 7.163 above), she would have immediately realized that the two telephone numbers were different. Apparently, the OC Registry did not check the two telephone numbers against each other or if she had checked, she failed to detect that they were different.

7.180 Another deficiency was that when the OC Registry telephoned the Operation Officer, she only stated the first four digits of the telephone number without reading out the entire telephone number. This LEA had since a few years ago adopted a procedure that its officers had to read out in full the telephone number to be intercepted in the verification process. Had the OC Registry (and the Operation Officer as well) followed the procedure of reading out in full the telephone number in the present case,

the mistake might have been detected immediately. Neither did she tell the Operation Officer that she was referring to the telephone number in the First E-mail.

7.181 Later, when the Operation Officer confirmed to her that the user of the telephone number was the Subject and passed the verification folder back to her, the OC Registry simply believed in the Operation Officer's wild guess that the Subject had a mistress instead of taking any reasonable step (indeed it could be a very simple step) to check that there was no discrepancy between the telephone number in the verification folder and that in the First E-mail before coming to any other explanation or conclusion. Apparently, it did not occur to the OC Registry that a probable cause could be that there was difference in the telephone number stated and hence difference in the checking results. Given her experience in ICSO matters, it is a pity that the OC Registry did not think of such a probability.

The Applicant

7.182 Similarly, the LEA's investigation report held the Applicant responsible for only his failure in the discharge of his supervisory responsibility. In my view, he also failed in the verification process in that, being the applicant of the interception application, he did not himself check to ensure the correctness of the telephone number (for example, by a simple check against the verification folder which was available to him) before he signed off the application document.

7.183 The LEA's investigation report stated that subject to the advice and comments given in my review findings, appropriate disciplinary

action would be taken against the Applicant and the OC Registry. I questioned why the former practice of making recommendation on disciplinary actions with reasons in support in the LEA's investigation report was not followed in this case.

7.184 I requested the LEA to reconsider the disciplinary action against the Operation Officer and let me have its proposal of the disciplinary actions to be taken against the Applicant and the OC Registry.

7.185 In reply, the LEA proposed that the Applicant and the OC Registry should each be given a **written warning** for their respective failures. The LEA also proposed to raise the level of punishment to the Operation Officer to **written warning.**

My findings

7.186 The period of wrong interception lasted about eight hours, during which 18 calls were intercepted. Only two of the intercepted calls were listened to by the listener, for a total of 71 seconds.

7.187 Despite the purported issue of a prescribed authorization for the interception of Facility Y (the wrong telephone number), the interception was unauthorized by virtue of section 48(5) of the Ordinance. The unauthorized interception was caused by the lack of vigilance on the part of five officers in the verification and application process. There was no indication of any ulterior motive in this unauthorized interception. The proposed punishment of written warning each to the Applicant, the OC Registry, the Operation Officer and the Assistant Processing Officer and a written warning of dismissal to the Processing Officer were appropriate.

7.188 My review of this non-compliance had also exposed deficiencies in the verification procedure and the application process of the LEA which it had taken measures to improve.

Report 8: 893 instances of non-compliance with the Revised Additional Conditions imposed by panel judges in prescribed authorizations for interception

7.189 On 7 July 2011, the panel judge imposed a set of Revised Additional Conditions on a prescribed authorization for interception in order to prevent LPP information from being obtained. These Revised Additional Conditions were replicated for similar cases that followed. The LEA drew my attention to these Revised Additional Conditions about a month later, at my inspection visit on 2 August 2011. When I reviewed the matter back in my office, I considered that the LEA might not have acted in accordance with these Revised Additional Conditions. On 11 August 2011, I wrote to the head of the LEA questioning how the department complied with these Revised Additional Conditions. It was upon this query that the LEA wrote to the panel judge to seek clarification and found that it had hitherto misunderstood the requirements of the panel judge set in the Revised Additional Conditions. The LEA thereupon discontinued the relevant operations. On 19 August 2011, the LEA submitted an initial report to me pursuant to section 54 of the Ordinance. On 18 November 2011, the LEA submitted a full investigation report to me which revealed that there were 893 instances of non-compliance with the Revised Additional Conditions involving eight prescribed authorizations in the period from early July to mid August 2011. The particulars of these 893 instances of non-compliance are set out below:

Prescribed authorization ('PA')	No. of instances of non-compliance with the Revised Additional Conditions
PA (1)	7
PA (2)	19
PA (3)	43
PA (4)	1
PA (5)	41
PA (6)	56
PA (7)	725
PA (8)	1
Total	**893**

[Non-disclosure of the facts of the case, details of non-compliance and my review

Paragraphs 7.190 to 7.232 relate to the facts of the case, details of the non-compliance and my review. Since their contents hinged on and were intimately related to the details of Revised Additional Conditions, to adhere to the statutory principle of not prejudicing the prevention or detection of crime or the protection of public security, I have removed them from the Annual Report that will be published openly for the public, including members of the Legislative Council and the media. Nevertheless, in the Annual Report that I have separately submitted to the Chief Executive, the said paragraphs are intact and have not been excised. The paragraphs that follow, being paragraphs 7.233 to 7.237 below, have been slightly

*adjusted for providing my findings in this case, the easier understanding of these findings, and the further development of this matter.**]***

My findings

7.233 The LEA's investigation report indicated that there were a total of 893 instances of non-compliance with the Revised Additional Conditions in eight prescribed authorizations and that the communications concerned were not accessed by any officer of the LEA. My office had checked the ATRs and related records. Our checking results tallied with what was reported by the LEA.

7.234 The nature of the non-compliance was the breaching of two of the Revised Additional Conditions.

7.235 Regarding the culpability of the three officers concerned, save as stated below, I am content to accept the LEA's views, namely, that they were culpable for (i) their overconfidence in their understanding or interpretation of the Revised Additional Conditions which turned out to be wrong, and (ii) the unsatisfactory manner in their seeking clarification of the interpretation from the Panel Judges' Office ('PJO'). They failed to act prudently in the course of handling the matter. I considered that they were also culpable for failing to promptly draw my attention to the matter. Accepting that their reasons for this third failure were their misunderstanding or misinterpretation of the Revised Additional Conditions and their failure to seek clarification in writing from the PJO, the delay in letting me know was a specific fault for which they should also be responsible. Even though the fault of delay stemmed from the first two failures, there was no duplication of charges in spite of the same cause.

However, I agreed with the suggestion that no additional punishment should be meted out to them for this third failure. Regarding disciplinary actions, I considered that the **verbal warning** proposed by the LEA for each of the three officers was much too lenient because their failures were the root cause of no less than 893 instances of non-compliance.

7.236 As regards the culpability of the LEA's management and senior officers in this matter, the review of and decision on this matter as a whole cannot be finalized before the completion of this annual report.

7.237 While I was not satisfied with the way this case was handled by the LEA officers, I did not have evidence of any ulterior motive or ill will on the part of the LEA management or any of the officers concerned. The instances of non-compliance, albeit numerous, had not resulted in intrusion into the privacy of the affected persons in all practicality because the communications concerned had not been accessed by any officer of the LEA.

Report 9: Retention by an LEA officer of documents suspected to be related to interception operations

7.238 In November 2011, an LEA reported to me a possible irregularity where an officer of the LEA retained certain documents relating to interception operations carried out three to four years ago in respect of the investigation of a crime under his command. Among these documents, some were suspected to be notes or copy of notes made from interception operations or with contents suspected to be related to intelligence obtained from interception operations.

7.239 Section 59(1)(c) of the ICSO provides:

> 'Where any protected product has been obtained pursuant to any prescribed authorization issued or renewed under this Ordinance on an application by any officer of a department, the head of the department shall make arrangements to ensure that the protected product is destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization.' (Emphasis added.)

The requirements of the above provision are also set out in the Code of Practice [Note 11].

7.240 Under section 2 of the ICSO, protected product means 'any interception product or surveillance product'. Interception product means 'any contents of a communication that have been obtained pursuant to a prescribed authorization for interception, and includes a copy of such contents.'

7.241 Since the implementation of the ICSO, the LEA had issued internal guidelines on interception and covert surveillance operations, including a destruction policy in accordance with the requirements under section 59(1)(c) of the ICSO and the Code of Practice.

7.242 As some of the documents retained by the officer are suspected to be notes containing intelligence derived from interception operations, they may constitute interception products, which are protected products within the definition of section 2 of the ICSO. According to the internal guidelines of the LEA, under normal circumstances, such documents should be destroyed within one month after the conclusion of

Note 11 The requirement is set out in paragraph 168 of the current version of the Code of Practice issued in November 2011.

the relevant interception operations, which should be sometime in 2008. Subject to the outcome of the investigation, the officer in retaining the said documents might have been in breach of the destruction policy stipulated in the internal guidelines of the LEA, which are in place to ensure that the requirements under section 59(1)(c) of the ICSO and the Code of Practice are satisfied.

7.243 The officer had been interdicted from duty in connection with another crime under prosecution by another LEA. The LEA sought my advice on whether investigation of the above irregularity should start right away or be deferred until the conclusion of the trial and any subsequent appeal arising therefrom.

7.244 It seemed to me that any investigation to be undertaken by the LEA on the above irregularity might have the risk of being accused of persons in authority interfering with the officer's defence in the criminal proceedings or of other possible allegations that the officer might make to assist his defence. I therefore advised the LEA that it was not advisable to start the investigation at that stage.

Other cases

7.245 Apart from the above cases of non-compliance and irregularity, there were other cases of irregularity relating to the recording and documentation of the movements of devices capable of being used for covert surveillance but were used or allegedly used for non-ICSO purposes, which are set out in Chapter 4. Cases of irregularity relating to LPP and JM other than those mentioned in this chapter are set out in Chapter 5. For a quick and easy reference, a very brief summary of all the cases of

non-compliance and irregularity (in Chapter 4, Chapter 5 and this chapter) can be found in Chapter 11.

[This page is left blank.]

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 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 of Practice 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 gives me a discretion to refer my recommendations and any other matters I consider fit to the Chief Executive, the Secretary for Justice and any panel judge or any one of them. During the report period, there was no occasion on which I considered it

appropriate to have my recommendations referred to the Chief Executive or the Secretary for Justice.

8.3 In cases where the matters or recommendations concern the panel judges, I inform them of the same, so that they are fully apprised of those matters and my recommended arrangements well in time.

Recommendations to the Secretary for Security

8.4 The recommendations I made to the Secretary for Security during the report period are set out below.

(1) Paragraph 9 of the Code of Practice

8.5 In the incident of Outstanding Case (iii) mentioned in paragraphs 7.13 to 7.39 of Chapter 7 of my Annual Report 2010, an LEA officer, in the course of carrying out covert surveillance under a prescribed authorization, conducted unauthorized covert surveillance on a telephone call at 1256 hours ('the 1256 Call'). After realising that it was unauthorized, the LEA officer stopped the covert surveillance on this call only but did not stop the whole operation. He continued to conduct covert surveillance (authorized) on a further telephone call at 1307 hours ('the 1307 Call'), which ended at about 1315 hours. At about 1325 hours, the LEA officer reported the outcome of the covert surveillance on both the 1256 Call and the 1307 Call to his supervisor. No further covert surveillance was conducted under the prescribed authorization after the covert surveillance on the 1307 Call.

8.6 At the time of the incident, paragraph 9 of the Code of Practice stipulated that should any officer discover that any interception or

covert surveillance was being or had been carried out without the authority of a prescribed authorization, it should be stopped immediately.

8.7 Having reviewed the incident, I considered that the LEA officer did not comply with paragraph 9 of the Code of Practice because he did not stop the whole operation immediately. I also considered that the wording of paragraph 9 of the Code of Practice was not entirely clear as to whether the whole operation or only the part of the operation which was unauthorized should be stopped immediately. I requested the Secretary for Security to amend the Code of Practice to put the matter beyond doubt. In response to my suggestion, the Secretary for Security proposed to amend paragraph 9 of the Code of Practice to the effect that the whole operation should be stopped as soon as practicable. Regarding this proposed replacement of the word 'immediately' with the phrase 'as soon as practicable', the Secretary for Security explained that the LEAs expressed concerns that it might not be always feasible to stop the entire covert surveillance at once, for example, when participating agents or informers were involved in the operation and their safety was at risk. The proposed amendment was to give the LEAs flexibility in handling such a situation.

8.8 I expressed reservation about the change of the word 'immediately' to 'as soon as practicable'. While I appreciated that there might be situations where it might not be feasible to stop the whole operation at once, I was equally concerned that if the same Outstanding Case (iii) happened again in future, the LEA officer could claim that he had stopped the whole operation as soon as practicable in compliance with the proposed paragraph 9 of the Code of Practice because the whole operation was stopped in less than 20 minutes (at 1315 hours) after the unauthorized

covert surveillance on the 1256 Call. I suggested that it should be spelt out clearly in paragraph 9 of the Code of Practice that the whole operation should be stopped immediately except in circumstances where it was not feasible to do so in which case the whole operation should be stopped as soon as practicable. My suggestion was accepted and paragraph 9 of the Code of Practice was amended accordingly.

(2) Time to make disciplinary award

8.9 In the light of my recommendation in paragraph 9.18 of my Annual Report 2010 that an appropriate disciplinary award should be made against an offending officer after the head of the LEA should first be apprised of my view at the conclusion of my review, the Secretary for Security amended paragraph 177 of the Code of Practice to stipulate this requirement for the LEAs to follow. Section 54 provides that where the head of any LEA considers that there may have been any case of failure by the LEA or any of its officers to comply with any relevant requirement, he shall submit to me a report on details of the case (including any disciplinary action taken in respect of any officer). This implies that the head of the LEA can take disciplinary action before he submits a non-compliance report to me. With the amendment to paragraph 177 of the Code of Practice, I requested the Secretary for Security to consider if there was a need to make corresponding amendment to section 54 in the comprehensive review of the Ordinance being conducted by him.

Recommendations to heads of LEAs

8.10 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. If required, the Secretary for Security and his staff may also be involved in coordinating the responses from the LEAs and drawing up their implementation proposals. All of my recommendations of substance to the LEAs during the report period are set out in the ensuing paragraphs.

(1) Reporting of incidents, irregularities and non-compliance

8.11 Under section 54, each of the LEAs is obligated to submit to me a report with details of any case of failure by it or any of its officers to comply with any relevant requirements of the Ordinance. Other than such non-compliance cases, I had also requested the LEAs to report to me cases that might not be non-compliance or might not be considered by their own department as non-compliance, including cases that were only classified as irregularities or even as mere incidents.

8.12 To ensure prompt submission of these reports to me, I provided a time frame and reporting arrangement for the LEAs to follow, namely:

(a) For any cases (whether non-compliance, irregularity or incident), the LEA should cause an initial report to be submitted to me or my Secretariat (where appropriate) within five working days of the discovery of the event.

