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# Annual Report 2013 to the Chief Executive

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by

The Commissioner on  
Interception of Communications  
and Surveillance

June 2014

# 截取通訊及監察事務專員辦公室

Office of the Commissioner on Interception of Communications and Surveillance

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The Honourable C Y Leung, GBM, GBS, JP  
The Chief Executive  
Hong Kong Special Administrative Region  
People's Republic of China  
Tamar  
Hong Kong

**CONFIDENTIAL**

Dear Sir,

## **Annual Report for the Year 2013**

I have the pleasure, pursuant to section 49 of the Interception of Communications and Surveillance Ordinance, in submitting to you the annual report for the year 2013, together with its Chinese translation.

Yours sincerely,



(D. G. Saw)  
Commissioner on Interception of  
Communications and Surveillance

Encl: Annual Report for 2013

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## **Abbreviations**

Unless the context otherwise requires:

affidavit/affirmation/ statement	affidavit or affirmation in support of an application to a panel judge for a prescribed authorization/statement in writing in support of an application to an authorizing officer for 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 of Practice, COP	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 121 report	report submitted pursuant to paragraph 121 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
LegCo	Legislative Council
LPP	legal professional privilege
LPP information	information protected by legal professional privilege
non-ICSO purpose	purpose which is not related to ICSO
Ordinance	Interception of Communications and Surveillance Ordinance
panel judge	the panel judge appointed under section 6 of the Ordinance
PJO	Panel Judges' Office
QR Code	Quick Response Code
renewal application	application for renewal of a prescribed authorization
RSM	removable storage medium
REP-11 report/REP-13 report	report on material change of circumstances or initial material inaccuracies under a prescribed authorization made on form REP-11 or form REP-13
Reported LPP Call	a call with LPP likelihood, heightened LPP likelihood or 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
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 2013
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**

1.1 I was appointed as the Commissioner on Interception of Communications and Surveillance ('Commissioner') for a term of three years with effect from 17 August 2012. Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance, Cap 589 ('Ordinance' or 'ICSO'), I am required to submit an annual report to the Chief Executive ending on 31 December in each year. This is my second annual report which covers the period 1 January to 31 December 2013.

1.2 The scheme of the ICSO is to regulate the activities of the four law enforcement agencies ('LEAs') 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 activities cannot be lawfully and properly carried out unless the relevant requirements stipulated in the Ordinance are satisfied.

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. 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 ('COP') issued by the Secretary for Security.

1.4 Whether a prescribed authorization should be granted is expressly based on the necessity and proportionality principles, and the premise that 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. One of the functions of the Commissioner is to oversee the compliance by the LEAs and their officers with the relevant requirements of the scheme of the ICSO. The objects and spirit of the Ordinance must be at the forefront of that oversight when this function is engaged.

1.5 In my Annual Report 2012, I reported that I was satisfied with the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO. I have also made an observation that 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. A review of the performance of the LEAs and their officers in undertaking their interception or covert surveillance operations in 2013 is detailed in Chapter 9.

1.6 Part of the function of the Commissioner is to be involved in advising the LEAs in designing ways to resolve hitherto unexpected problems and taking the opportunity to anticipate others. This engagement is ongoing and operates 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.

1.7 During the year, I have exchanged views with the Security Bureau on proposed legislative amendments of the ICSO. I am pleased to note that the Administration has reported to the Panel on Security of the Legislative Council ('LegCo') in July 2013 on the review of the ICSO and has commenced the law drafting process. The Administration hoped that the amendment bill would be enacted within the 2014-15 legislative session. In this regard, I would follow the progress of these proposals closely.

1.8 In this annual report, I have continued the practice of providing the utmost transparency of my work as the Commissioner, save to take care not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security. It is important that I do not reveal information that might have helped individuals who may wish to cause harm to Hong Kong. In this regard, I have included as much information as possible insofar as its publication does not amount to contravention of the non-prejudice principle.

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## **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 1,372 written applications for interception made by the LEAs, of which 1,365 were granted and seven were refused by the panel judges. Among the successful applications, 602 were for authorizations for the first time ('fresh applications') and 763 were for renewals of authorizations that had been granted earlier ('renewal applications').

## **Reasons for refusal**

2.3 Of the seven refused applications, two were fresh applications and five were renewal applications. The refusals were mainly due to the following reasons:

- (a) no or limited useful information had been obtained from the interception operation conducted under previous authorizations;
- (b) inadequate/insufficient materials to support the allegations put forth;
- (c) the conditions of necessity and proportionality were not met; or
- (d) omission of an assessment of likelihood of obtaining legal professional privilege ('LPP') information or journalistic material ('JM') in the affirmation in support of the application.

