

Commissioner on Interception of Communications and Surveillance
Annual Report 2011

Summary

1. The Interception of Communications and Surveillance Ordinance, Cap 589 ('the Ordinance' or 'ICSO') came into force on 9 August 2006. Mr WOO Kwok-hing, the Commissioner on Interception of Communications and Surveillance ('the Commissioner'), submitted his fifth full-year annual report, ie Annual Report 2011, to the Chief Executive on 29 June 2012. The report covers the period from 1 January 2011 to 31 December 2011. The following is a summary of the report.

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

3. During the report period, a total of 1,221 prescribed authorizations (including fresh and renewed authorizations) were issued.

Among them, 1,196 were judge's authorizations for interception, 20 were judge's authorizations for Type 1 surveillance, and five were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs. These authorizations included 44 that had been renewed more than five times.

4. During the report period, a total of eight applications for interception were refused. For the reasons for refusal, please see paragraph 2.3 of Chapter 2 of the report.

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

6. A total of 137 persons were arrested in 2011 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. The Commissioner considered it imperative for LEAs to maintain clear and accurate records on the movement and use of ICSO and non-ICSO devices (i.e. capable devices) to ensure that there is no misuse or unauthorized use of surveillance devices. During the report period, the Commissioner and his staff has devoted time in checking device registers and documentation regarding the use of these devices in the LEAs. In view of errors found relating to the handling of surveillance devices and documentations in some of the LEAs, the Commissioner requested the

LEAs concerned to take note of the need for strict compliance with the device control requirements, explain to and impress upon their officers what their responsibilities are under the Ordinance. Please see Chapter 4 of the report for details.

8. The Ordinance makes specific reference to legal professional privilege ('LPP') and journalistic material ('JM') for particular caution when interception or covert surveillance is to be authorized and carried out. During the report period, there was a surge of the number of reports of cases involving information that might be subject to LPP made to the Commissioner pursuant to paragraph 120 of the Code of Practice ('COP 120 reports'). Regarding LPP cases, the LEA is obligated to state an assessment of LPP likelihood in its application for a prescribed authorization. Whenever there is anything that transpires which may affect such assessment, the LEA has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report. The Commissioner directed the LEAs to give him a similar notification of each of such occurrences as if under paragraph 120 of the Code of Practice, thus resulting in the increase of the number of LPP reports. For the purpose of the report, a subject of an investigation is used as the basis for counting each LPP case. Applying this counting system, there were altogether 101 COP 120 reports that amounted to 37 LPP cases. All were interception cases. Among these 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, of which three involved the obtaining of LPP

information. There were four LPP cases in the Annual Report 2010 which were found to have breached the additional conditions imposed by the panel judges in the prescribed authorizations and the review of the non-compliance in these four cases has been completed in 2011. As regards JM cases, the Code of Practice was amended on 28 November 2011 to formalize the requirement that the Commissioner 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. During the report period, the Commissioner received two reports on obtaining of JM through interception. Please refer to Chapter 5 of the report for details of the Commissioner's reviews of these LPP and JM cases.

9. The Commissioner observed that the panel judges continued to be very cautious in dealing with cases that might possibly involve LPP information. 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 were stringent and effective in safeguarding this important right of individuals to confidential legal advice.

10. 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. After carrying out examination, the Commissioner found all these 18 cases not in the applicants' favour and notified each of them in writing accordingly. Under the Ordinance, the Commissioner was not allowed to provide reasons for his determination. In addition, there were four applications brought forward from 2009 that 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 Commissioner had completed the relevant examinations and a notification of his findings not in favour of the applicants was duly given.

11. During the report period, the Commissioner gave notices 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. The Commissioner 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 the report, the Commissioner has not yet received any response from the relevant persons.