(b) A full investigation report of the case should be submitted to me or my Secretariat (where appropriate) within two calendar months after submission of the initial report. If it is assessed

that there is any difficulty in keeping this time frame because of the complexity of the case or for any other reasons, notification should be given of such reasons at the earliest opportunity at the submission of the initial report or soon thereafter, with a proposal from the LEA when the full investigation report will be submitted.

(c) An initial report and a full investigation report on a case of non-compliance should be covered by a letter signed by the head of the LEA concerned in order to comply with the requirement in section 54, whereas those on an irregularity or incident could be covered by a letter or memo signed by a responsible officer of the LEA instead.

8.13 For the purpose of checking whether the time frame was complied with by the LEAs, I also requested the officer making the discovery of the event to make a record of discovery, which should be a contemporary record and signed with date and time by the discovering officer and by the senior officer to whom he reported the discovery.

8.14 The procedural and processing requirements referred to in paragraphs 8.12 and 8.13 above have worked hand-in-hand with my recommendation mentioned in paragraph 7.121 of Chapter 7, in that a general time-frame has been established for the LEAs to follow in submitting reports to me, and the failure on the part of LEA officers in complying with the time-frame and any time-line set by me may be visited with disciplinary action. These measures will surely improve efficiency and prevent delay in the discharge of my functions of overseeing and reviewing the LEAs' ICSO-related activities.

(2) Inclusion of the rank of listeners in ATR

8.15 In cases where an interception operation was assessed to have the likelihood of obtaining information subject to LPP, the panel judge would impose additional conditions in the prescribed authorization concerned to safeguard the right of individuals to confidential legal advice. One of these additional conditions was that the listening to the intercept product should be undertaken by officers not below a certain rank. I observed that the ATRs provided by an LEA did not show the rank of the listeners. To facilitate my checking as to whether the LEA had complied with the additional condition imposed by the panel judge, I recommended improvement to the presentation of the ATR to put in the rank of the officers who had listened to the intercept product. The LEA accepted this advice and the inclusion of the rank of listeners in the ATR was implemented in February 2011.

(3) Reporting to the Commissioner under paragraph 120 of the Code of Practice

8.16 Paragraph 120 of the Code of Practice ('COP 120') requires the LEAs to notify me of any interception or covert surveillance operation that is likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. At the time of submitting a report to me pursuant to COP 120, the LEAs should attach to the report a sanitized copy each of the application and supporting affirmation, prescribed authorization, REP-11 report, the panel judge's determination, discontinuance report (if applicable), ATR, etc. To ensure that the ATR provided to me contained adequate information for my examination, I advised that when reporting LPP cases to me under COP 120, the ATR

attached to the notification to me should cover the period up to the date of notification or three weeks after disconnection of the facility concerned, whichever was earlier. This advice was accepted by the LEA concerned and was made to apply to all the LEAs.

(4) Submission of REP-11 report

8.17 Under a standard condition in a judge's authorization, an LEA is under a continuing duty to bring to the attention of a panel judge any material change of the circumstances upon which the authorization was granted or renewed, and such circumstances include the obtaining or likely obtaining of LPP information or heightened likelihood of obtaining LPP information. The material change of circumstances should be reported to the panel judge by using an REP-11 report. There were cases handled by an LEA where the interception operation was discontinued partly due to the obtainment of information subject to LPP but no REP-11 report was submitted to the panel judge. The LEA only submitted a discontinuance report under section 57 ('section 57 report'), which did not contain all the information required to be disclosed in an REP-11 report, such as the interception of and listening to other calls related to the reported LPP call. I recommended that both an REP-11 report and a section 57 report should be submitted to the panel judge in cases where the discontinuance of operation was related to an LPP or suspected LPP call or where there was heightened likelihood of obtaining LPP information. The recommendation was accepted by the LEA. See paragraphs 5.63 and 5.64 of Chapter 5.

(5) Recommendations in connection with covert surveillance and devices for non-ICSO purposes

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

(a) To provide sufficient information in application

Sufficient background information should be included in the statement in writing so that the authorizing officer could make a well-informed and well-considered decision as to whether the application should be granted or refused [paragraph 3.28].

(b) Electronic system for the control of capable devices

A system similar to the computerised device management system for handling devices for ICSO and non-ICSO purposes should be developed for the control of capable devices [paragraph 3.33(a)].

(c) Amendments to the device request forms

I proposed various amendments to the device request forms, in particular, the addition of the time of signature by the officers concerned [paragraph 3.33(d)].

(d) *Enhancement of the computerised device management system*

The computerised device management system should be enhanced to automatically capture the date and time of making a post-entry record and keep the history of all the post-entry records made [paragraph 3.34].

(e) *Amendments on the device register*

Any amendments made on the device register should be signed with date and time by the officer making the amendments and the amended pages under cover of a memo providing the reason for the amendments should be promptly sent to my office [paragraph 4.11].

(f) *To ensure consistency between the device register and the device request memo*

The device request memo used by the LEA should be amended to make it clear who the endorsing officer was and who the approving officer was so as to avoid inconsistency between the request memo and the records on the device register [paragraph 4.64].

(g) *Change in the name of the officer who has overall control over the issue and receipt on return of devices*

In the instruction issued by the LEA on the issue and return of non-ICSO devices and other related documents, the name of

'the Receiving Officer' should be altered to read 'the Device Controller' [paragraph 4.67].

(h) *Improvements to the procedure on the return of devices*

In cases where the receiving officer (advised to be called 'the Device Controller') is unavailable, the endorsing officer should sign on the device register as the receiving officer when he has received the device back from the returning officer. When the receiving officer is next available and checks the device register, he should countersign, with date and time, the entries made by the endorsing officer if he finds the entries correct [paragraph 4.67].

(6) Recommendations made upon review of LPP and JM cases

8.19 In my review of the LPP and JM cases in Chapter 5 of this report, I made some recommendations to the LEAs concerned. The recommendations that apply to LPP and JM cases are set out below:

LPP Case 1

(a) The LEA should provide further and better training on the meaning of LPP information and on the proper and prudent attitude to take in handling possible LPP-related matters to its officers dealing with ICSO-related matters [paragraph 5.40].

JM Case 1

(b) If the LEA considered that JM had been obtained, it should be more definite and expressly say so in the REP-11 report instead of saying 'might' or 'possible' [paragraph 5.90].

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

8.20 In the course of my review of the non-compliance, irregularities and incidents mentioned in Chapter 7, I also made some recommendations to the LEAs concerned, which are summed up below:

Outstanding cases from 2010

Outstanding Case (ii): Listening to two prohibited calls

(a) The LEA should disclose to the panel judge all the hitherto unknown names and aliases of the subject known to the LEA (as soon as each crops up) with a corresponding 'if known' declaration [paragraph 7.48(f)].

Cases occurring or discovered in 2011

Report 3: Listening to calls made to or from prohibited numbers on five occasions

(b) The LEA should look into the practice of listening and note-taking by its listeners and work out improvement measures so that it could be discerned from the listener's notes

whether a call had been listened to but considered irrelevant or it had not been listened to [paragraph 7.120(c)].

(c) If any officer of the LEA fails to comply with the time-line set by me in my request for documents or information or report, it should be dealt with as a disciplinary matter [paragraph 7.121].

Additional recommendations

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

[This page is left blank.]

CHAPTER 9

OTHER RECOMMENDATIONS

Introduction

9.1 As I said in Chapter 1, most of my recommendations and suggestions have been accepted by the Security Bureau and the LEAs, or they have made practical arrangements to remedy the adverse effect of the defects or deficiencies intended to be addressed by such recommendations and suggestions.

Important recommendation not receiving support

9.2 The single most important of my recommendations is to have the Ordinance amended to give me and my staff as designated by me the express power necessary for listening to, viewing and monitoring the products from interception and covert surveillance of our choice. I have explained in my past annual reports time and again that this power would become the strongest weapon to safeguard citizens' rights to privacy and to privileged confidential legal advice because it would be the key tool to expose malpractices of the LEAs and their officers and would pose as a forceful deterrent against such malpractices and their concealment. This recommendation has, to my greatest disappointment, remained unadopted, far less implemented, by the Administration.

Bad reasons for non-support

9.3 Hereunder, I first set out in italics the reasons and arguments expressed so far by a few for refusing to give me the power or for delaying

my suggested amendment to the Ordinance for that purpose. I shall proceed to briefly analyse and dissect them under the heading of ANSWER so as to show that they are more specious than real, unsubstantiated or misconceived.

(I) *Access to intercept and surveillance products should be made available only to a limited number of people and only for the relevant purpose of the prescribed authorization. The products should maintain secrecy and should be preserved only for a period no longer than required. Section 59 of the ICSO sets out the safeguards for intercept products to minimize disclosure and requires that they be destroyed as soon as their retention is not necessary for the relevant purpose of the prescribed authorization, and where the intercept products contain LPP information, they must be destroyed as soon as reasonably practicable. The preservation of intercept and surveillance products will need to be balanced against the need to protect the privacy of communications and the right to confidential legal advice. How should section 59 of the ICSO be amended so that the existing statutory requirements to destroy intercept products could be relaxed to address the Commissioner's concerns without unduly undermining the privacy interests and the right to confidential legal advice of the individuals concerned?*

ANSWER:

9.4 The relevant purpose of a prescribed authorization ('PA') is for the prevention or detection of serious crimes or the protection of public security. It is for this relevant purpose that a PA will be issued upon the

application of an LEA. It is correct to say that intercept and surveillance products should not be accessed or examined except for the relevant purpose and thus only be by LEA officers. It is also correct to say that the products should not be retained for longer than necessary for the relevant purpose and should be destroyed thereafter. A fair balance should be struck between the length of the preservation of the product and the constitutional rights of privacy of communications and confidential legal advice.

9.5 However, it should be noted that when a PA has been issued, the relevant authority (in most cases, a panel judge) has been satisfied that the interception or covert surveillance should be carried out against the subject for the relevant purpose. There are already materials to justify a reasonable suspicion that the subject is involved in a serious crime and the panel judge has been satisfied on the proportionality and necessity tests that a PA should properly be issued against the subject. The subject's rights of privacy of communications and confidential legal advice have already been infringed upon for the sake of the relevant purpose when the PA is carried out by the LEA and its officers who examine the intercept or surveillance products. The checking of the products by the Commissioner and his staff admittedly amounts to an added intrusion, but the purpose is to ensure that the LEA officers have done nothing wrong in the conduct of the statutory activities against the subject. This is for **protecting the subject**, and at the same time, **protecting the public** by exposing any wrongdoing or impropriety on the part of the LEA officers. Looking at the matter in this light, which is also a matter of fact, the preservation of products for the examination by the Commissioner and his staff **would protect the subject's and the public's rights rather than undermining them.**

9.6 It is by virtue of the PA that the LEA officers are allowed to have access to the intercept or surveillance products. The extension of access to the Commissioner and his staff would cause added intrusion to the subject's rights, but this extended access to be granted to the Commissioner and his staff is to ensure that the conduct of statutory activities by the LEA officers against the subject was authorized, proper and lawful. The Commissioner's requirement to preserve the products for his examination is to ensure that there is no destruction of this most important evidence for exposing the LEA's misconduct or malpractice, if any, which is for the **ultimate purpose of protecting the subject and the public.**

9.7 The destruction requirement under section 59 should be made subject to the Commissioner's requirement to examine the intercept or surveillance product. The security risk is reduced to the minimum by having the intercept and surveillance products kept and preserved in the LEA's premises. Examination of the products will be made upon the request of the Commissioner, which will be carried out at the LEA's premises. When the review is completed, the Commissioner will allow the material to be destroyed by the LEA.

*(II) There is reservation about random checking or vesting the Commissioner with an unfettered **discretion** in selecting cases for random checking, and it is considered that due consideration should be given to introduce a threshold which the Commissioner has to meet before exercising his power to conduct checking so as to **deter possible abuse of power**. Should there be any limitations on the extent to which the Commissioner and his designated staff may select*

intercept products for listening, albeit on a random basis? Should there be a threshold that the Commissioner and his staff must meet before they exercise the power to listen to intercept products at random or to listen to intercept products that an LEA has reported to contain LPP information or information that might be protected by LPP, such as reasonable suspicion of non-compliance?

ANSWER:

9.8 This is a piece of sophistry to pull wool over the eyes of the unguarded. The talk of the fear of unfettered discretion and of the need to deter possible abuse of power **attempts to impress but is in fact devoid of any substance. It sounds grand in principle conceptually but lacks factual support.** What is the maximum unfettered discretion and possible abuse that the Commissioner is capable of? The utmost the Commissioner can do is to examine each and every of the intercept and surveillance products obtained by the LEAs whose officers have been authorized by PAs to examine in the first place. What is so fearful about that, and how would that abuse the power when given?

9.9 The Commissioner is not seeking a power to perform interception or conduct covert surveillance at random; he only seeks a power to inspect intercept and surveillance products at random and as he chooses. The products are those already obtained by the LEAs under PAs issued by a relevant authority, and the Commissioner's checking of these products could only amount to added intrusion into the privacy rights of the subjects under those LEA operations which had already been found justified by the PA. There is no intrusion into the untouched privacy rights of any individual.

9.10 It is **dangerous to restrict the Commissioner's power of inspection** or examination of intercept and surveillance products. The suggestion of imposing a threshold, for example, of only allowing him and his staff to examine products in **reported** cases that involve LPP information or where there is reasonable suspicion of non-compliance is to allow the LEA to put a straitjacket on the Commissioner and to choose and decide which products he and his staff should be entitled to examine, and indeed to get away with not reporting those cases to the Commissioner at all. If the operation of the system could be based on trust in the LEAs, there would be no need to have the oversight authority of the Commissioner. It is the power and **unfettered discretion given to the Commissioner to carry out random check that would pose as a useful and strong deterrent** against the LEAs not to do anything unauthorized or conceal any unauthorized acts. If the discretion is fettered by the LEA and if the Commissioner's power of checking is limited by having to meet a threshold of conditions, the deterrent, which is the predominant aim of the recommended measure, will be lost.

(III) Should the Commissioner and his Office be subject to requirements similar to those that the LEAs are required to comply with under the ICSO, and should there be any reporting and/or disciplinary arrangements in the event of non-compliance with these requirements? The legislative amendment should specify the responsibility of the Commissioner (or his designated staff) and the consequence of non-compliance with the arrangements or internal guidelines should be spelt out clearly. Sufficient measures should be put in place to guard against unauthorized access and to ensure data security.

ANSWER:

9.11 No problem. The Commissioner does not seek a treatment different from that applicable to the LEAs and their officers or a position above them or above the law. These questions should have been directed at the Commissioner and they would have been readily answered in the affirmative without further ado; there would not have been any delay caused by directing these questions to other alleged stakeholders. The Commissioner and those of his staff designated by him to have access to intercept and surveillance products will certainly be subject to the same law and criminal sanction against leakage of secret information. There is no difficulty for the Commissioner to issue disciplinary guidelines to which such designated staff should be subject. Any reasonable measures to guard against any unauthorized access and to ensure data security are most welcome.