## **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. An emergency authorization shall not last for more than 48 hours and may not be renewed. 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.

2.5 During the report period, no application for emergency authorization for interception was 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 may orally deliver his determination to issue the prescribed authorization or give the reasons for refusing the application. Paragraph 92 of the COP 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.

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

### **Duration of authorizations**

2.8 For over 70% 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. While the longest approved duration was 43 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 stringent control over the duration of the authorizations.

## **Offences**

2.9 Table 2(a) in Chapter 8 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) of the Ordinance, 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. The officer concerned shall then report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned.

2.11 The number of authorizations for interception revoked 'fully' under section 57 during the report period was 489. Another 94 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, interception of the remaining approved facilities continued to be in force.

2.12 The grounds for discontinuance were mainly that the interception operation was not or no longer productive, the subject had stopped using the telecommunications facility concerned for his criminal activities, or the subject was arrested.



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 LPP information 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 101 arrests but only four section 58 reports were made to the panel judge. The panel judge allowed the LEA to continue with the interceptions related to three section 58 reports after imposing additional conditions on the prescribed authorizations concerned to safeguard LPP information, whereas the prescribed authorization of the remaining section 58 report was revoked. As regards the other arrest cases, decisions were made by the LEAs concerned to discontinue the interception operation pursuant to section 57 instead of resorting to the section 58 procedure. This reflects the fact that the LEAs were appreciative of the risk of obtaining LPP information after an arrest.

### **Authorizations with five or more previous renewals**

2.14 There were 41 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, particular attention was paid 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 inspection visits to the LEAs.

### **Effectiveness of interception**

2.15 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 85 persons, who were subjects of prescribed authorizations, were arrested as a result of or further to interception operations. In addition, 167 non-subjects were also arrested consequent upon the interception operations.

### **Procedure of oversight for interception**

2.16 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**

2.17 The LEAs were required to submit weekly reports to the Secretariat, Commissioner on Interception of Communications and Surveillance ('Secretariat') on their respective applications, successful or otherwise, and other relevant reports made to the panel judges/departmental authorizing officers by way of completing forms designed for the purpose ('weekly report forms'). Such weekly reports deal with all statutory activities, i.e. interception and covert surveillance. At the same time, the PJO was also requested to submit weekly report forms on the applications they received from 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 the Secretariat.

2.18 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.

2.19 Upon receipt of the weekly report forms from the LEAs, the 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.

### **Checking of cases during inspection visits**

2.20 Should the Commissioner perceive a need, clarification and explanation on the weekly report forms would also be sought in the inspection visits to the offices of the LEAs. In the visits, the Commissioner would also select, on a random basis, some other cases for examination apart from those requiring clarification. Documents to be scrutinised by the Commissioner would include the original of the applications, reports on discontinuance, reports on material change of circumstances, reports on initial material inaccuracies, case files and internal review documents, etc. Such inspection visits were carried out so that secret or sensitive information contained in case files and documents that would otherwise be required to be sent to the Secretariat for checking would always remain in the safety of the LEAs' offices to avoid any possible leakage.

2.21 If questions or doubts still could not be resolved after the examination of such documents, the Commissioner would require the LEA to answer the queries or to explain the cases in greater detail.

2.22 In addition to matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 830 applications for interception, including granted authorizations and refused applications, and 311 related documents/matters had been checked during the Commissioner's inspection visits to the LEAs in the report period.

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

2.23 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 the Secretariat for further checking the interceptions conducted by the LEAs.

2.24 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 the Commissioner with a four-weekly return to ensure that the facilities intercepted tally with those as reported by the respective LEAs and to notify the Commissioner at once upon discovery of any unauthorized interception, the Team has also 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 intervals as designated by the Commissioner from time to time. All these records are available to the Secretariat but only the Commissioner and his designated staff 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 the Commissioner, ensuring that no unauthorized interception has taken place.

## **Results of various forms of checking**

2.25        Apart from the cases of non-compliance and incidents referred to in Chapter 6, there was no other case of wrong or unauthorized interception revealed by the various forms of checking.

2.26        The checking of the archived material referred to in paragraph 2.24 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 Report 2 of Chapter 6 was found to have been recorded.

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# **CHAPTER 3**

## **COVERT SURVEILLANCE**

### **Covert surveillance**

3.1 Pursuant to section 2 of the ICSO, 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: Type 1 and Type 2. Type 1 surveillance has a higher degree of intrusiveness into the privacy of the subject and requires a panel judge's authorization whereas an authorization for Type 2 surveillance, termed an executive authorization, can be issued by an authorizing officer of the department to which the applicant belongs. An authorizing officer is an officer not below the rank equivalent to that of Senior Superintendent of Police designated by the head of department.

