

**Commissioner on Interception of Communications and Surveillance**  
**Annual Report 2012**

**Summary**

1. The Interception of Communications and Surveillance Ordinance, Cap. 589 ('the Ordinance' or 'ICSO') came into force on 9 August 2006. Mr. D. G. Saw was appointed as the Commissioner on Interception of Communications and Surveillance ('the Commissioner') on 17 August 2012 for a term of three years and was required pursuant to section 49 of the Ordinance to submit an annual report to the Chief Executive. Mr. Saw submitted his first report, i.e. Annual Report 2012, on 27 June 2013. The report covers the period from 1 January 2012 to 31 December 2012. It overlaps with the term of office of the former Commissioner Mr. Woo Kwok-hing, GBS which expired on 16 August 2012. The following is a summary of the report.

2. The Commissioner's main functions are to oversee the compliance by four law enforcement agencies ('LEAs') 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 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 1,180 prescribed authorizations (including fresh and renewed authorizations) were issued. Among them, 1,161 were judge's authorizations for interception, six were judge's authorizations for Type 1 surveillance, and 13 were executive authorizations for Type 2 surveillance (two of which consequent on oral applications) issued by designated authorizing officers of the LEAs. These authorizations included 41 cases that had been renewed more than five times.

4. During the report period, a total of seven 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 249 persons were arrested in 2012 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. The Commissioner considered it necessary to exercise tight control and close scrutiny over the movement and use of devices for ICSO and non-ICSO purposes to obviate the possibility that they might be used

for covert surveillance without authorization or unlawfully. During the last quarter of 2012, the Commissioner advised the LEAs that any removable storage media for surveillance devices should be handled in a secure and strictly regulated manner akin to the withdrawal and return of surveillance devices. He also suggested that the LEAs should ultimately use the computerised device management system to record the issue and return of any removable storage media.

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. Regarding LPP cases, the LEA applicant is obligated to state his assessment of the likelihood of obtaining LPP information when making an application for a prescribed authorization. If subsequently there is anything that transpires which may affect the assessment, the LEA has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report. The LEAs would also give the Commissioner a similar notification of each such occurrence. In the report period, there were 13 LPP cases with submission of REP-11 reports to the panel judges. They included one case of obtaining LPP information and 12 cases of heightened LPP likelihood. As regards JM cases, the Code of Practice provides that the LEAs should notify the Commissioner 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. In the report period, three reports of JM cases were received. 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 18 applications for examination were received, one of which could not be entertained because the application had not raised matters within the ambit of the function of the Commissioner. Another six were subsequently not pursued by the applicants. Of the remaining 11 applications, four alleged interception, one suspected covert surveillance and six claimed a combination of interception and covert surveillance. After making all necessary enquiries, the Commissioner or his predecessor found all these 11 cases not in the applicants' favour and accordingly notified each of them in writing. Under the Ordinance, the Commissioner is not allowed to provide reasons for his determination.

11. Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person when the Commissioner discovers there is a

case in which interception or covert surveillance has been carried out by an officer of any of the four LEAs covered by the Ordinance without a prescribed authorization. During the report period, no notice pursuant to section 48 was issued.

12. In 2012, the Commissioner received reports of irregularities/incidents from LEAs relating to ten ICSO cases. All were submitted not under section 54 of the Ordinance i.e. these are not cases of non-compliance with relevant requirements. Moreover, the review of the two outstanding cases brought forward from the Annual Report 2011 has been completed. These are set out in Chapter 7 of the report. Another five cases that related to the use of surveillance devices for non-ICSO purposes are covered in Chapter 4.

13. During the report period, the LEAs have taken disciplinary actions against 17 officers in the form of verbal advice, verbal warning, written warning, written warning of dismissal or reprimand for cases mentioned in Chapters 5 and 7 of the Annual Report 2011. Please see Table 12 in Chapter 9 for details.

14. To better carry out the objects of the Ordinance, the Commissioner made a number of recommendations to the LEAs under section 52 of the Ordinance during the report period. Please see Chapter 8 of the report for details.

15. On the whole, the Commissioner was satisfied with the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2012. The LEAs had adopted a cautious approach in applying for prescribed authorizations, their preparation of the applications was of a good standard and they did observe the necessity and proportionality principles. In the report period, there was no case of wrong or unauthorized interception revealed by the various forms of checking. In respect of covert surveillance, while there were some areas for improvement, most of the cases checked were found to be in order. Generally, there was no sign of abuse of surveillance devices for any unauthorized purposes. In the handling of LPP and JM cases, the LEAs continued to adopt a very cautious approach and no irregularities were found. In the report period, save for one case which involved a false report of a storekeeper in the handling of devices for non-ICSO purpose, neither the Commissioner nor his predecessor have made findings that any of the other cases of irregularity/incidents was due to deliberate disregard of the statutory provisions, the Code of Practice or the control of surveillance devices. While the mistakes or errors are to be regretted, the Commissioner considered that the incidents were the consequences of inadvertent or careless mistakes or occasionally unfamiliarity on the part of the officers with the rules and procedures of the ICSO scheme.

16. The Commissioner also pointed out that he had been encouraged by the positive response from the LEAs to initiatives he made to address problem areas. The LEAs have been advised to pursue the

introduction of computer based processes designed and intended to minimize manual input into the system and thus reduce unnecessary human error.

17. Nevertheless, there was still room for improvement for all LEA officers in carrying out their duties. The LEAs need to concentrate on developing a more focused and responsible mind set in officers at all levels responsible for the operation of the ICSO scheme. The Commissioner has expressed concern over one of the cases mentioned in Chapter 4 which involved the dishonest conduct of an officer and the failure of the LEA concerned to notify the Commissioner immediately upon becoming aware of the confession of the officer. There must be prompt, full and frank disclosure to the Commissioner at all times.

18. The Administration is undertaking a comprehensive review of the Ordinance. While welcoming any improvements proposed for the ICSO scheme, the Commissioner unreservedly endorses his predecessor's sentiments that the most important recommendation is to give the Commissioner and staff as designated by him the express legal power necessary for listening to, viewing and monitoring the products from interception and covert surveillance as the Commissioner chooses. He considers that this would be the primary tool to expose any malpractices of the LEAs and their officers and would act as a forceful deterrent against such malpractices and their concealment.

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 could not be carried out satisfactorily without their help and co-operation.

20. 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.