(IV) A respondent considers that section 53 of the ICSO, by necessary implication, already gives the Commissioner the power to obtain from the LEA the intercept products of possible communications that might be covered by LPP or JM and to listen to them.

ANSWER:

9.12 Disagreed. Section 53 of the ICSO empowers the Commissioner to obtain all information from any person, including the LEAs. However, since privacy of communications and confidential legal advice are fundamental human rights, one seriously doubts whether the general power under section 53 will be sufficient to confer on the Commissioner the power to override such rights to obtain private

communications and LPP information or likely LPP information and to examine them.

(V) There is also suggestion that the Commissioner's staff who are empowered to listen to intercept products should have some knowledge of the law (preferably holding a law degree) and have knowledge or training on the concept of LPP.

ANSWER:

9.13 Agreed. If and when the power is given, until we have legally trained personnel, we shall hold training sessions for the officers whom I designate the duty of examining intercept and surveillance products.

(VI) There is a proposal that the Commissioner could obtain authorizations from panel judges in order to listen to intercept products of cases which involve LPP information or have the likelihood of obtaining LPP information. The Security Bureau is seeking legal advice on whether the existing provisions of the ICSO allow the Commissioner to listen to any intercept products with an authorization from a panel judge or by other possible administrative means.

ANSWER:

9.14 The functions of the three stakeholders under the Ordinance are clear and distinct. The panel judges are to examine and, if the conditions of proportionality and necessity are satisfied, grant applications for statutory activities to be carried out by the LEA officers for the relevant

purpose; the LEA officers are to apply for PAs and to carry out statutory activities against the subjects in accordance with the relevant requirements of the Ordinance; and the Commissioner is to carry out his oversight and review functions regarding the LEAs and their officers in the performance of their functions under the Ordinance. Each has his/their own role to play under the statutory scheme. It would be improper to distract panel judges as to what the Commissioner needs to do in executing his review functions. As the ICSO stands now, there is no power on the part of the panel judges to authorize access to intercept or surveillance products save for the relevant purpose, ie prevention or detection of serious crime or protection of public security.

No further delay justified

9.15 This most important of my proposals was first made in my Annual Report 2008, which was published in 2009. The comprehensive review of the Ordinance was supposed to take place also in 2009, three years after the coming into force of the Ordinance, but so far no conclusion has been reached as to whether the proposal should even be adopted. The consultation with so-called stakeholders on the proposal will serve no useful purpose but delay. The procrastination will increase the period of the preservation of the material (pending a decision on this matter) and increase the risk of leakage, which ironically is part of the reasons wielded for opposing my proposal.

Provision prohibiting or deferring examination

9.16 Section 45 sets out the grounds for the Commissioner not to carry out an examination in respect of an application therefor based on

suspected interception or covert surveillance. One of the grounds is in subsections (2) and (3), which provide:

> '(2) Where, before or in the course of an examination, the Commissioner is satisfied that any relevant criminal proceedings are pending or are likely to be instituted, the Commissioner shall not carry out the examination or, where the examination has been commenced, proceed with the carrying out of the examination (including the making of any determination further to the examination)–
>
> (a) in the case of any pending criminal proceedings, until they have been finally determined or finally disposed of; or
>
> (b) in the case of any criminal proceedings which are likely to be instituted, until they have been finally determined or finally disposed of or, if applicable, until they are no longer likely to be instituted.
>
> (3) For the purposes of subsection (2), criminal proceedings are, in relation to an examination, regarded as relevant if, but only if, the interception or covert surveillance alleged in the application for the 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.'

9.17 According to section 45, insofar as I am satisfied that there are any pending or likely relevant criminal proceedings, it is imperative that my examination cannot start or continue until the proceedings are finally

determined or disposed of. It may take a considerable time to reach this final determination or disposal because parties to criminal proceedings may choose to appeal through the entire hierarchy of the judicial system in Hong Kong, from the trial court to the intermediate appellate court and, if allowed, to the Court of Final Appeal. The criminal proceedings, from first instance and throughout all the appellate stages, will likely take a matter of three or more years. Since the Commissioner's power of examination is suspended for such a long period of time, it would be difficult for me to gather the necessary evidence for deciding if the application is substantiated. The longer the delay, the more likely memory will fade and evidence will be lost.

9.18 The Security Bureau was consulted as to the purpose and background of the Ordinance making this provision. After a brief research, the Security Bureau informed us that the legislative intent was to avoid defendants in criminal proceedings using an application for examination to me in an attempt to delay the proceedings, which would waste or abuse our judicial resources and the resources of my Commission.

9.19 For the time being, I do not see the reasoning given by the Security Bureau entirely justifies my inaction in processing an application for examination because of the matters set out in section 45(2). As far as my office is concerned, a normal and straight forward application for examination that is entitled to be entertained by me will be fully investigated and dealt with in no longer than three months. No more resources of my office will be depleted for an examination to be carried out than for it to be put on hold by reason of section 45(2). The tribunal dealing with the criminal proceedings and any application on the part of a

defendant to adjourn pending my determination on his application for an examination is not bound to accede to an adjournment; it will all depend on the circumstances of each particular case. Any unwarranted application for an adjournment will, no doubt, be rejected. I do not see how judicial resources can be unjustifiably wasted in the circumstances.

9.20 On the other hand, if an unauthorized interception or covert surveillance operation had been carried out against a defendant in criminal proceedings and he makes an application for examination to me, why should the examination be stalled with the increasing risk of losing all evidence that may justify the application? Moreover, if I find the application substantiated, the finding may help the defendant in his defence against the charge(s) he faces in the criminal proceedings. I do not see any sufficient reasonable explanation for this prohibition in section 45 or the delay as compelled by it; rather I see the removal of the prohibition being reasonable for the protection of the rights of privacy and communication of Hong Kong people including defendants in criminal proceedings.

9.21 By a letter dated 10 May 2012, I made a **recommendation** to the Secretary for Security that consideration be given to have subsections (2) and (3) of section 45 repealed. Up to the completion of this annual report, I have not yet received any substantive response from the Administration.

Names and aliases and the 'if known' requirement

9.22 The recommendations made under this heading arose out of Outstanding Case (ii) detailed in Chapter 7 of this annual report.

9.23 Schedule 3 to the Ordinance provides for the necessary contents of the affidavit or statement supporting an application for the issue or renewal of a prescribed authorization for interception or covert surveillance, in four Parts. Part 1 of Schedule 3 applies to the affidavit in support of an application for issue of a panel judge's authorization for interception and its paragraph (b)(xi)(A) requires the affidavit to set out

> '(xi) 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 [as the subject] … has also been identified as the subject of the interception or covert surveillance concerned; …' (abbreviated as the 'if known' requirement).

9.24 The same 'if known' requirement applies to the affidavit supporting an application for the issue of a judge's authorization for Type 1 surveillance (paragraph (b)(xii) of Part 2 of Schedule 3) and also to the statement supporting an application for the issue of an executive authorization for Type 2 surveillance (paragraph (b)(xii) of Part 3 of Schedule 3).

9.25 However, the 'if known' requirement is not expressly made to apply to the affidavit or statement supporting an application for the renewal of a judge's authorization for interception or Type 1 surveillance or an executive authorization for Type 2 surveillance (see Part 4 of Schedule 3).

9.26 The provision in Part 4 of Schedule 3 that has some connection with the 'if known' requirement is its paragraph (a)(ii), which

requires the affidavit or statement supporting the renewal application to set out

> 'any significant change to any information previously provided in any affidavit or statement under this Ordinance for the purposes of any application for the issue or renewal of the judge's authorization or executive authorization, …'

9.27 In Outstanding Case (ii) mentioned in Chapter 7 above, the subject was only known to the LEA as an unknown male at the time of the application for and grant of the fresh authorization. Without a name, the 'if known' requirement had no application. Very soon after the commencement of the interception operation carried out pursuant to the fresh prescribed authorization, a full name and a partial name of the subject surfaced. The LEA did not submit an REP-11 report on material change of circumstances to the panel judge on either the full name or the partial name. When a renewal of the fresh prescribed authorization was sought, only the partial name and not the full name of the subject was mentioned in the affirmation in support of the renewal application. The LEA's explanation for the non-disclosure of the full name and the non-submission of an REP-11 report was that the subject had not yet been identified (ie with the certainty of an identity card number) to qualify as a significant change of information or material change of circumstances. The partial name was disclosed in the renewal application because it was a name commonly used by the officers concerned in referring to the subject. Its disclosure in the renewal affirmation did not seem to aim at satisfying paragraph (a)(ii) of Part 4 of Schedule 3, cited above, as a piece of significantly changed information. In any event, the 'if known'

requirement did not apply to a renewal application. Thus, the LEA considered that it had sufficiently complied with the provisions of the Ordinance and no blame could be attached to its officers for not mentioning the full name that had transpired and whether this full name or the partial name had been a subject of any application for the issue or renewal of a prescribed authorization in the preceding two years.

9.28 I have in various paragraphs under Outstanding Case (ii) in Chapter 7 dealt with some of the reasoning for the need to disclose all the names and aliases of a subject and the necessary application of the 'if known' requirement to the affidavit or statement supporting a renewal application. I recapitulate these reasons and set out others below:

(a) Full and frank disclosure is of paramount importance for the reliable operation of the ICSO. I am of the view that an LEA should disclose to the panel judge or the authorizing officer all the names and aliases of the subject known to the LEA, together with a 'if known' declaration as to whether any of them has been the subject of any application within the preceding two years.

(b) Full and frank disclosure must apply so that all names and aliases of the subject should be disclosed for the information and consideration of the relevant authority in determining whether to grant or refuse the renewal application sought. After all, applications for carrying out any of the statutory activities by the LEAs made to the panel judges and the departmental authorizing officers are *ex parte* applications

without any opposing party, which all the more accentuates the need to comply with the full and frank disclosure principle.

(c) Where the 'if known' requirement applies to fresh applications, obviously for good reasons, there is no logical distinction why it should not equally apply to renewal applications.

(d) Whether or not any name or alias of the subject that has transpired after the grant of the fresh authorization amounts to a significant change of information provided for in paragraph (a)(ii) of Part 4 of Schedule 3, all such names and aliases should be disclosed to the relevant authority as a matter of full and frank disclosure and to avoid argument. This should be complemented with the 'if known' requirement to give a full picture to the relevant authority regarding the proposed subject or the subject under the existing prescribed authorization.

(e) Lack of any item of such information in the affidavit or statement supporting a renewal application may mislead the relevant authority. Moreover, to require each of the names and aliases of the subject to be disclosed as soon as it surfaces will enable the relevant authority to review whether the conditions for the granting of the prescribed authorization are still met in the new light and will on the other hand help deter or discourage any possible abuse to disguise an unlawful interception through the use of switched identity.

(f) No discretion should be given to LEA officers to decide which name or alias of the subject should be disclosed or reported to

the relevant authority. This would avoid any excuse from misunderstanding or misinterpretation and also avoid mistakes being made by LEA officers.

9.29 By reason of the above, I **recommend** that Part 4 of Schedule 3 be amended to add in the 'if known' requirement. Before the amendment to the Ordinance is effected and as a corollary, I **recommend** that the Code of Practice be amended to include the 'if known' requirement to apply to renewal applications for any of the statutory activities. I also **recommend** that a requirement be added in the Code of Practice for the LEAs to disclose all names and aliases of the subject that surface from time to time by way of a timely REP-11 report to the relevant authority, regardless of whether they are considered as a significant change of information. This will fulfil the full and frank disclosure principle and rule out any possible procrastination of its compliance.

[This page is left blank.]

CHAPTER 10

STATUTORY TABLES

10.1 In accordance with section 49(2), this chapter provides separate statistical information in relation to the statutory activities 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 12]

Table 1(a)

		Judge's Authorization	Emergency Authorization
(i)	Number of authorizations issued	518	0
	Average duration [Note 13]	29 days	-
(ii)	Number of authorizations renewed	678	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	44	Not applicable
(vi)	Number of applications for the issue of authorizations refused	7	0
(vii)	Number of applications for the renewal of authorizations refused	1	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 12 Executive authorization is not applicable to interception.

Note 13 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	19	4	0
	Average duration	3 days	3 days	-
(ii)	Number of authorizations renewed	1	1	Not applicable
	Average duration of renewals	5 days	8 days	-
(iii)	Number of authorizations issued as a result of an oral application	0	0	0
	Average duration	-	-	-
(iv)	Number of authorizations renewed as a result of an oral application	0	0	Not applicable
	Average duration of renewals	-	-	-
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	0	0	Not applicable
(vi)	Number of applications for the issue of authorizations refused	0	0	0
(vii)	Number of applications for the renewal of authorizations refused	0	0	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	0	Not applicable

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

Table 2(a) [Note 14]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Engaging in bookmaking	Cap. 148	Section 7, Gambling Ordinance
Managing a triad society/assisting in the management of a triad society	Cap. 151	Section 19(2), Societies Ordinance
Keeping a vice establishment/ managing a vice establishment/ assisting in the management of a vice establishment	Cap. 200	Section 139, Crimes Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Theft	Cap. 210	Section 9, Theft Ordinance
Handling stolen property/goods	Cap. 210	Section 24, Theft Ordinance
Conspiracy to inflict grievous bodily harm/shooting with intent/wounding with intent	Cap. 212	Section 17, Offences Against the Person Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance
Misconduct in public office	—	Common Law

Note 14 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 15]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs 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
Burglary	Cap. 210	Section 11, Theft Ordinance
Handling stolen property/goods	Cap. 210	Section 24, Theft Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance
Perverting the course of public justice	—	Common Law

Note 15 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 16]		
	Subject	**Non-subject**	**Total**
Interception	64	67	131

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 17]		
	Subject	**Non-subject**	**Total**
Surveillance	19	1	20

Note 16 Of the 131 persons arrested, 14 were attributable to both interception and surveillance operations that had been carried out.

Note 17 Of the 20 persons arrested, 14 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 137.

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 section 41(1)		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 582 applications and 351 related documents / matters had been checked. (See paragraphs 2.31, 3.23, 3.24 and 3.36 of this report.)
(c) LPP cases reviewed by the Commissioner	33	Interception	LPP Case 1 A call revealed that the Subject would approach a Mr Y of a solicitors' firm ('Mr Y') regarding a date of pending appearance in a court case of another

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			person. The telephone number of Mr Y was also mentioned in the conversation. Having been reported of the interception of a subsequent call which was made by the Subject to the telephone number of Mr Y ('Call 2'), a Chief Listening Officer instructed a Senior Listening Officer to listen to the call so as to clarify if it contained LPP information. The Senior Listening Officer listened to Call 2 in its entirety and then reported its content to the Chief Listening Officer. The Chief Listening Officer considered that Call 2, which was on matters relating to the pending court appearance, did not contain any LPP information. Nevertheless, in view of the heightened LPP likelihood, the Chief Listening Officer decided to submit an REP-11 report to the panel judge to report on the matter. Having considered the REP-11 report, the panel judge allowed the prescribed authorization to continue with additional conditions imposed. In this case, the Commissioner considered that: (i) based on the gist of the conversations as stated in the REP-11 report, Call 2 did contain LPP information; (ii) it was wrong to task an officer with listening to Call 2 so as to ascertain if the call contained LPP information (the purpose should have been to avoid obtaining LPP information); and (iii) the Senior Listening Officer should have put on hold monitoring when the Subject started to ask the receiver specific information about the pending court appearance.