## **Written applications**

- 3.3 During this report period, there were a total of
- (a) 38 written applications for Type 1 surveillance, of which 34 were granted and four were refused by the panel judge. Among these successful applications, 25 were fresh applications and nine were renewal applications; and
  - (b) 13 written applications for Type 2 surveillance. All were fresh applications and were granted by the authorizing officer.

3.4 Of the refused Type 1 surveillance applications, two were fresh applications and the other two were renewal applications. The grounds for refusal were mainly insufficient information to justify the issue of an authorization.

## **Emergency authorizations**

3.5 An officer of an LEA may apply in writing to the head of the department for the issue of an emergency authorization for any Type 1 surveillance, if he considers that there is immediate need for the Type 1 surveillance to be carried out by reason of an imminent risk of death or serious bodily harm, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances of the case that it is not reasonably practicable to apply for the issue of a judge's authorization. An emergency authorization shall not last longer than 48 hours and may not be renewed. 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. During the report period, no application for emergency authorization for Type 1 surveillance was made by the LEAs.

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

### **Oral applications**

3.7 Applications for Type 1 and Type 2 surveillance, including those for emergency authorization, should be made in writing. Nonetheless, 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. The relevant authority may orally deliver his determination to issue the prescribed authorization or to refuse the application.

3.8 The COP 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. Failing to do so will cause that orally granted prescribed authorization to be regarded as revoked upon the expiration of the 48 hours.



3.9 During this report period, no oral application for Type 1 or Type 2 surveillance was made by the LEAs.

### **Duration of authorizations**

3.10 The maximum duration authorized for both Type 1 and Type 2 surveillance allowed under the Ordinance is three months. The longest approved duration of Type 1 surveillance granted in this report period was about 16 days whereas the shortest one was less than a day. Overall, the average duration for such authorizations was about six days. In this report period, the longest approved duration of Type 2 surveillance granted was about 12 days while the shortest one was less than a day. The overall average duration of Type 2 surveillance executive authorizations was about three days.

### **Authorizations with five or more previous renewals**

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

### **Offences**

3.12 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 are set out in Table 2(b) in Chapter 8.

### **Revocation of authorizations**

3.13 During the report period, 25 Type 1 surveillance operations were discontinued under section 57 before the natural expiration of the prescribed authorizations. The grounds for discontinuance were



mainly that the surveillance had been carried out, the anticipated event to be monitored did not materialize or the subject was arrested. Section 57(3) requires the LEA to report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned upon receipt of the report on discontinuance. Of these 25 discontinuance cases, eight prescribed authorizations concerned were subsequently revoked by the panel judge. For the remaining 17 cases, the prescribed authorizations had already expired by the time the panel judge received the discontinuance reports. Thus, the panel judge could only note the discontinuance reported instead of revoking the prescribed authorization.

3.14 As regards Type 2 surveillance cases, during this report period, 14 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, the subject was arrested or the operation was not productive. 13 of the prescribed authorizations concerned were subsequently revoked by the authorizing officer. For the remaining one, the prescribed authorization concerned had expired by the time the authorizing officer received the discontinuance report. Hence, he could only note the discontinuance instead of revoking the prescribed authorization.

3.15 Revocation of authorizations is expressly provided for in section 58 of the ICSO for covert surveillance when the subject(s) of the covert surveillance has been arrested. During this report period, no report was made to the relevant authority under section 58 seeking continuation of prescribed authorizations in spite of the arrest of the 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, demonstrates that they were appreciative of the risk of obtaining LPP information after an arrest.

### **Application for device retrieval warrant**

3.17 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**

3.18 As a result of or further to surveillance operations, be it Type 1 or Type 2, a total of 21 persons who were subjects of the prescribed authorizations were arrested. In addition, 23 non-subjects were also arrested in consequence of such operations.

### **Procedure of oversight**

3.19 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 of the above reviews are set out in the ensuing paragraphs.

### **Checking of weekly reports**

3.20 Weekly reports submitted by the LEAs and PJO cover all statutory activities, including both types of covert surveillance. The way of checking that has been described in Chapter 2 for interception equally applies to surveillance.