12. During the report period, the Commissioner and his office received a number of reports of non-compliance or irregularities from the LEAs. For the nine reports of non-compliance or irregularities set out in Chapter 7 of the report, seven related to interception and two related to surveillance. While four of these nine reports were made under section 54

of the Ordinance on non-compliance with the relevant requirements, the remaining five reports were submitted not under section 54 of the Ordinance. Moreover, the review of the two outstanding cases brought forward from the Annual Report 2010 has been completed. Apart from these cases of non-compliance and irregularity, there were other cases of irregularity relating to the use of surveillance devices for non-ICSO purposes and LPP/JM, which are set out in Chapters 4 and 5 of the report respectively.

13. During the report period, disciplinary actions had been taken against 16 officers in the form of verbal advice, verbal warning, written warning or written admonishment for the cases mentioned in Chapter 7 of the Annual Report 2010 and Chapter 7 of the report. Please see Table 12 in Chapter 10 of the report for details.

14. To better carry out the objects of the Ordinance, the Commissioner made a number of recommendations to the Secretary for Security and the heads of LEAs under sections 51 and 52 of the Ordinance during the report period. The Commissioner has also set out some other recommendations in Chapter 9 of the report. Please see Chapters 8 and 9 of the report for details of the Commissioner's recommendations.

15. From the case details relating to surveillance devices in Chapter 4 and cases of non-compliance and irregularities in Chapter 7, it can be seen that the Commissioner is not fully satisfied with the

performance of the LEAs and their officers in their compliance with the requirements of the ICSO, although he has not made any finding that any of the cases of non-compliance or irregularity was due to deliberate disregard of the statutory provisions or the law. It is obvious that these incidents were mainly the consequences of inadvertent or careless mistakes or unfamiliarity on the part of certain officers with the rules and procedures of the ICSO scheme. The LEAs have been requested to take appropriate disciplinary action against the officers concerned and remind their officers generally to be more careful and vigilant in the discharge of their duties in connection with the ICSO scheme. In addition to disciplinary action, the Commissioner considers that the LEAs are also duty bound to provide sufficient training to their officers tasked with handling ICSO-related matters.

16. The Commissioner also expresses his dissatisfaction with some of the LEAs who took a defensive attitude towards his enquiries into cases of non-compliance, irregularity and incident. This was manifested by the complex and convoluted way of presenting facts and arguments in their investigation reports which in turn made the Commissioner's task all the more difficult and resulted in delays in the completion of investigations.

17. Notwithstanding the matters referred to in paragraph 16 above the report of most cases of non-compliance or irregularity was done by the LEAs of their own accord, albeit in compliance with the statutory provision or the Code of Practice or the practice established by the Commissioner.

Without such voluntary compliance by the LEAs, it would be difficult, if not impossible, for the Commissioner and his staff to discover or unearth any contravention by the LEAs.

18. The Commissioner also advises that 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 products of interception and covert surveillance that he has proposed. This initiative as detailed in Chapter 9 of the report, if implemented, together with stringent compliance with the procedural requirements imposed by the Commissioner would pose a powerful deterrence against possible abuse by the LEAs or their officers or against concealment of such abuse.

19. In this report, the Commissioner expresses his gratitude to the panel judges, the Security Bureau, the LEAs and the communications services providers as his task as the Commissioner on various aspects under the Ordinance would have been quite impossible without their unstinting support and cooperation. He also expresses his thanks to Legislative Council Members and members of the media and the public, for their views and even criticisms.

20. The Commissioner expressed two wishes in the Annual Report 2010, 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 he has to submit to the Chief Executive would reduce in size year after year. Unfortunately, neither of these wishes has been accomplished. One of the reasons was because non-compliance and irregularity cases arose from the unfamiliarity of certain LEA officers with the rules and procedures of the ICSO scheme. Secondly, much of the blame can be attributed to the complacent attitude of some LEA officers in the discharge of their duties in ICSO-related matters. The Commissioner also believes, his recommendation that he and his staff be permitted to examine and listen to products of interception and covert surveillance, would serve as a forceful deterrence to any officer of any LEA who sought for whatever reason to contravene the Ordinance.

21. The Commissioner is confident that the continued operation of the ICSO scheme will step closer and closer towards safeguarding the rights to privacy and communication of people in Hong Kong.

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