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			The Commissioner recommended that further and better training on the meaning of LPP information and on the proper and prudent attitude to take in handling possible LPP-related matters should be provided to all officers dealing with ICSO-related matters. After receipt of the Commissioner's findings, the LEA proposed to give a verbal advice (disciplinary in nature) to the Chief Listening Officer and the Senior Listening Officer to take a more prudent approach in handling ICSO-related duties especially when LPP materials are likely to be involved. The Commissioner considered the disciplinary actions appropriate. (See paragraphs 5.18 – 5.44 of Chapter 5.)
		Interception	<u>LPP Case 2</u> An intercepted call listened to by an LEA listener contained LPP information ('the LPP call'). In view of the obtainment of LPP information and the fact that the interception operation concerned was not productive, the LEA discontinued the operation and submitted a discontinuance report to the panel judge citing the above two grounds of discontinuance. The Commissioner observed that no REP-11 report was submitted to the panel judge and that the discontinuance report did not mention whether there were any other calls between the Subject's telephone number and the telephone number involved in the LPP call ('other calls'). In response to the Commissioner's observations above, the head of the LEA stated that the transcript and <u>available records</u> of this case had been examined, which revealed that there were eight 'other calls'. An officer of the LEA clarified at

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			the Commissioner's inspection visit to the LEA that the 'available records' that had been examined included data that had been archived ('the archived data'). However, the archived data as checked by the Commissioner's office unearthed that there were in fact 26 'other calls', which had been listened to by the LEA listeners prior to the LPP call. For this discrepancy, the head of the LEA explained that the eight 'other calls' were revealed by his officers examining the transcripts. His officers did not examine the data that were still available in the computer server and the archived data. The Commissioner considered the handling of this case by the LEA unsatisfactory. First, there was no REP-11 report to the panel judge. Second, there was no genuine and conscientious effort to check the number of 'other calls'. Third, when the Commissioner asked what available records had been examined to come up with the figure of eight 'other calls', he was misled into believing that all the available records including the archived data had been examined. In this connection, the Commissioner has written to the head of the LEA to seek his view as to what actions he proposes to take against the officers concerned for the improper handling of this case. (See paragraphs 5.45 – 5.65 of Chapter 5.)
		Interception	<u>LPP Case 3</u> A listener listened to a call with heightened LPP likelihood. The panel judge allowed the prescribed authorization to continue with additional conditions imposed. A few days later, another listener listened partially to another call which contained LPP information. In

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			view of the obtainment of LPP information and the fact that the value of continuation of the operation was considered not proportional to the risk or drawback of obtaining further LPP information, the LEA discontinued the interception operation. The Commissioner reviewed the case and found no irregularity. (See paragraphs 5.66 – 5.68 of Chapter 5.)
		Interception	<u>LPP Case 4</u> There were three occasions where likelihood of obtaining LPP information was heightened. On the first two occasions, the panel judge allowed the prescribed authorization to continue but with additional LPP conditions imposed. The Commissioner found nothing untoward regarding the LPP call ('LPP Call-1') on the first occasion. Regarding the second occasion, the REP-11 report stated that there were two 'other calls' made between the Subject's telephone number and the telephone number involved in the LPP call ('LPP Call-2'). However, checking of the data by the Commissioner's office revealed that there was one additional 'other call' intercepted before LPP Call-2 which had been listened to in part by an LEA listener but was omitted in the REP-11 report. The LEA explained that the omission was due to the oversight of the listener who drafted the REP-11 report and that the reporting officer checking the correctness of the draft report also failed to detect the omission. The LEA proposed that both officers be given a verbal advice (disciplinary in nature) for the need to exercise due care and vigilance in performing ICSO duties. The Commissioner considered the disciplinary

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			actions appropriate. On the third occasion, after listening to a call with heightened LPP likelihood ('LPP Call-3'), the listener continued to listen to five further calls before she reported the matter to the supervisor who decided to discontinue the interception operation. The second further call ('Further Call 2') was a call made to the same telephone number involved in LPP Call-3. The LEA explained that only after listening to the last further call, the listener thought about what she had heard from LPP Call-3 and Further Call 2 and started to have a feeling that the Subject might contact the lawyer whose name was mentioned in LPP Call-3. She therefore considered the need to err on the safe side to put on hold monitoring and report to her supervisor at this stage. As the Commissioner had not listened to the audio recording of the intercept products archived in the LEA, he was not able to reach a decision on: (i) whether the listener's explanation for listening to five further calls after listening to LPP Call-3 should be accepted; or (ii) whether the listener had complied with the additional LPP conditions imposed by the panel judge. (See paragraphs 5.69 – 5.83 of Chapter 5.)
		Interception (29 reviews)	<u>The other 29 LPP cases</u> The Commissioner has completed the review of these LPP cases. For five of these cases, there were a total of 893 instances of non-compliance with the Revised Additional Conditions imposed by the panel judge in the prescribed

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			authorizations (ie Report 8 in Chapter 7). Nothing untoward was found for the remaining 24 LPP cases. (See paragraph 5.84 of Chapter 5.)
(d) JM cases reviewed by the Commissioner	2	Interception	<u>JM Case 1</u> At the time of the grant of the prescribed authorization, it was already assessed that interception of the communications of the Subject might result in obtaining of JM and the panel judge imposed a set of restrictive conditions. Having regard to the contents of two calls between the Subject and the journalists having been published in some newspapers, the officer-in-charge of the interception unit considered that the contents might amount to possible JM. An REP-11 report was submitted to the panel judge to report on the matter, together with a discontinuance report as the Subject was arrested. The panel judge then revoked the prescribed authorization. Although there were inconsistencies in the reporting and assessment of this JM case by the LEA, the Commissioner considered that JM had been obtained. Having reviewed the case, the Commissioner found nothing untoward. However, as the Commissioner had not listened to the intercept products, no finding could be made as to the veracity of the contents of the two calls as stated in the REP-11 report and whether, apart from the above two calls, there were any other communications 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. (See paragraphs 5.85 – 5.93 of Chapter 5.)

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<u>JM Case 2</u> At the time of application for and issue of the prescribed authorization, it was not envisaged that the interception operation would likely involve JM. As interception progressed, a call was made by the Subject in which details of an arrest action were mentioned. The listener, after re-listening to the call and being clear that the Subject was calling a newspaper and the receiver might be a reporter, informed her supervisor who caused a check of the newspapers and found that there were articles reporting the said arrest action in certain newspapers. The LEA then submitted an REP-11 report to the panel judge stating that 'JM might have been inadvertently obtained through interception'. The LEA requested to continue the interception but the panel judge considered that actual JM had been obtained and revoked the prescribed authorization. The disconnection of the facility was completed 10 minutes after the revocation of the prescribed authorization. Having conducted a review, the Commissioner made the findings that the interception after revocation of the prescribed authorization and before the disconnection of the facility, which lasted 10 minutes, was unauthorized and that no call was intercepted during the 10 minutes of unauthorized interception. As the Commissioner had not listened to the audio recording of the intercept products, no finding could be made as to the veracity of the contents of the call as stated in the REP-11 report and whether apart from that call, there were any other communications which might have contained JM in the intercept products listened to by the LEA. The Commissioner considered that JM had

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			been obtained through the call and found no sufficient evidence to determine whether it was obtained through inadvertence or otherwise. (See paragraphs 5.94 – 5.98 of Chapter 5.)
(e) Incidents / irregularities reviewed by the Commissioner	11	Interception	<u>Non-compliance / Irregularity Report 1</u> A listener accessed a call when monitoring should have been put on hold pending submission of an REP-11 report to the panel judge on heightened likelihood of obtaining LPP information and a determination by the panel judge on the continuation or otherwise of the prescribed authorization concerned. The call lasted 117 seconds and the listener had accessed it for 15 seconds when she was preparing the draft REP-11 report. This unauthorized access was not reported in the REP-11 report submitted to the panel judge later but was discovered by the Commissioner during review of the LPP case. At the Commissioner's request, the department conducted an investigation into the incident. The department's investigation report stated that on the day when the listener prepared the draft REP-11 report, the listener did not intend to listen to any intercepted call and therefore did not wear a listener's headphone. She only checked the data for the purpose of compiling the REP-11 report. The department considered that it was an 'accidental' access caused by inadvertence and suggested that the listener should be verbally advised (disciplinary in nature) to be more cautious when performing a listener's duties. The Commissioner considered that the unauthorized access must have been caused by negligence if not a deliberate act and the proposed punishment of verbal advice was too lenient. Having considered the

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			Commissioner's comments, the department proposed raising the level of disciplinary action against the listener to verbal warning, which was agreed by the Commissioner. Regarding the listener's supervisor ('the Supervisor'), the department had not proposed any punishment against him. The Commissioner requested the department to reconsider the action to be taken against the Supervisor having regard to the fact that he failed in his supervisory functions and adopted a lax practice in that: (i) he failed to ensure that the access right of listeners had been properly removed for suspending the monitoring and that the REP-11 report contained all necessary and material information for the panel judge's consideration; and (ii) he failed to check the up-to-date ATR when signing the REP-11 report for submission to the panel judge. Had he checked the up-to-date ATR, he would have discovered the listener's 'accidental' access. Having considered the Commissioner's comments, the department proposed a verbal advice (disciplinary in nature) be given to the Supervisor for him to enhance his supervisory function in overseeing the conduct of interception operations. The Commissioner agreed with the proposed verbal advice against the Supervisor. (See paragraphs 7.50 – 7.92 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 4</u> This is the JM Case 2 described in Chapter 5. The continued interception of 10

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			minutes after the prescribed authorization had been revoked was without the authority of a prescribed authorization, amounting to non-compliance with the requirement of the Ordinance. (See paragraph 7.124 of Chapter 7.)
		Surveillance	Non-compliance / Irregularity Report 5 In response to the questions raised by the Commissioner on the non-compliance in a related case, the department discovered the irregularity that the officer-in-charge of the operation ('OC Operation'), in preparing the affirmation ('the Affirmation') in support of the application of a prescribed authorization for Type 1 surveillance, made an incorrect statement that a previous prescribed authorization ('the First PA') authorized covert surveillance on meetings between Subject 1, Subject 2 and Mr A ('the Incorrect Statement'), yet the First PA only authorized surveillance on meetings between Subject 1 and Subject 2. The supervisor of the OC Operation ('the Supervisor', being the affirmant and applicant of the application) and the Assistant Head of Department failed to notice the Incorrect Statement. In his review of the case, the Reviewing Officer also did not notice the Incorrect Statement in the Affirmation and concluded that there was no non-compliance or irregularity. The department's investigation report stated that the irregularity was due to the mistaken belief or misimpression of the OC Operation and the Supervisor on the terms of the First PA, the error in copying from the terms of an earlier prescribed authorization and the lack of vigilance of these two officers. The department proposed to give a written warning to the OC Operation, the Supervisor and the Reviewing Officer. No disciplinary

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			action could be taken against the Assistant Head of Department as he had left the service before the discovery of the mistake. Having conducted a review, the Commissioner made the finding that the mere wrong description of the First PA in the Affirmation could not reasonably be said to be sufficient evidence of a deliberate concealment of the true terms of the First PA. The proposed disciplinary actions were appropriate except that for the Reviewing Officer. As he had been given a written warning for the same cause during his review of the First PA, a verbal warning would be a proper action to be taken. Although a wrong statement in the contents of an affirmation is a serious matter, the department was correct in treating this case as an irregularity instead of non-compliance as no relevant requirements of the Ordinance were breached. (See paragraphs 7.125 – 7.138 of Chapter 7.)
		Surveillance	<u>Non-compliance / Irregularity Report 6</u> Two surveillance devices were withdrawn from the device store for training purpose (non-ICSO purpose). Although it was stated clearly in the relevant device request memo that the issue of the two devices was for non-ICSO purpose, the device issuing officer made the records of issue in the ICSO Device Register in the Device Management System ('DMS'), instead of the Non-ICSO Device Register in the DMS. The device issuing officer made up dummy information of an authorization for Type 2 surveillance (such as an ICSO number of the authorization) for inputting into the ICSO Device Register. After discovery of the incident by the department, the device issuing officer explained that he made up the dummy

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			information of a Type 2 surveillance operation with a view to simulating a real surveillance operation for the training so that the participating officers would have a stronger impression. The department found it difficult to accept this logic since the officers on the ground would not see the DMS records. The department considered that the device issuing officer was trying to put up an excuse to explain his wrongdoing. The department concluded that the mistake committed by the device issuing officer was caused by his carelessness, negligence and ignorance and that there was no evidence to suggest ill-intent on his part. Since the device issuing officer had proceeded on pre-retirement leave, the department considered that it would not serve any meaningful purpose by initiating any disciplinary action against him. The Commissioner did not agree with the department that the mistake was caused by carelessness or negligence. The device issuing officer deliberately entered false information into the device register and this amounted to falsification of records. Although the real reason for the wrongdoing of the device issuing officer was not known, a serious view and action must be taken because the case involved a falsification of records and copycats must be discouraged. The Commissioner considered that disciplinary action should be taken against the device issuing officer, which would surely get the message across that any falsification of records would not be tolerated. Taking heed of the Commissioner's views, the department awarded a 'reprimand' to the device issuing officer before his retirement from the service. (See paragraphs 7.139 – 7.158 of Chapter 7.)