### **Checking of cases during inspection visits**

3.21 The mechanism of checking cases during inspection visits to the LEAs is described in Chapter 2.

3.22 During the year, 32 applications for Type 1 surveillance and 26 related documents/matters had been checked.

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. Special attention has all along been paid 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 the 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 16 applications for Type 2 surveillance and 19 related documents/matters had been checked. Generally speaking, the cases were found to be in order while there were some areas for improvement as set out below:

- (a) During an inspection visit to an LEA, I noticed that there was only limited information provided in an application for Type 2 surveillance. I considered that the level of information provided in the application might not be sufficient to satisfy a panel judge to issue the prescribed authorization if it was an application for Type 1 surveillance. In this regard, the LEA was advised that the standard of information provided in applications for Type 1 and Type 2 surveillance should be the same. In examining the records of another Type 2 surveillance case, it was found that of the two devices issued, only one was used while the other one was retained as a spare until the operation was complete. I raised my concerns as the authorizing officer should have noted from the application that one vehicle was to be targeted and yet he did not query the request for the issue of more than one device. I advised that authorizing officers should take a critical approach when considering Type 2 applications and when necessary, seek clarification and explanation from the applicant before they come to any determination. The LEA has taken heed of the advice. In subsequent inspection visits, I observed that there was a general improvement in the standard in the preparation of Type 2 applications and I expressed my wish to see such standard maintained.
- (b) Comprehensive information and full versions of events should be included in the Review Form for the Reviewing Officer to conduct the review properly and for the Commissioner to exercise his oversight function effectively. On one occasion, in examining the manual records and post-entry records in the device management system

('DMS') of an LEA, I noted that there was no mention of a system failure which had caused the use of manual recording nor was the system failure mentioned in the Review Form. I advised that an incident of such nature or any deviation from normal procedures should be mentioned for the attention of the Reviewing Officer so that he could assess whether there were any irregularities or areas for improvement. The LEA agreed and has subsequently reminded all officers concerned of the need to be careful when conducting review of covert surveillance operations and to include all relevant information in the Review Form.

3.24 In examining the weekly reports, there may be some cases where surveillance devices have been withdrawn under a prescribed authorization but no surveillance operation is carried out. The Commissioner would consider the following matters required further enquiry:

- (a) whether the prescribed authorization should have been sought in the first place;
- (b) the reason for not carrying out any surveillance operation pursuant to the prescribed authorization;
- (c) whether the devices drawn were used during the period concerned for any purposes other than those specified in the prescribed authorization; and
- (d) the way in which the devices drawn were kept by officers before they were returned to the device store/registry.



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

### **Checking of surveillance devices**

3.25 Having regard to the fact that covert surveillance, as defined by the Ordinance, is surveillance carried out with the use of one or more surveillance devices, the LEAs had been required 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 register of devices withdrawn based on loan requests supported by a prescribed authorization and a separate 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 checking purposes.

3.26 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 updated inventory list and device registers are submitted to the Commissioner regularly. Where necessary, the LEAs are also required to provide copies of the device request forms for 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.

### **Visits to device stores**

3.27 Apart from the checking of inventory lists and device registers of surveillance devices managed by the LEAs, the Commissioner would also make inspection visits to the device stores of the LEAs for the following purposes, namely:

- (a) to check the entries in the original registers against the entries in the copy of registers submitted to the Commissioner, 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 the Commissioner 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 the knowledge of the Commissioner or his staff and seek explanation as to how they might be used for conducting covert surveillance operations.

3.28 During the report period, a total of five visits were made to the device stores of LEAs.

### **Removable storage media**

3.29 To better control the issue and return of surveillance devices, the majority of the LEAs have adopted the DMS in their device stores. In 2012, I advised the LEAs that the removable storage media ('RSM') for surveillance devices should be handled in a secure and strictly regulated manner akin to the withdrawal and return of surveillance devices so as to avoid any possibility of these RSM (e.g. memory cards, discs and tapes) being substituted, or in any way



tampered with. In this report period, as a consequence of my recommendation, an LEA has adopted the use of tamper-proof labels to seal the RSM inside the devices at the time of issue. Upon my advice, other LEAs indicated that the same arrangement would be made in their departments.

3.30 In response to my previous suggestion on the use of DMS to record the movement of RSM, in the report period, an LEA developed prototypes of RSM which have affixed to them a Quick Response ('QR') Code (which can be read by the DMS). After seeing the demonstrations by the LEA on using the DMS to record the issue and return of these prototypes, I have made some suggestions to further improve the process. The new system was eventually rolled out in early 2014. I have suggested that other LEAs consider adopting similar systems.

### **Devices for non-ICSO purposes**

3.31 As a matter of practice, an authorized covert surveillance is always supported by a prescribed authorization issued by a relevant authority but a non-ICSO operation requiring issue of devices will not have that support. Hence, in keeping track of issue of surveillance devices for non-ICSO purposes, the LEAs have accepted the requirements that a two-level approval by way of an endorsement of an officer and an approval of a senior 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 will issue the surveillance devices requested.

3.32 During the year, an incident report relating to surveillance devices issued for a non-ICSO operation was received. An LEA reported in September 2013 on the loss of the original copy of a Record of Issue in respect of two surveillance devices issued for a non-ICSO operation.