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Surveillance (7 reviews)	There were other cases of irregularity relating to the recording and documentation of the movements of devices capable of being used for covert surveillance but used or allegedly used for non-ICSO purposes, which are set out below: A. <u>Duplicate use of request memo reference</u> The duplicate use of request memo reference was discovered when the Commissioner's office examined the 'device registers for the month of January 2010' submitted by an LEA in mid February 2010. There were altogether four cases of duplication (ie Duplication Cases 1 to 4). In each of these duplication cases, there was a pair of device request memos with duplicated memo reference and the endorsing officer was the same. As advised by the LEA, the duplication was caused by the respective withdrawing officers, who either forgot to file a copy of the request memo back into the master file or did not make a note on the master file on the use of the reference number; hence the other withdrawing officers unknowingly used the same reference in preparing the subsequent request memos. The LEA attributed the mistake to the carelessness of the endorsing officers who overlooked the duplication of the reference number on the request memos. Such duplication, which happened for four times within a month within the same device registry and involved several officers, smacked of widespread malpractice in that registry. For example, one might suspect that the device request memo was non-existent at the time of withdrawal of devices

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			but was created at a later date and backdated to the date of withdrawal. In addition to the duplication in the memo reference, the Commissioner also found other mistakes and anomalies in Duplication Cases 2 to 4 and made enquiries with the LEA requesting explanations for each of these cases. Apart from the above mistakes relating to the duplication cases, the Commissioner's office found a number of other anomalies, mistakes or irregularities regarding the device register of the same device registry. The major one was that not an insignificant number of the entries had the name and rank of the endorsing officer crossed out and replaced by another name. According to the LEA, the mistakes were due to the introduction of the new request memo on 1 January 2010. All the officers who had withdrawn devices in January 2010 did not fill in the 'approving officer' column of the device register and some of these officers also made mistakes in the 'endorsing officer' column of the device register. The officer-in-charge of the device registry ('OC') only spotted the respective mistakes in the 'approving officer' column and the 'endorsing officer' column on 29 January 2010 and in early February 2010, but not soon after the implementation of the new request memo on 1 January 2010. Following the query by the Commissioner's office in mid February 2010, the OC conducted a further inspection in late February 2010 and spotted a few more errors, including that a withdrawing officer

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			put down the name of an officer in the 'endorsing officer' column in 17 entries of the device register who was neither the endorsing officer nor the approving officer by using the wrong name chop. The device registry concerned also made mistakes of one kind or another such as no indication of the date of issue or the date of return of devices in entries on various pages of the device register and there was no indication that the OC or other senior officers who had checked the device register cared about the absence of such in the relevant entries of the device register. All these, in aggregate, presented a worrying picture if not suggestions of abuse and ulterior motive. The LEA attributed the repeated anomalies and irregularities unearthed to inadvertent oversight and carelessness of the officers concerned and the difficulties they encountered in adapting to the new requirements for withdrawal of device. The only remedial action taken by the LEA was to remind the officers concerned to exercise greater care in handling the device register and request memo. However, the Commissioner considered that it was not merely carelessness or inattentiveness of the officers concerned but a problem of their **lax and slapdash working** attitude and they should be subject to a higher level of discipline. In response, the LEA proposed that counselling (non-disciplinary in nature) be made to some of the officers concerned. The Commissioner had not completed the review on this series of cases.

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			(See paragraphs 4.4 – 4.37 of Chapter 4.) B. <u>Discrepancies between device register and device request memos</u> During an inspection visit to an LEA in late 2010, the Commissioner spotted a number of discrepancies between certain entries in the device register and the device request memos for non-ICSO purposes in that LEA. There were a total of five cases of discrepancies (ie Discrepancy Cases 1 to 5). For Discrepancy Case 1, the mistake was that the name of the drawing officer was mistakenly stated as the endorsing officer in the device register by the designated officer of the Support Unit, which was not discovered by the drawing officer and the device issuing officer in signing the device register. For Discrepancy Case 2, the drawing officer was changed from one officer (ie Officer A) to another officer (ie Officer B) but the lower part of the device request memo still stated that Officer A drew the device. Various officers did not detect the mistake in signing the request memo and the designated officer of the Support unit also made mistake in the entries he made into the device register. It also exposed the malpractice of Officer A of signing in advance to acknowledge receipt of device before the approval for issue and the actual issue of device. For Discrepancy Case 3, the drawing officer made a mistake as to the date of the device request memo when

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			preparing the memo and gave two different statements on her mistake. For Discrepancy Case 4, the device request memo and the device register all recorded that the device was issued at 1750 hours on the 17th day but the LEA claimed that the device was issued by a senior officer of the Support Unit (ie Officer C) at 0750 hours on the 20th day without any documentary proof. The Commissioner was very skeptical about this case. The wrong time of issue (ie 1750 hours on the 20th day) was made by Officer C in the device request memo, which was unnoticed by the officers concerned in signing the request memo. The designated officer of the Support Unit then found the drawing time unreasonable and therefore entered the date and time on the device register as the 17th day and 1750 hours and accordingly amended the device request memo without making reference to his supervisors or seeking clarification with the drawing officer. All officers signing the device register did not notice the mistake and the device issuing officer also failed to spot the wrong date of approval entered. For Discrepancy Case 5, the designated officer of the Support Unit made mistakes as to the date of issue of device and the date of approval in the device register. The device issuing officer, the same officer as in Discrepancy Case 4, also failed to detect the wrong date of approval in this case. For the above five discrepancy cases, severe counselling (non-disciplinary

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			in nature) was given by the LEA to the officers concerned. Taking into account the Commissioner's views and suggestions, the LEA proposed that verbal / written warning be given to a total of five officers. (See paragraphs 4.38 – 4.64 of Chapter 4.) C. <u>Missing entry in device register</u> An LEA reported that while a surveillance device was returned to the device registry, no entry for the return of the device was made in the relevant non-ICSO device register. The Commissioner found that the entries made on the device register did not follow the required format of pairing up the 'Issued' and 'Returned' entries as stipulated in his letter to the Security Bureau and copied to the LEAs. The LEA explained that the officers might have overlooked the requested design and remedial action by arranging the 'Issued' and 'Returned' rows in a paired up manner and other enhancement measures had been taken. (See paragraphs 4.65 – 4.67 of Chapter 4.) D. <u>Alleged input problem of the DMS</u> The LEA alleged that there was an input problem of the DMS resulting in its failure to record the return of a surveillance device. It occurred when the storekeeper of the device registry ('Storekeeper') processed the return of a camera bearing a device code 006 ('camera 006'), which was returned together with two other devices by an officer at about 1644 hours on 8 January 2011. The

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			Storekeeper claimed that he logged out from the system and logged in again to retry the whole return process for camera 006 and the system appeared to return to normal function. Upon analyzing the various entries in the device register, the Commissioner's office found it strange that the officer was tasked to return camera 006 (issued under a device request memo for general observation in rural area) and two other devices (issued under a different device request memo for general observation in industrial area) and made further enquiry with the LEA in March 2012. In parallel, the Commissioner's office also sought clarification with the engineer (who did not belong to the LEA) to verify the claim of the LEA. The Commissioner's tentative findings were that there had been a mix-up of devices shortly after issue. Given the findings of the engineer that there was no log indicating that camera 006 had been returned on or after 8 January 2011 and there was also no error log indicating any system abnormality on or after 8 January 2011, the Storekeeper was not telling the truth about the retry for the return of camera 006. The DMS did not have any input problem on 8 January 2011, which was only the system design that it did not accept the return in one batch of devices issued under different device request memos. The LEA should have known the real cause by 17 January 2011 after being informed of the engineer's findings, but it still pretended that there was an input problem of the DMS in its memos of July 2011 and January

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			2012. In its memo of 30 April 2012, the LEA also did not take the opportunity to disabuse the Commissioner's office that in fact there was no input problem. All these memos were signed by the same Assistant Head of Department. The memos concerned were also misleading in representing that it was also the belief of the engineer who had examined the incident that there was an input problem, although no conclusive findings could be made as to why the input problem occurred. There is prima facie evidence that the LEA made false or misleading representations to the Commissioner's office. Upon the Commissioner's request for a full investigation report, the head of the LEA admitted in his letter of 7 June 2012 that there was indeed a mix-up of the two devices. He reassured the Commissioner that they had no intention whatsoever to conceal or withhold any information and that the LEA would conduct a full inquiry on the matters relating to the alleged input problem and whether there were any false representations to the Commissioner. (See paragraphs 4.68 – 4.97 of Chapter 4.) E. <u>Loss of surveillance device</u> An LEA reported that a surveillance device and its associated accessories withdrawn for a non-ICSO surveillance operation were lost, which might have accidentally fallen off from a vehicle. The Commissioner agreed with the disciplinary award of a written admonishment proposed by the LEA. The disciplinary action did not fall

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			within the ambit of section 49(2)(d)(viii) of the ICSO. (See paragraph 4.98 of Chapter 4.) F. <u>Discrepancies regarding the time of making retrospective entries of the issue of devices for non-ICSO purposes in the relevant register of the DMS, the manual records and the DMS audit log</u> On a certain day, the DMS of a department was undergoing system maintenance and accordingly manual records were made for the issue and return of devices. After maintenance, retrospective entries were made in the DMS. However, discrepancies were found regarding the time of making retrospective entries of the issue of three non-ICSO devices in the register of the DMS, the manual records and the DMS audit log. The Commissioner has not yet completed the review at the time of writing this report. (See paragraphs 4.99 – 4.102 of Chapter 4.) G. <u>Missing records on the issue of 69 surveillance devices for non-ICSO purposes</u> 69 surveillance devices were withdrawn from a device store for non-ICSO purpose through the DMS but the return of these devices was rejected by the DMS because no corresponding issue records could be retrieved from the system. The device issuing officer suspected that he might have failed to press the 'Confirm' button to confirm the issue of the devices, which was confirmed later by the department after an

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			investigation. The Commissioner accepted the department's conclusion that there was no ill intent on the part of the officers concerned and no foul play was detected. The Commissioner considered that the senior officer who was responsible for the management and operation of the device store should have reported the matter to the department's Registry for ICSO matters straightaway after knowing the incident. (See paragraphs 4.103 – 4.108 of Chapter 4.) [Note: There were other cases of irregularity relating to LPP and JM and are referred to in Chapter 5 and items (c) and (d) above. Paragraph 7.245 of Chapter 7 is relevant.]

Number of reviews conducted under section 41(2)		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	6	Interception	Outstanding Case (i) from 2010 This case was brought forward from Annual Report 2010. The non-compliance was discovered by the Commissioner during his inspection visit to the department in December 2010. It involved the breach of one of the

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
department or any of its officers to comply with any relevant requirement			additional conditions imposed by the panel judge in a prescribed authorization to guard against the risk of obtaining LPP information, which provided that the department should refrain from listening to calls made to or from certain specified numbers ('the prohibited numbers'). However, the Commissioner noticed from the inspection of the relevant documents that the listener had partially listened to an outgoing call from the subject's facility to a prohibited number for 35 seconds. After investigation, the department considered that the listener should be given a verbal warning for his negligence and lack of vigilance in performing his listening duty. Remedial measures were also taken to help listeners differentiate prohibited number(s) from others. Having reviewed the case, the Commissioner agreed that the non-compliance was due to the listener's negligence in performing his listening duty. The disciplinary action proposed to be taken against him was appropriate. As the Commissioner had not listened to the intercept product archived in the department, no finding could be made on the veracity of the content of the part of the call that the listener had listened to and recorded in the listener's notes. (See paragraphs 7.8 – 7.13 of Chapter 7.)
		Interception	<u>Outstanding Case (ii) from 2010</u> This case was brought forward from Annual Report 2010. In view of a change in the assessment of LPP likelihood, the panel judge imposed additional conditions in the prescribed authorization, one of which was prohibition against listening to any call

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			between the subject facility and a prohibited number. After the imposition of the additional conditions, two calls involving the prohibited number were listened to – one by Listener A and the other by Listener B. Upon realizing that a call listened to by him was a prohibited call, Listener B immediately reported the matter to his supervisor ('Supervisor C'). The checking of ATR found that Listener A had also listened to another prohibited call a few days before. The investigation of the LEA concluded that the respective prohibited calls were listened to by Listener A and Listener B inadvertently. The LEA believed that the two prohibited calls did not contain LPP material. During the investigation, the LEA found that Listener A, when carrying out the listening duties, skipped a considerable number of calls which he ought to have listened to but he did not. This reflected Listener A's lack of diligence in performing listening duties. The LEA proposed that Listener A and Listener B should be given a verbal warning and a verbal advice (disciplinary in nature) respectively. For Supervisor C, the LEA proposed that she should be verbally advised (disciplinary in nature) for the need to provide proper training and guidance to her subordinates in performing ICSO related duties and to monitor the performance of her subordinates more closely. In reviewing the case, the Commissioner considered that the proposed verbal warning against Listener A and the proposed verbal advice against Listener B were too lenient. For the proposed punishment against Listener B, the Commissioner drew the LEA's attention to the award proposed by another department in a similar non-compliance

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			case. The LEA subsequently revised the disciplinary actions. With the agreement of the Commissioner, the LEA issued to Listener A a written admonishment for 'Neglect of Duty' and gave Listener B a verbal warning. For Supervisor C, the Commissioner questioned the LEA why she was singled out for not providing the necessary training to Listener B if the lack of induction training was a general phenomenon applicable to all interception units of the LEA. The LEA agreed that Supervisor C should not be held entirely responsible for the incident and, therefore, withdrew the disciplinary verbal advice proposed for Supervisor C. At the time of the application for the fresh authorization in question, the LEA did not know the name or alias of the Subject. In the course of reviewing the above non-compliance case, the Commissioner discovered that the full name of the Subject already surfaced on the first day of the interception operation. However, the LEA did not submit an REP-11 report to the panel judge to report the full name. The full name of the Subject was also not mentioned in the subsequent application for the renewal of the authorization. The Commissioner felt the non-disclosure of the full name of the Subject highly suspicious and requested the LEA to conduct a full investigation of the case. According to the investigation report submitted to the Commissioner, the LEA's existing practice was that not until a subject had been fully identified, the name of the subject would not be used in any of the ICSO applications relating to the subject. In this case, as the identity card number of the Subject was not revealed during the operation, his identity could not be

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			confirmed. He was therefore not considered by the LEA as fully identified, hence non-reporting of his full name. The LEA's investigation report concluded that there was no foul play in the incident and that there was no evidence to show that the identity of the Subject was being concealed on purpose throughout the ICSO applications. Having reviewed the case, the Commissioner considered that the full name of the Subject should have been disclosed to the panel judge even if the Subject was not fully identified at the material time, and recommended that the LEA should disclose to the panel judge all the hitherto unknown names and aliases of the subject known to the LEA when any such name or alias crops up, with a corresponding 'if known' declaration. As the Commissioner had not listened to the recording of the intercept products archived in the LEA, no finding could be made as to whether there was any switched identity or ulterior motive by not disclosing the full name of the Subject to the panel judge. (See paragraphs 7.14 – 7.49 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 2</u> There was a non-compliance case occurring in 2010 where the panel judge imposed an additional condition in the prescribed authorization such that listening to intercept products could only be undertaken by officers not below a certain rank ('the specified rank') but an officer below the specified rank, after the lifting of the additional condition, listened to 51 calls intercepted before the lifting of the additional condition (Report 3 of Chapter 7 of Annual Report 2010). Prompted by this non-compliance case,