3.33 The background to this incident was that two surveillance devices were issued for a non-ICSO operation. A Record of Issue was generated by the DMS upon completion of the device issue process. Together with the two devices issued, the officer who withdrew the devices ('Withdrawing Officer') took the Record of Issue to the officer who approved the request for the devices ('Approving Officer') for checking and signature. After the Approving Officer signed on the Record of Issue, the Withdrawing Officer made a photocopy of the document for filing. Being the officer responsible for returning the original Record of Issue to the device registry in person, the Withdrawing Officer called the storekeeper on duty for an appointment to return the original Record of Issue but to no avail. He put the original Record of Issue into a master file temporarily pending return of it. About ten days later, an officer of the device registry sent a reminder to the Approving Officer for return of the original Record of Issue. The Approving Officer reported that it could not be found.

3.34 The investigation by the LEA showed that the master file which kept the original Record of Issue temporarily was also used by other team members for filing documents relating to the issue and return of surveillance devices for non-ICSO purposes. The original Record of Issue in question might have been inadvertently mislaid. It was not found though considerable efforts had been made to locate it.

3.35 The LEA proposed a number of remedial/improvement measures to prevent recurrence of similar incidents. It also recommended that a stern reminder be given to the Withdrawing Officer and his supervisor as they did not display a high level of alertness regarding the timely handling of the document in question.

3.36 I have examined the relevant documents including the photocopy of the Record of Issue. Nothing untoward was found and I agreed to the proposed actions against the two officers.

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## **CHAPTER 4**

### **LEGAL PROFESSIONAL PRIVILEGE AND JOURNALISTIC MATERIAL**

#### **Obligations of LEAs regarding LPP cases**

4.1 The Ordinance requires that when making an application for a prescribed authorization, the applicant should state in the affidavit or statement the likelihood that any information which may be subject to legal professional privilege ('LPP') will be obtained by carrying out the interception or covert surveillance.

4.2 Paragraph 121 of the COP provides that the LEA should notify the Commissioner of interception/covert surveillance operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. On the basis of the LEA's notification ('the COP 121 report'), the Commissioner may review the information passed on to the investigators to check that it does not contain any information subject to LPP that should have been screened out.

4.3 Regarding each of these cases, there are procedures 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 the likelihood of obtaining LPP information. If subsequently there is anything that transpires which may affect the assessment, which is considered as a material change of circumstances, the officer concerned has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, to notify the authorizing

officer by way of an REP-13 report. If the subject of the interception or covert surveillance has been arrested and the officer concerned considers that the operation should continue, the officer should also submit a section 58 report to the relevant authority assessing the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the interception or covert surveillance. The officer 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 have been taken or are proposed to take to prevent infringement of the right to communications that are protected by LPP. In order to apprise the Commissioner promptly with timely information on this important matter, the concerned LEA is required to give the Commissioner a similar notification of each of such occurrences.

4.4 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 the important right of individuals to confidential legal advice. During the report period, the panel judge refused a fresh application for interception because the applicant failed to state in the affirmation in support of the application the likelihood of obtaining LPP information. Details of the case have been included in Chapter 6.



## **The Commissioner's requirements to the LEAs**

4.5 There is a set of reporting and preservation requirements. For interception operations, 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 in respect of this call. This is named a 'Reported LPP Call' irrespective of whether LPP information has indeed been obtained. The reporting officer has to disclose in the 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 also state whether there are any other 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 listeners. 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. The LEA should preserve the interception products of all intercepted calls when such products are still available at the time of discovery of the Reported LPP Call, the transcripts, summaries, notes, ATRs, etc. The preserved records should not be destroyed without the prior consent of the Commissioner. Similar arrangements should also be made in respect of cases where journalistic material ('JM') is involved or likely to be involved.

4.6 In the event that LPP information has been inadvertently obtained in covert surveillance operations, paragraph 121 of the COP

also provides that investigators monitoring the operations will be required to hand over the recording to a dedicated unit who will screen out any information subject to LPP before passing it to the investigators for their retention. The Commissioner should be notified. On the basis of the department's notification, the Commissioner may review the information passed on by the dedicated unit to the investigators to check that it does not contain any information subject to LPP that should have been screened out.

### **LPP reports received in 2013**

4.7 In the report period, COP 121 reports were submitted on 35 LPP cases. Amongst these cases, there were 24 LPP cases with submission of REP-11 reports, REP-13 reports or section 58 reports to the relevant authorities. These included:

- (a) two cases of possible obtaining of LPP information; and
- (b) 22 cases of heightened likelihood of obtaining LPP information.

### ***Two cases of possible obtaining of LPP information***

4.8 In the first case, an LEA submitted a COP 121 report to me on a case of possible obtaining of LPP information in a Type 2 surveillance operation.

4.9 At the grant of the prescribed authorization, the surveillance operation was not assessed to have a likelihood of obtaining LPP information. Subsequent to the commencement of the operation, the LEA considered that information subject to LPP might have been inadvertently obtained during a monitored meeting. An

REP-13 report and a discontinuance report were subsequently submitted to the authorizing officer who duly revoked the prescribed authorization.

4.10 In view of the concern that LPP information might have been inadvertently obtained and having reviewed the circumstances of the case, the LEA formed the view that there was a heightened likelihood of obtaining LPP information in an interception related to the same investigation case. An REP-11 report and a discontinuance report in respect of the interception were subsequently submitted to the panel judge who revoked the authorization. This is one of the cases counted under paragraph 4.7(b) above.

4.11 After obtaining advice from me as to how the content of possible LPP information contained in the surveillance product should be assessed and reported to me, the LEA conducted a screening of the surveillance product in accordance with paragraph 121 of the COP. The LEA stated in the report of the result of the screening that a certain part of the audio recording might contain LPP information, while the remaining conversation largely concerned the matters under investigation. An edited copy of the audio recording in which the conversation that might contain LPP information had been screened out was passed to the relevant investigating team.

4.12 I conducted a review of both the Type 2 surveillance and interception cases. On the basis of the information provided by the LEA, it was arguable that LPP information had been obtained in the Type 2 surveillance operation. Nevertheless, the matter was handled by the LEA in compliance with paragraph 121 of the COP. As I had not examined the contents of the surveillance and interception products, no finding could be made as to:

- (a) the veracity of the record of the conversations of the relevant meeting as stated in the REP-13 report concerned and the report on screening of the surveillance product prepared by the LEA; and
- (b) whether there were any communications subject to LPP in the surveillance and interception products listened to by the LEA officers.

4.13 Subject to these qualifications, no irregularity was found.

4.14 As for the second case, it also related to a report on the possible obtaining of LPP information in a Type 2 surveillance operation. At the grant of the prescribed authorization, the surveillance operation was not assessed to have a likelihood of obtaining LPP information. Subsequent to the commencement of the operation, the LEA considered that information subject to LPP might have been inadvertently obtained during a monitored meeting. An REP-13 report and a discontinuance report were subsequently submitted to the authorizing officer who duly revoked the prescribed authorization.

4.15 After the screening of the relevant surveillance product in accordance with paragraph 121 of the COP, the LEA found that no LPP information had been obtained in the surveillance operation.

4.16 I conducted a review of the case. On the basis of the information provided by the LEA, I agreed that no LPP information had been obtained in the surveillance operation. However, as I had not listened to the surveillance product, no finding could be made as to:

- (a) the veracity of the record of the conversations of the relevant meeting as stated in the report on screening of the surveillance product prepared by the LEA; and
- (b) whether there were any other communications subject to LPP in the surveillance product listened to by the LEA officers.

4.17 Subject to these qualifications, no irregularity was found.

***22 cases of heightened likelihood of obtaining LPP information***

4.18 These 22 cases included:

- (a) one case where the prescribed authorization was revoked by the panel judge which resulted in an inadvertent unauthorized interception of 22 minutes. Details of the case have been included in Chapter 6;
- (b) 14 cases where the panel judge allowed the continuation of the prescribed authorization subject to additional conditions imposed to guard against the risk of obtaining LPP information; and
- (c) seven cases where the concerned LEA discontinued the operations of its own accord.

4.19 In the review of these LPP cases, I together with my staff have checked all the relevant documents and records including the prescribed authorization, the REP-11 report, section 58 report, the determination by the panel judge, the listener's notes, the written summaries, the call data, the ATRs, etc. For cases where the panel judge allowed the prescribed authorizations to continue subject to



additional conditions, we have 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 interception product after the discontinuance or revocation of the prescribed authorizations.

4.20 Pending the legislative amendment as proposed by the Administration authorizing the Commissioner and his staff to listen to the recording of interception products, there was no recording of intercepted calls listened to in my review of LPP cases. Hence, no finding could be made as to the veracity of the contents of the conversations in the Reported LPP Call as stated in the REP-11 reports. Similarly, no finding could be made as to whether the calls preceding the Reported LPP Call 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.

4.21 In my review of LPP cases in 2013, nothing untoward was found except the inadvertent unauthorized interception case in Report 2 of Chapter 6.

### **Obligations of LEAs regarding JM cases**

4.22 The Ordinance requires the LEA 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. The COP 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.