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			the Commissioner requested the LEA concerned to conduct checks on all sections of the department involved in telecommunications interception with additional conditions imposed and later lifted to see if there was any similar mistake. The LEA's examination found that there were four similar non-compliance cases, which happened between June 2008 and February 2010. In these four cases, officers below the specified rank (Officer A in the first case, Officer B in the second case, Officer C in the third case and Officer D in the fourth case), after the lifting of the additional condition, listened to one to five calls intercepted before the lifting of the additional condition ('pre-lifting calls'). Officer A, Officer B, Officer C and Officer D respectively listened to two pre-lifting calls for a total of 73 seconds, one pre-lifting call for three seconds, five pre-lifting calls for a total of 107 seconds and one pre-lifting call for six seconds. The LEA considered that the pre-lifting calls were listened to by the four non-specified rank officers inadvertently and that they did not report such inadvertent listening to their supervisors because they were not aware at the time that they were listening to calls restricted to specified rank officers. The LEA also believed that the chances of the nine pre-lifting calls containing LPP information should be low. The LEA proposed that while Officer B and Officer D should be verbally advised (disciplinary in nature), Officer C should be given a verbal warning. As Officer A had retired from the service in 2008, no disciplinary action could be taken against her. Having reviewed the four non-compliance cases, the Commissioner

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			found that there was no evidence of bad faith or ulterior motive and considered the proposed disciplinary actions appropriate. The intercept products of the four cases had been destroyed. As the Commissioner had not listened to the nine pre-lifting calls in question, no finding could be made on whether they contained information subject to LPP. (See paragraphs 7.93 – 7.114 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 3</u> During a review of an LPP case, the Commissioner's office found that a listener had listened to five calls made to or received from three of the prohibited numbers, contravening one of the additional conditions imposed by the panel judge, which prohibited the department from listening to calls made between the subject facility and the prohibited numbers in order to guard against the risk of obtaining LPP information. According to the department's investigation report, the listener was unaware of her unauthorized listening to the five calls until she was enquired about the matter by the department. The listener accepted full responsibility for the non-compliance and considered that her performance had been affected by heavy workload. After considering all the circumstances, the department recommended that a written warning be given to the listener. Having conducted a review, the Commissioner made the findings that the listener was culpable for the five incidents of non-compliance, in particular the fifth one as the flagging system was

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			functioning properly at that time. The proposed disciplinary action against the listener was appropriate. The Commissioner recommended the department to look into the listening and note-taking practice in respect of its listeners and to work out improvement measures. He also made a recommendation to the department so as to ensure its officers to comply with the time-line set by him in his request for information or report. (See paragraphs 7.115 – 7.123 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 7</u> This non-compliance was due to the inclusion of a wrong telephone number in a prescribed authorization, resulting in the interception of a facility of a person who was not related to the investigation, for about eight hours. The case involved the following five LEA officers: (i) the applicant of the application for authorization for interception ('the Applicant'); (ii) the officer-in-charge of the ICSO registry ('OC Registry') who headed a dedicated application team; (iii) the officer responsible for investigating the crime ('the Operation Officer'); (iv) the Processing Officer of the dedicated application team; and (v) the Assistant Processing Officer of the dedicated application team.

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			The Operation Officer firstly created the mistake by entering a wrong digit of the telephone number proposed to be intercepted ('1234 5078' instead of '1234 5678') in a document she e-mailed to the OC Registry. In the confirmation process, she failed to detect the discrepancy on a number of occasions and even rationalized the discrepancy with an imaginary cause. The OC Registry failed to realize that the number in the e-mail from the Operation Officer (wrong facility) and that on the verification form contained in the verification folder (correct facility) were different. Both the Operation Officer and the OC Registry did not follow the procedure of reading out the entire telephone number to be intercepted in the verification process, which had been adopted by the LEA since a few years ago. The Assistant Processing Officer and the Processing Officer also failed to detect the discrepancy between the telephone number shown on the draft application documents and the number shown on the verification form in the verification folder. The Applicant confirmed the application without checking the correctness of the telephone number, resulting in the issue of the authorization for intercepting the wrong number by the panel judge. It transpired on the first day of interception that the line under interception was not used by the Subject. Subsequent checking by the OC Registry discovered that the telephone number authorized for interception was incorrect. The LEA immediately discontinued the interception and submitted a discontinuance report to the panel judge who then revoked the authorization.

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			The Commissioner found that the unauthorized interception was caused by the lack of vigilance on the part of the five officers in the verification and application process. There was no indication of any ulterior motive in the case. The proposed punishment of written warning and written warning of dismissal to the officers concerned were appropriate. The verification procedure and application process of the LEA had since been improved. (See paragraphs 7.159 – 7.188 of Chapter 7.)
		Interception	<u>Non-compliance / Irregularity Report 8</u> On 7 July 2011, the panel judge imposed a set of Revised Additional Conditions on a prescribed authorization in order to prevent LPP information from being obtained. The same Revised Additional Conditions were replicated for similar cases that followed. The LEA drew the Commissioner's attention to the Revised Additional Conditions about a month later, at an inspection visit on 2 August 2011. When the Commissioner reviewed the matter back in his office, he considered that the LEA might not have acted in accordance with the Revised Additional Conditions and wrote to the head of the LEA on 11 August 2011 questioning how the department complied with the Revised Additional Conditions. It was upon this query that the LEA wrote to the panel judge to seek clarification and found that it had hitherto misunderstood the requirements of the panel judge set in the Revised Additional Conditions. The LEA thereupon discontinued the relevant operations. The LEA's investigation report revealed that there were a total of 893 instances of

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			non-compliance with the Revised Additional Conditions involving eight prescribed authorizations from early July to mid August 2011. *[Since the contents of the facts of the case, details of the non-compliance and the Commissioner's review hinged on and were intimately related to the details of Revised Additional Conditions, to adhere to the statutory principle of not prejudicing the prevention or detection of crime or the protection of public security, the Commissioner has removed them from the Annual Report that will be published openly for the public, including members of the Legislative Council and the media.]* The Commissioner found that the results of checking of ATRs and related records conducted by his office tallied with what was reported by the LEA that there were 893 instances of non-compliance in eight prescribed authorizations and the communications concerned were not accessed by any officer of the LEA. The nature of the non-compliance was the breaching of two of the Revised Additional Conditions. The Commissioner considered that the verbal warning proposed by the LEA for each of the three officers concerned was much too lenient because their failures were the root cause of no less than 893 instances of non-compliance. As regards the culpability of the LEA's management and senior officers in this matter, the review of and decision on this matter as a whole cannot be finalized before the completion of this annual report. While the Commissioner was not satisfied with the way this case was handled by the LEA officers, he did not have evidence of any ulterior motive or ill will on the part

Number of reviews conducted under section 41(2)		Interception / Surveillance	Summary of reviews
			of the LEA management or any of the officers concerned. The instances of non-compliance, albeit numerous, had not resulted in intrusion into the privacy of the affected persons as the communications concerned had not been accessed. (See paragraphs 7.189 – 7.237 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 section 41(1)		Interception / Surveillance	Broad nature of irregularities or errors identified
Section 41(1)			
(a) Reviews during the periodical inspection visits to LEAs	1	Surveillance	Mistake in the departmental review of surveillance operations conducted pursuant to an executive authorization. (See paragraphs 3.29 – 3.30 of Chapter 3.)
(b) Reviews of LPP cases pursuant to paragraph 120 of the Code of Practice	896	Interception	<u>LPP Case 1</u> Inaccurate assessment of LPP risk, not putting on hold monitoring when it was clear that LPP information would be obtained and failure to appreciate the purpose of only allowing specified rank officers to listen to calls with possible LPP involvement.
		Interception	<u>LPP Case 2</u> Unsatisfactory handling of the case by the LEA. The normal practice of submitting an REP-11 report stating whether there were any 'other calls' between the telephone numbers involved in the LPP call was not followed. There was also a dispute as to what material the LEA had examined as the basis for stating that there were only eight such 'other calls' but in fact there were 26 'other calls'.
		Interception	<u>LPP Case 4</u> Omission to include in the REP-11 report a call between the Subject's facility and the telephone number involved in the second LPP call that was suspected to involve LPP information. No submission of REP-11 report on the

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception / Surveillance	Broad nature of irregularities or errors identified
			third occasion where likelihood of obtaining LPP information was heightened. Interception (893 cases) <u>Other 5 LPP cases</u> A total of 893 instances of non-compliance with the Revised Additional Conditions imposed by the panel judge in the prescribed authorizations. (For details, see item (c) under section 41(1) in Table 5 and Chapter 5.)
(c) Review of JM cases	2	Interception Interception	<u>JM Case 1</u> Inconsistency in the assessment and reporting on whether JM had been obtained. <u>JM Case 2</u> Unauthorized interception of 10 minutes after revocation of the prescribed authorization by the panel judge upon receipt of REP-11 report on obtaining of JM. (For details, see item (d) under section 41(1) in Table 5 and Chapter 5.)
(d) Other reviews	18	Interception Interception	<u>Non-compliance / Irregularity Report 1</u> Unauthorized access to a call for 15 seconds when monitoring was supposed to be put on hold. <u>Non-compliance / Irregularity Report 4</u> Unauthorized interception of 10 minutes after revocation of the prescribed authorization by the panel judge upon receipt of REP-11 report on obtaining of JM. This is the JM Case 2 referred to in item (c) above.

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception / Surveillance	Broad nature of irregularities or errors identified
		Surveillance	<u>Non-compliance / Irregularity Report 5</u> Incorrect statement about the terms of a prescribed authorization found in the affirmation in support of an application for Type 1 surveillance.
		Surveillance	<u>Non-compliance / Irregularity Report 6</u> Making of records of issue of devices for non-ICSO purpose in the ICSO Device Register instead of the Non-ICSO Device Register in the DMS.
		Surveillance (14 cases)	Cases of irregularity relating to the recording and documentation of the movements of devices capable of being used for covert surveillance but used or allegedly used for non-ICSO purposes with a breakdown as follows: A. Duplicate use of request memo reference (4 cases) B. Discrepancies between device register and device request memos (5 cases) C. Missing entry in device register (1 case) D. Alleged input problem of the DMS (1 case) E. Loss of surveillance device (1 case) F. Discrepancies regarding the time of making retrospective entries of the issue of devices for non-ICSO purposes in the relevant register of the DMS, the manual records and the DMS audit log (1 case) G. Missing records on the issue of 69 surveillance devices for non-ICSO purposes (1 case) (For details, see item (e) under section 41(1) in Table 5, Chapter 4 and Chapter 7.)

Number of cases of irregularities or errors identified in the reviews under section 41(2)		Interception / Surveillance	Broad nature of irregularities or errors identified
Section 41(2)			
(a) Reviews on cases in default of application being made for confirmation of emergency authorization within 48 hours as reported by the head of department under section 23(3)(b)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(b) Reviews on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours as reported by the head of department under section 26(3)(b)(ii)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(c) Reviews on non-compliance cases as reported by the head of department under section 54	906	Interception Interception (2 cases) Interception (4 cases)	<u>Outstanding Case (i) from 2010</u> Listening to a call made to a prohibited telephone number for 35 seconds. <u>Outstanding Case (ii) from 2010</u> Listening to two prohibited calls and non-disclosure of full name of subject to panel judge. <u>Non-compliance / Irregularity Report 2</u> Four cases of listening to intercept products by officers below the rank specified in the LPP additional conditions of the prescribed authorizations after such conditions

Number of cases of irregularities or errors identified in the reviews under section 41(2)		Interception / Surveillance	Broad nature of irregularities or errors identified
			were lifted. Interception (5 cases) Non-compliance / Irregularity Report 3 Listening to calls made to or from three of the prohibited numbers on five occasions. Interception Non-compliance / Irregularity Report 7 Unauthorized interception of a facility of a person who was not related to the investigation for about eight hours. Interception (893 cases) Non-compliance / Irregularity Report 8 893 instances of non-compliance with the Revised Additional Conditions imposed by panel judges in prescribed authorizations for interception. (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 18]
20	2	2	14	2

Note 18 Of the 20 applications received, two were subsequently not pursued by the applicants.

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 19]		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)]	18	2	2	14

Note 19 As mentioned in Note 18 above, there were two out of the 20 applications for examination that could not be processed. As a result, the number of cases that the Commissioner had not found in the applicant's favour was 18. The number of notices given by the Commissioner under section 44(5) was therefore 18, 16 of which were given during the report period and two of which thereafter.

Besides, the Commissioner had also issued five notices during the report period under section 44(5) in respect of applications for examination brought forward from 2010 which were reported in the Annual Report 2010.

In addition, the Annual Report 2010 had mentioned that there were four applications brought forward from 2009 which were subject to section 45(2). During the report period, the relevant criminal proceedings in respect of these four cases had been finally determined or finally disposed of, whereupon the examination of them was carried out. The relevant examinations had been concluded and a notice was given by the Commissioner after the report period.

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	3

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

Table 10

Recommendations made by the Commissioner		**Interception / Surveillance**	**Broad nature of recommendations**
Reports to the Chief Executive on any matter relating to the performance of the Commissioner's functions [section 50]	Nil	Not applicable	Not applicable
Recommendations to the Secretary for Security on the Code of Practice [section 51]	2	Interception & Surveillance	(1) Paragraph 9 of the Code of Practice should be amended to spell out clearly that should any officer discover that any interception or covert surveillance was being or had been carried out without the authority of a prescribed authorization, the whole operation should be stopped immediately, instead of as soon as practicable as proposed by the Secretary for Security, except in circumstances where it was not feasible to do so in which case the whole operation should be stopped as soon as practicable. (See paragraphs 8.5 – 8.8 of Chapter 8.) (2) Consideration should be given to making corresponding amendment to section 54 in the comprehensive review of the Ordinance given the amendment to paragraph 177 of the Code of Practice regarding the time to make disciplinary award. (See paragraph 8.9 of Chapter 8.)

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the Code of Practice [section 52]	7	Interception & Surveillance	(1) Following a time frame and reporting arrangement provided by the Commissioner to ensure prompt submission of reports on incidents, irregularities and non-compliance, namely: (i) submission of an initial report within five working days of the discovery of the event; (ii) submission of a full investigation report within two calendar months after submission of the initial report; and (iii) when submitting initial and full investigation report, the covering letter/memo should be signed by the head of the LEA or a responsible LEA officer as appropriate. A record of discovery should also be made by the officer making the discovery of the event to start the time running. (See paragraphs 8.11 – 8.14 of Chapter 8.) (2) Improving the presentation of the ATR to put in the rank of the officers who had listened to the intercept product. (See paragraph 8.15 of Chapter 8.) (3) When reporting LPP cases to the Commissioner under paragraph 120 of the Code of Practice, the ATR attached to the notification should cover the period up to the date of notification or three weeks after disconnection of the facility concerned, whichever was earlier. (See paragraph 8.16 of Chapter 8.)