### **JM reports received in 2013**

4.23 In 2013, I did not receive any report on obtaining of JM through interception or covert surveillance operations.

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## **CHAPTER 5**

### **APPLICATION FOR EXAMINATION AND NOTIFICATION TO RELEVANT PERSON**

#### **Application for examination**

5.1 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 departments. Upon receiving an application, the Commissioner shall 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,

unless he refuses to carry out an examination by reason of section 45(1). 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 by the Government.

5.2 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. This section is discussed further at paragraphs 5.15 to 5.18.

### **The procedure**

5.3 The procedure involved in an examination can be briefly described below. Enquiries will be made with the particular LEA which, the applicant alleges, has carried out either interception or covert surveillance or a combination of both against him as to whether any such statutory activity has taken place, and if so the reason why. Enquiries will also be made with the PJO as to whether any authorization 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 counter-checked to ensure correctness. Apart from the information given above, it is considered undesirable to disclose more details about the methods used for the examination of

applications or about the examinations undertaken, because that would possibly divulge information that may prejudice the prevention or detection of crime or the protection of public security.

5.4 The applications for examination will have to satisfy 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.

5.5 Some applicants alleged that they had been 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 have been cases previously where the applicants said they had been implanted with a device that could read and manipulate their mind or being tracked and injured by rays emitted by a device. These again did not form a proper basis for an application 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.

5.6 Some applicants described how a particular person, as opposed to an LEA officer, carried out the suspected interception or

covert surveillance. This failed to satisfy the second requirement to entertain an application or to engage in an examination.

5.7 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 Secretariat. In addition, there are leaflets available to prospective applicants which contain the necessary information for making an application.

### **Applications received in 2013**

5.8 During the report period, there were 19 applications for examination. Five applications were subsequently not pursued by the applicants. Of the remaining 14 applications, one alleged interception, one alleged covert surveillance and 12 claimed a combination of interception and covert surveillance. Since none of the 14 applications came within the ambit of the exceptions covered by section 45(1) or section 45(2), I carried out an examination provided for in section 44 in respect of each case.

5.9 After making all necessary enquiries, I found all these 14 cases not in the applicants' favour and accordingly notified each of the applicants in writing of my findings, with 11 of such notices issued during the report period and three thereafter. By virtue of section 46(4) of the Ordinance, the Commissioner is not allowed to provide reasons for his determination or to inform the applicants whether or not the alleged or suspected interception or covert surveillance had indeed taken place.



## **Notification to relevant person**

5.10 Section 48 obliges the Commissioner to give notice to the relevant person whenever, during the performance of the functions under the Ordinance, the Commissioner discovers 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 the Commissioner shall only give a notice when he considers 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 the Commissioner from his obligation if the relevant person cannot, after the use of reasonable efforts, be identified or traced, or where he considers that the intrusiveness of the interception or covert surveillance on the relevant person is negligible.

5.11 Consideration of the application of section 48 may arise under a number of situations. For example, the interception of telephone communications 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 an unauthorized interception. It gives rise to the necessity of considering whether the Commissioner should, as obliged by section 48 of the Ordinance, give a notice to the relevant person of the wrong interception and indicate in the notice, among others, the duration of the unauthorized interception. He will be invited to make written submissions in relation to the assessment of reasonable compensation to be paid to him by the Government.

5.12 During the report period, no notice pursuant to section 48 of the Ordinance was issued.

### **Prohibition against disclosure of reasons for determination**

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

5.14 During the year, I have observed that there were occasions that the applicants felt that their purpose of applying for examination had not been achieved as I could not disclose the reasons for my determinations. It is hoped that the public will understand that this statutory prohibition 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 the Commissioner carries out his duties and functions under the Ordinance with the utmost good faith and sincerity.

### **Provision prohibiting or deferring examination**

5.15 Section 45(2) sets out the grounds for the Commissioner not to carry out an examination because of any relevant criminal proceedings. My predecessor has made a recommendation in paragraphs 9.16 to 9.21 of the Annual Report 2011 that consideration be given to have subsections (2) and (3) of section 45 repealed. He was of the view that if the Commissioner's power of examination is suspended for a considerable time because of the criminal proceedings,

it would be difficult for the Commissioner to gather the evidence for the application.

5.16 In March 2013, the Administration advised that having examined the proposal carefully with the Department of Justice and the LEAs, it inclined to retain sections 45(2) and (3) in the ICSO. The reasoning given is that section 45(2) relates to the *sub judice* rule which essentially governs what public statements can be made about ongoing legal proceedings before the court. The rule applies where court proceedings are ongoing, and through all stages of appeal until the matter is finally disposed of. It may also apply where court proceedings have not yet been started, but are imminent. On the basis of this rule, section 45(2) seeks to regulate the relations between the court and the Commissioner having regard to the importance of judicial independence and an accused person's right to a fair trial, and to ensure that criminal trials would not be influenced by any determinations or comments made by the Commissioner.