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			(4) Submitting both an REP-11 report and a discontinuance report under section 57 to the panel judge in cases where the discontinuance of operation was related to an LPP or suspected LPP call or where there was heightened likelihood of obtaining LPP information. (See paragraph 8.17 of Chapter 8.) (5) Recommendations in connection with covert surveillance and devices for non-ICSO purposes on: (i) provision of sufficient information in application; (ii) development of an electronic system for the control of capable devices; (iii) amendments to the device request forms; (iv) enhancement of the computerised DMS; (v) amendments on the device register; (vi) consistency between the device register and the device request memo; (vii) change in the name of the officer who has overall control over the issue and receipt on return of devices; and (viii) improvements to the procedure on the return of devices. (See paragraph 8.18 of Chapter 8.) (6) Recommendations made upon review of LPP and JM cases:

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			(i) the LEA should provide further and better training on the meaning of LPP information and on the proper and prudent attitude to take in handling possible LPP-related matters to its officers dealing with ICSO-related matters; and (ii) if the LEA considered that JM had been obtained, it should be more definite and expressly say so in the REP-11 report. (See paragraph 8.19 of Chapter 8.) (7) Recommendations made upon review of cases of non-compliance, irregularities and incidents: (i) disclosing to the panel judge all the hitherto unknown names and aliases of the subject known to the LEA (as soon as each crops up) with a corresponding 'if known' declaration; (ii) improving the listening and note-taking practice by the listeners so that it could be discerned from the listener's notes whether a call had been listened to but considered irrelevant or it had not been listened to; and (iii) dealing the case as a disciplinary matter if any officer of the LEA fails to comply with the time-line set by the Commissioner in his request for documents or information or report. (See paragraph 8.20 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	3

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

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
Case 1 Surveillance	Case 1 (i) An LEA officer, who was the surveillance officer of the surveillance operation, committed the following mistakes: (a) recorded and partly listened to a telephone call between a participating agent and a person unrelated to the investigation, which fell outside the ambit of the executive authorization and was unauthorized; and (b) failed to report the unauthorized surveillance to his supervisor immediately after the conclusion of the above call and instead, proceeded with the recording of another call which came 10 minutes afterwards. This officer was given two verbal warnings for his inadequacy in performance and lack of vigilance in the execution of Type 2 surveillance leading to unauthorized surveillance outside the terms of the executive authorization and the breach of paragraph 9 of the Code of Practice in failing to stop the entirety of the surveillance operation at once upon realization of the unauthorized surveillance. (ii) An LEA officer, who was the supervisor of the officer referred to in (i) above, failed to mention in the discontinuance report the possible unauthorized surveillance. This officer was given a verbal warning for his inadequacy in performance that he had failed to comply with the requirement under paragraph 160 of the Code of Practice by not	Case 1 (i) Two verbal warnings were given on 20.6.2011. (ii) A verbal warning was given on 9.6.2011.

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	giving full reasons with specific and clear description of the ground for discontinuance and/or relevant circumstances leading to the discontinuance in the discontinuance report. (See paragraphs 7.13 – 7.39 of Chapter 7 of Annual Report 2010.)	
Case 2 Surveillance	Case 2 (i) An LEA officer, who was the officer-in-charge of the surveillance operation, was not alerted that one of the surveillance operations was conducted not in compliance with the terms of the prescribed authorization and was unauthorized. This officer was given a written warning for his negligence of duty and lack of vigilance as the officer-in-charge of the surveillance operation.	Case 2 (i) A written warning was given on 17.6.2011.
	(ii) An LEA officer, who was the supervisor of the officer referred to in (i) above and the applicant of the prescribed authorization, failed to exercise sufficient supervision on the execution of the surveillance operation. This officer was given a written warning for his lack of vigilance and due diligence in undertaking his supervisory duties in respect of the execution of the surveillance operation.	(ii) A written warning was given on 27.6.2011.
	(iii) An LEA officer, who was the acting supervisor of the officer referred to in (i) above, failed to detect the non-compliance concerning the surveillance in the review process. This officer was given a verbal warning for his failure to detect the non-compliance, given that the review folder was routed through him to the reviewing officer.	(iii) A verbal warning was given on 17.6.2011.

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	(iv) An LEA officer, who was the head of the unit tasked with investigating cases of irregularity or non-compliance under the ICSO, failed to appreciate the conflict of interest and reported the non-compliance to the Assistant Head of Department mentioned in (v) below, instead of to the supervisor(s) of the reviewing officer. This officer was given a written warning for his lack of vigilance, alertness, sensitivity and professionalism in dealing with the conflict of interest situation that was consequent upon the reviewing officer being an involved party in the investigation of the non-compliance, and the failure to report the discovery of the non-compliance direct to the most senior officers of the department.	(iv) A written warning was given on 11.7.2011.
	(v) An LEA officer, who was the Assistant Head of Department and subordinate of the reviewing officer mentioned in (vi) below, failed to appreciate the conflict of interest from the possible involvement of the reviewing officer in failing to detect the non-compliance and to take appropriate steps to handle the matter. This officer was given a written warning for his lack of vigilance, alertness, sensitivity and professionalism in dealing with the conflict of interest situation that was consequent upon the reviewing officer being an involved party in the investigation of the non-compliance, and the failure to report the matter to the supervisor(s) of the reviewing officer or to ask the head of the unit mentioned in (iv) above to do so.	(v) A written warning was given on 11.7.2011.
	(vi) An LEA officer, who was the Senior Assistant Head of Department and the reviewing officer of the Type 1 surveillance concerned, failed to detect the surveillance operation concerned being unauthorized during the review process. This officer was given a written warning for his lack of vigilance and professionalism in failing to	(vi) A written warning was given on 17.6.2011.

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	detect the non-compliance in the review of the surveillance operation. (See paragraphs 7.136 – 7.227 of Chapter 7 of Annual Report 2010.)	
Case 3 Surveillance	Case 3 (i) An LEA officer, who was the case officer of the investigation concerned, failed to realize that the instructions given by the officer-in-charge of the investigation in light of the unexpected emergence of the representative of the Subject were in conflict with the terms of the executive authorization, and that the Type 2 surveillance conducted on the representative was unauthorized. This officer was given a written warning for her negligence of duty and lack of vigilance as the case officer in the execution of the surveillance operation.	Case 3 (i) A written warning was given on 28.6.2011.
	(ii) An LEA officer, who was the officer-in-charge of the investigation concerned, failed as a direct supervisor to give clear instructions to the subordinate officers and to realize that there had been unauthorized surveillance conducted on the representative of the Subject. This officer was given a written warning for her negligence of duty and apparent lack of vigilance as the applicant for the executive authorization and direct supervisor of the surveillance operation.	(ii) A written warning was given on 28.6.2011.
	(iii) An LEA officer, who was the supervisor of the officer mentioned in (ii) above, failed to remind the officer-in-charge of the investigation either to obtain a fresh executive authorization if the officer-in-charge was minded towards conducting surveillance on the representative, or to withhold any	(iii) A written warning was given on 28.6.2011.

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	surveillance on the representative in view of the restrictive terms of the authorization. He was also not alerted to the fact that unauthorized surveillance had been conducted on the representative of the Subject. This officer was given a written warning for his lack of vigilance in undertaking supervisory duties in the application for and the execution and review of the surveillance operation. (See paragraphs 7.40 – 7.52 of Chapter 7 of Annual Report 2010.)	
Case 4 Interception	Case 4 (i) An LEA officer tasked with re-listening to 51 calls to see if they contained any LPP information, omitted to listen to 10 of the calls. This officer was verbally warned for his negligence in the incident. (ii) An LEA officer, who was the officer-in-charge of the interception, failed to detect the omission mentioned in (i) above and submitted an REP-11 report which stated wrongly that the 51 calls had been re-listened to. This officer was verbally advised of the need to exercise due care and vigilance when handling interception operations in future. (iii) An LEA officer, who was the Section Head and the supervisor of the officer referred to in (ii) above, reported in an REP-11 report that no LPP material had surfaced despite the fact that there were 51 outstanding calls which had not been listened to. The officer also failed to detect the omission mentioned in (i) above. This officer was verbally advised of the need to exercise due care and vigilance when handling interception operations in future. (See paragraphs 7.99 – 7.135 of Chapter 7 of Annual Report 2010.)	Case 4 (i) A verbal warning was given on 18.11.2011. (ii) A verbal advice was given on 27.9.2011. (iii) A verbal advice was given on 27.9.2011.

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
Case 5 Interception	Case 5 (i) An LEA officer failed to identify a call between the subject facility and a prohibited number under one of the additional conditions imposed by the panel judge, and listened to the call twice. The officer discovered the mistake by himself and reported to his supervisor promptly. This officer was verbally warned for the need to exercise care and vigilance when handling interception operations with LPP likelihood. (ii) An LEA officer failed to identify a call between the subject facility and a prohibited number under one of the additional conditions imposed by the panel judge, and listened to the call once. This was the second time the officer committed a mistake on ICSO-related duty. This officer was given a written admonishment for 'Neglect of Duty'. (See paragraphs 7.14 – 7.30 of Chapter 7.)	Case 5 (i) A verbal warning was given on 15.11.2011. (ii) A written admonishment was given on 18.11.2011.
Case 6 Interception	Case 6 An LEA officer listened to a total of five calls made to or received from three of the specified numbers to which listening was prohibited under one of the additional conditions imposed by the panel judge. This officer was given a written warning for her negligence of duty and lack of vigilance, failing to ensure that the interception operation was conducted in strict compliance with the terms of the additional conditions. (See paragraphs 7.115 – 7.123 of Chapter 7.)	Case 6 A written warning was given on 30.12.2011.

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.

CHAPTER 11

REVIEW OF COMPLIANCE BY LAW ENFORCEMENT AGENCIES

Introduction

11.1 As explained in paragraphs 7.1 to 7.4 of Chapter 7, the LEAs are to submit reports of non-compliance with any relevant requirement of the Ordinance, irregularity or incident to me pursuant to section 54 of the Ordinance or otherwise.

11.2 Paragraph 120 of the Code of Practice obliges the concerned LEA to notify me of cases that are likely to involve LPP information or JM.

11.3 I also obtain early 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 and JM risks provided together with such weekly reports.

11.4 Through all these avenues, I am able to have cases of non-compliance, irregularities, incidents and those relating to LPP information and JM brought to my attention for examination and review without any delay.

LEAs' compliance

11.5 I have set out in Chapter 4 cases of errors made by LEA officers relating to devices capable of being used for covert surveillance ('capable devices') although they were used or alleged to be for non-ICSO purposes and in Chapter 7 cases of non-compliance and irregularity. From the detailed description of such cases, one can see that I am not fully satisfied with the overall performance of the LEAs and their officers in their compliance with the requirements of the ICSO, although I have not made any finding that any of the cases of 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 or ill will. From the analysis of the cases referred to in Chapters 4 and 7, it is obvious that the incidents, be they irregularities or more serious non-compliance, were **mainly** consequences of inadvertent or careless mistakes or unfamiliarity on the part of certain officers with the rules and procedures of the ICSO scheme. There is evidence that this unfamiliarity may partly be caused by the perennial change of personnel by the departments for handling ICSO-related matters. I fully understand that this change of personnel is for career development and promotion of the staff concerned, but if it is unavoidable, I consider that adequate training must be given by the departments to the staff taking up the duties left by their more experienced predecessors. Another cause may be that officers who were not squarely tasked to deal with cases related to any of the statutory activities under the ICSO were not too well trained and were thus unfamiliar with how they should properly follow the procedure and process of dealing with capable devices whose movements

and usage should be precisely and meticulously recorded for the purpose of avoiding abuse (see paragraphs 3.31 to 3.34 of Chapter 3).

11.6 What I detest is that some of the officers of the LEAs handling ICSO-related matters adopted a **lax attitude** in the discharge of their duties. This problem was manifested in a few cases that I refer to in earlier chapters of this report, ie paragraphs 4.6 to 4.37 and 4.38 to 4.64 of Chapter 4, particularly paragraphs 4.35, 4.36, 4.43 and 4.56 thereof, and paragraphs 7.28, 7.88 to 7.92, 7.155 and 7.158 of Chapter 7. I have urged the LEAs to take appropriate disciplinary action against the officers concerned so as to deter them and others from repeating the mistakes and remind them to be more careful and vigilant in the discharge of their duties in connection with the ICSO scheme and that the LEAs should also devote more efforts to alter this damaging lax attitude of their staff.

11.7 Besides disciplinary actions, I consider that the LEAs are duty bound to provide sufficient training to their officers tasked with handling ICSO-related matters. Apart from the law and control being relatively new to everyone concerned, the rules and procedures are quite complex for officers to grasp. The officers who are operating under the ICSO will need to be very familiar with the provisions of the Ordinance as well as its relevant requirements, to apply successfully for prescribed authorizations for carrying out the statutory activities and to execute the prescribed authorizations and the involved operations with great care and vigilance. Those officers who are handling capable devices, even for non-ICSO purposes, will need to be careful and precise as to the documentation and recording of the movement and use of capable devices. Both types of officers will need to be subjected to my oversight and review honestly,

candidly and helpfully. All these require a higher intellect of the officers, and a higher educational level as a background will help. In short, the officers involved should perform their various functions under the ICSO scheme with care and professionalism. This high demand on them should not be considered as a requirement of over-qualification but rather as being commensurate with the importance of their tasks as well as providing the necessary assurance to the public that their rights of privacy, communication, LPP and JM are properly protected.

11.8 Hereunder I summarize in table form the cases of mistakes and errors made relating to devices as mentioned in Chapter 4 and cases of non-compliance and irregularity mentioned in Chapter 7 and their main causes to demonstrate my above conclusions, comments and observations. All of the cases referred to in Chapter 4 were irregularities and not non-compliance and they were mostly discovered by my office when closely checking the records of movements of devices and related documents. Some of the non-compliance and irregularity cases mentioned in Chapter 7 were also discovered by my staff and I, instead of reported by the LEAs of their own accord, and they are marked with the notation (discovered) under the 'Nature of case' column in the table of Chapter 7 cases.

Chapter 4 Cases (all irregularities):

Item No.	Paragraph reference (the figures refer to paragraph numbers in this Annual Report) and case summary	Main cause or reason found
1.	4.4 to 4.37: Four cases of duplication of use of request memo reference and related matters	Carelessness or oversight of officers concerned: **lax attitude.**
2.	4.40: Discrepancy Case 1 of discrepancies between device register and device request memo	Mistake made by the officer concerned in making entry into the device register which was not discovered by other officers who had sight of the entry: **lax attitude.**
3.	4.41 to 4.44: Discrepancy Case 2 of discrepancies between device register and the device request memo with amendment as to the withdrawing officer	Mistakes made by various officers in signing the request memo and in making entries into the device register; malpractice of signing in advance receipt for devices before the approval for issue and actual issue of the devices.
4.	4.45 to 4.46: Discrepancy Case 3 of discrepancies between device register and the device request memo that was amended as to the date of withdrawal	Mistake made by the officer preparing the device request memo.
5.	4.47 to 4.56: Discrepancy Case 4 of discrepancies between device register and the device request memo that was amended as to the date and time of withdrawal	Wrong *time* of withdrawal was carelessly entered by a senior officer into the device request memo, unnoticed by the signatory officers. Later a junior officer under the senior officer noticed that the (wrong) time

Item No.	Paragraph reference (the figures refer to paragraph numbers in this Annual Report) and case summary	Main cause or reason found
		was not yet reached on the day, who thought the *date* of withdrawal was wrong and amended the date of the memo and the date of withdrawal to an earlier date, without consulting anyone, and he made entries into the device register with the wrong *time* and wrong *date*. All officers who signed on the register did not notice the mistakes. This is another instance of the **lax attitude** of the officers concerned.
6.	4.57 to 4.60: Discrepancy Case 5 of discrepancies between device register and the device request memo as to the date of approval and date of withdrawal	Mistake in making entries in the device register by the designated officer of the Support Unit. He later corrected the mistaken date of withdrawal but failed to correct the wrong date of approval. The responsible officer failed to notice the mistake.
7.	4.65: Not using my requested design of pairing up the 'issued' and 'returned' entries in the device register	Officers had overlooked incorporating the design.
8.	4.68 to 4.97: Alleged input problem of the DMS; in truth a mix-up of the same type of devices by officers	Tentative findings: the Storekeeper lied that he had retried to input return of the device; the LEA should have known the cause but pretended it was an input problem with the DMS; there was prima facie evidence that the LEA made false representations to us.

Item No.	Paragraph reference (the figures refer to paragraph numbers in this Annual Report) and case summary	Main cause or reason found
9.	4.98: Loss of a device while on non-ICSO duty	Carelessness of the officer concerned.
10.	4.99 to 4.102: Discrepancies in time of input of retrospective entries in the DMS non-ICSO device register and in other records	Review not yet completed.
11.	4.103 to 4.108: Issue records of 69 devices missing from the DMS register of devices for non-ICSO purposes	Negligence of issuing officer in failing to press the 'Confirm' button upon issuing the devices. The matter should have been reported to the ICSO Registry of the LEA straightaway.

Chapter 7 Cases:

Item No.	Case reference	Nature of case	Main cause or reason found (the figures in brackets refer to paragraph numbers in this Annual Report)
1.	Outstanding Case (i): Listening to a call made to a prohibited telephone number	Non-compliance (discovered)	Negligence of the listener in performing his listening duties (7.12).
2.	Outstanding Case (ii): (a) Listening to two prohibited calls; and	(a) Non-compliance	(a) Both listeners' inadvertent oversight but one of them might be guilty of

Item No.	Case reference	Nature of case	Main cause or reason found (the figures in brackets refer to paragraph numbers in this Annual Report)
			dereliction of duty (7.28 to 7.29); lack of induction training for listeners (7.30).
	(b) Non-disclosure of full name of subject to panel judge	(b) Irregularity (discovered)	(b) Unsatisfactory practice of the LEA regarding names and aliases (7.48(e) & (f)); insufficiency of Part 4 of Schedule 3 to the Ordinance (9.23 to 9.29).
3.	Report 1: Unauthorized access to a call when monitoring was supposed to be put on hold	Non-compliance (discovered)	Inadvertent oversight of the listener (7.85 to 7.86, 7.88); unsatisfactory administrative supervision regarding access right (7.84(e)); the LEA's internal order not specific or clear enough (7.84(g) & (h)).
4.	Report 2: Four cases of listening to intercept products by officers below the rank specified in the LPP additional conditions of the PAs after such conditions were lifted	Non-compliance (reported at my request)	Inadvertence of listeners below the specified rank (7.113).
5.	Report 3: Listening to calls made to or from prohibited numbers on five occasions	Non-compliance (discovered)	Negligence of duty and lack of vigilance of the listener (7.118, 7.120(d)).

Item No.	Case reference	Nature of case	Main cause or reason found (the figures in brackets refer to paragraph numbers in this Annual Report)
6.	Report 4: Unauthorized interception of 10 minutes after revocation of the PA by the panel judge upon receipt of REP-11 report on obtaining JM	Non-compliance	Inevitable non-compliance after revocation of PA due to insufficiency of the Ordinance (5.96, 7.124).
7.	Report 5: Incorrect statement about terms of a PA found in affirmation supporting application for Type 1 surveillance	Irregularity	Careless mistake, no sufficient evidence of a deliberate concealment of the true terms of the PA (7.136).
8.	Report 6: Issue of devices pretending to be for ICSO purpose	Irregularity	Deliberate entry of false dummy information into the ICSO device register by device issuing officer; failing in his duty to keep proper records of movements of devices (7.139 to 7.158).
9.	Report 7: Unauthorized interception of a wrong facility	Non-compliance	Five officers failed in various degrees in their duties to act vigilantly in the verification and application processes of the facility proposed for interception (7.159 to 7.188).

Item No.	Case reference	Nature of case	Main cause or reason found (the figures in brackets refer to paragraph numbers in this Annual Report)
10.	Report 8: 893 instances of non-compliance with Revised Additional Conditions imposed by panel judges in PAs for interception	Non-compliance (discovered)	It was due to the misunderstanding or misinterpretation of the Revised Additional Conditions by the three officers involved; and the LEA's unsatisfactory manner in handling of this case in seeking clarification with the PJO and in informing me of the Conditions (7.189 to 7.237).
11.	Report 9: Retention by an LEA officer of documents suspected to be related to interception operations	Irregularity	Not yet investigated.

11.9 My above comments and observations on the compliance by the LEAs and their officers also apply to the cases that involved LPP risks, JM and connected irregularities discussed in Chapter 5. These cases, save those specifically dealt with in Chapter 7 and in the table of Chapter 7 cases under paragraph 11.8 above, are summarised below:

- LPP Case 1 concerned the listening to a call in its entirety where monitoring should have been put on hold at a certain point to avoid obtaining LPP information. The Senior Listener and her supervisor were both wrong. The supervisor erred in making an inaccurate assessment of LPP risk when

instructing her to listen to the call. The Senior Listener erred for not putting on hold monitoring when it was clear that LPP information would be obtained. The mistakes were caused by both officers' failure to understand the scope of LPP. The Senior Listener also failed to appreciate the purpose of only allowing specified rank officers to listen to calls with possible LPP involvement, which purpose is for avoiding obtaining of LPP information and not for ascertaining if the intercept product involves LPP information. [Paragraphs 5.18 to 5.44 of Chapter 5.]

- LPP Case 2 also related to a case of actual obtaining of LPP information from an intercepted call. The operation was discontinued and a discontinuance report was submitted to the panel judge, but the normal practice of also submitting an REP-11 report, which should state whether there were any other calls between the telephone numbers involved in the LPP call, was not followed. The LEA informed us that there were only eight such other calls but in fact there were 26 and there was a dispute as to what material the LEA had examined as the basis for stating that there were only eight such calls. The LEA's handling of this case was unsatisfactory. [Paragraphs 5.45 to 5.65 of Chapter 5.]

- In LPP Case 3, no irregularity was detected. [Paragraphs 5.66 to 5.68 of Chapter 5.]

- LPP Case 4 involved three occasions of heightened likelihood of obtaining LPP information. The officer who drafted the

REP-11 report on the second occasion omitted to include in it a call between the Subject's facility and the telephone number involved in the second LPP call that was suspected to involve LPP information, due to oversight. The reporting officer also failed to notice the omission. On the third occasion, after listening to the third LPP call, the listener continued to listen to five further calls, before putting on hold the monitoring allegedly for erring on the safe side to avoid obtaining LPP information. Save that it was wrong not to submit an REP-11 report on the third occasion, I found no evidence to counter the allegation. [Paragraphs 5.69 to 5.83 of Chapter 5.]

- In JM Case 1, JM was obtained. The only irregularity found was that there was inconsistency in the assessment and reporting on whether JM had been obtained. [Paragraphs 5.85 to 5.93 of Chapter 5.]

- I considered that JM Case 2 was where JM was also obtained. The LEA sought to continue with the interception but the panel judge revoked the prescribed authorization. This resulted in 10 minutes of unauthorized interception after the revocation and before the actual disconnection of the interception. [Paragraphs 5.94 to 5.98 of Chapter 5 and item 6 in the table of Chapter 7 cases under paragraph 11.8 above.]

- No irregularity was found in any other LPP cases except those in item 10 in the table of Chapter 7 cases.

11.10 During or at the conclusion of my examination and review of the cases, I continue to make recommendations and provide advice to the LEAs wherever appropriate, which helps **strengthening my checking capability** and drawing the attention of the LEAs to **ways and means of how better to comply with the ICSO requirements.** A great majority of my advice and recommendations have been accepted and adopted for use by the LEAs.

Limitation in ensuring compliance

11.11 From the reporting requirements as described in paragraphs 11.1 to 11.4 above, it is plain that the report or revelation of most cases of non-compliance or irregularity was done by the LEAs of their own accord, albeit for complying with the statutory provision or the Code or the practice established by me. Without such voluntary compliance by 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 shown in the cases in Outstanding Cases (i) and (ii)(b) and Reports 1, 3 and 8 in Chapter 7 shown in the table of Chapter 7 cases respectively as items 1, 2, 3, 5 and 10 under paragraph 11.8 above, we were able to discover instances of non-compliance in the course of my in-depth examination of the case and investigation into it.

11.12 The capability of mine and my staff in my small Secretariat in unearthing non-compliance or irregularity is very limited. This obviously would not only fail to pose as a deterrence to any possible contravention or its concealment if such were unfortunately committed by any of the LEAs or any of their officers, but the LEA officers' knowledge of this limited

capability would also, if employed dishonestly, weaken my role as the overseer of their compliance with the requirements of the Ordinance.

11.13 A necessary deterrence against any contravention or abuse of the Ordinance or prescribed authorizations or its concealment by the LEAs and their officers can be provided by the new initiative to check the audio intercept products that I have proposed. This initiative was originally detailed under the second heading in Chapter 9 of my Annual Report 2008, recommended in paragraphs 9.1 to 9.3 of Chapter 9 of my Annual Report 2010 to be extended to examination of surveillance products, and its complete version reiterated with the arguments against it analysed in paragraphs 9.2 to 9.15 of Chapter 9 of this annual report.

Identification of non-compliance

11.14 Of the total of eight cases of non-compliance, as opposed to mere irregularity, referred to in Chapter 7 of this report (see the table of Chapter 7 cases under paragraph 11.8 above) that occurred or unearthed or were investigated in 2011, four were reported to me by the LEAs of their own volition and four were discovered by my staff and me through the careful inspection and examination of the documents and materials requested from the LEAs. While it can be said that without the voluntary assistance from the LEAs it would be almost impossible for the non-compliance cases to be discovered, the stringency of the requirements imposed by me and the **unrelenting probes** that I conducted helped reveal a few of those cases. The significance is not limited to the fact of the actual exposure of those few cases, but more so in the idea of the effectiveness of the procedural requirements imposed by me and the stringency and seriousness with which they were carried out that I believe

has been impressed upon the LEAs that despite the little resources and manpower that can be wielded by my office and staff, we were **capable of identifying non-compliance or irregularity.** The idea would encourage voluntary disclosure or at least discourage concealment. This idea, together with the new initiative of checking the contents of the intercept and surveillance products, if implemented, would go hand in hand to pose as a powerful deterrence against possible abuse by the LEAs or their officers or against concealment of such abuse.

Unsatisfactory way of dealing with investigation

11.15 I cannot conclude this chapter without expressing my dissatisfaction against some of the LEAs who took too much of a defensive attitude towards my enquiries into cases of non-compliance, irregularity and incident. They obviously tried to prevent any blame to be attached to their officers consequent upon an investigation. This was manifested by the complex and involuted ways of presenting facts and arguments in a mixed and confusing manner to me and my office in their investigation reports and replies to our queries, sometimes even with retraction of an earlier version. This phenomenon generated difficulty in our trying to get at the truth of the matter under investigation and caused considerable delay and waste of effort and time.

[This page is left blank.]

CHAPTER 12

ACKNOWLEDGEMENT AND WAY FORWARD

Acknowledgement

12.1 My task as the Commissioner on various aspects under the Ordinance would have been quite impossible without the unstinting support and cooperation of the panel judges, the Security Bureau, the LEAs, and the CSPs. This was particularly so with the CSPs who were most helpful and accommodating despite the fact that their assistance to me must have cost them considerable effort and expenditure on manpower and resources.

12.2 The views and even criticisms of Legislative Council Members and members of the media and the public were sources of encouragement and challenge to me, constantly reminding me of my responsibility to protect the rights of people in Hong Kong in the spheres of privacy, communication, legal professional privilege and journalistic material. This can be achieved by overseeing the LEAs' compliance with the relevant requirements of the Ordinance and their acts being in accordance with the law, and my vigilance in this pursuit should not be slackened although the LEAs appear to be fully compliant and their interception and covert surveillance operations are for the expressed purposes of preventing and detecting serious crimes and protecting public security. Moreover, I have never stopped to search in earnest for ways and means whereby such compliance can be enhanced, if not ensured.

12.3 I take this opportunity to thank each and every one of these helpful individuals and organizations.

My wishes unaccomplished

12.4 I expressed two wishes as the Commissioner in my last annual report, which were that all the LEAs under the Ordinance would, of their own volition, carry out their interception and covert surveillance operations in total compliance with the law, and that the annual report that I have to submit to the Chief Executive would reduce in size year after year so that eventually its content is so brief as would barely satisfy the requirement to provide the statutory tables as those set out in Chapter 10 above. Unfortunately, neither of these wishes has been accomplished.

12.5 Three general causes for this unfortunate failure can be identified. First, non-compliance and irregularity cases were the consequence of the unfamiliarity of certain LEA officers with the rules and procedures of the ICSO scheme. Secondly, the blame can be attributed to the lax attitude of some LEA officers in the discharge of their duties in ICSO-related matters. The third cause was, I believe, the lack of the forceful deterrence against LEA officers that I have recommended but not adopted.

12.6 The first two causes have been dealt with in paragraphs 11.5, 11.6 and 11.7 of Chapter 11 and will not be repeated here. The forceful deterrence, being the third cause, will emanate from my recommendation of empowering me and my staff to examine and listen to products of interception and covert surveillance carried out by the LEAs. Absent the deterrence, it is less effective to urge the LEA officers to comply with the law of their own accord. I have, in paragraphs 9.2 to 9.15 of Chapter 9 above, analysed the specious arguments against the power to examine

interception and surveillance products I yearn to be granted to me and my staff, but the fact remains, I still do not have the power.

Way forward

12.7 The cases of non-compliance with the relevant requirements of the Ordinance, of irregularities and incidents, especially those involving new situations, present opportunities for me to correct the wrong and make improvements to plug loopholes and design measures for reducing irregularities and detecting or deterring non-compliance. This experience gathering with the positive effect is still continuing. I am confident that the continual operation of the ICSO scheme will step closer and closer towards safeguarding the rights to privacy and communication of people in Hong Kong. I hope this enthusiasm and confidence will not be dampened by the inaction of the Administration in giving effect to my recommendations.