5.17 In response, I suggested the Administration to further advise on the specific definition of and the implications of the wording of section 45(3) and the implications of the prohibitions contained in section 46. The Administration provided the advice that section 45(3) makes it clear that a section 45(2) prohibition is not linked to the fact that the applicant for examination is being prosecuted but rather to the fact that there exists a prosecution in which issues relating to the use of interception and covert surveillance will be ventilated at the trial and findings on these issues may be made by the trial judge.

5.18 In the circumstances, the advice clarified the definition of criminal proceedings in the relevant provision and its purpose. I am therefore content with the proposed way forward of the Administration in retaining sections 45(2) and (3) in the ICSO.

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## **CHAPTER 6**

### **REPORTS OF NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS**

#### **Reporting of non-compliance, irregularities and incidents**

6.1 By virtue of section 54, where the head of any department 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 the Commissioner a report with details of the case (including any disciplinary action taken in respect of any officer). Relevant requirement is defined in the Ordinance to mean any applicable requirement under any provision of the ICSO, the COP, or any prescribed authorization or device retrieval warrant concerned.

6.2 The section 54 obligation only applies where the head of the LEA considers that there may have been a case of non-compliance. The LEAs are also required to report cases of irregularities or even simply incidents to the Commissioner for his consideration and scrutiny so that any possible non-compliance will not escape his attention. Such reports are *not* made under section 54 of the Ordinance.

6.3 For cases of non-compliance, irregularity or incident discovered upon examination of the documents and information provided during inspection visits, the LEA concerned is required to investigate the matter and submit a report to the Commissioner.

6.4 When reporting, normally the LEAs would adopt a two-step approach. They would first submit an initial report upon discovery of

the event, to be followed by a full investigation report after an in-depth investigation into the case.

### **Cases occurring in 2013**

6.5 In 2013, the Commissioner received from LEAs reports of non-compliance/irregularities/incidents relating to ten ICSO cases. Except one case which was reported under section 54 of the Ordinance, the other nine were submitted *not* under section 54 of the Ordinance. They are dealt with in the ensuing paragraphs.

#### ***Report 1: An incident in which a surveillance operation was discontinued but it was erroneously represented in the device register that the operation would continue***

6.6 An LEA submitted a report to me in January 2013 on an incident where a Type 2 surveillance operation was discontinued but upon the return of the devices which had been used in the operation, it was erroneously represented in the device register that the operation would continue.

6.7 After the issue of the authorization for a Type 2 surveillance operation, surveillance devices were withdrawn from a device store on two occasions and these were then returned properly. On the third occasion, having considered that the operation was not productive, the case officer decided to discontinue the operation. Although it was stated in the memo for the return of devices that the surveillance operation had already been discontinued, the storekeeper mistakenly selected the checkbox of 'Continue' when processing the return of the devices through the DMS. This automatically led to a 'No' being shown in the column of '*Reporting Discontinuance with Date and Time*' in the device register, which was not correct. The mistake was discovered by



the store manager one day later when he inspected the device register. The storekeeper promptly admitted the mistake when asked by the store manager.

6.8 The investigation by the LEA showed that the officer had just taken up the role of storekeeper for less than two months. The LEA considered that the mistake was due to carelessness or a momentary lack of concentration on the part of the storekeeper. The storekeeper had been reminded to be more vigilant in handling ICSO-related duties and follow proper procedures in the control of surveillance devices.

6.9 Having reviewed the case, I considered that there was no evidence of improper conduct on the part of the storekeeper and agreed that she should be reminded to be more vigilant in her duties.

***Report 2: Unauthorized interception of 22 minutes after revocation of prescribed authorization by the panel judge***

6.10 An LEA reported to me an incident where interception continued for 22 minutes after a panel judge revoked the prescribed authorization upon considering the information provided by the LEA.

6.11 At the grant of the prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. In the course of the operation, the LEA considered that there was a heightened likelihood of obtaining LPP information through continued interception as a result of the Reported LPP Call and the subsequent revelation of the subject's arrest by another LEA. The LEA then submitted an REP-11 report and a section 58 report to the panel judge, requesting to continue with the interception. On the basis of the information provided by the LEA, the

panel judge considered that the conditions for the continuance of the prescribed authorization were not met and revoked the prescribed authorization. The facility was disconnected 22 minutes after revocation of the prescribed authorization.

6.12 In the review of the case, I together with my staff have checked all the relevant documents and records including the prescribed authorization, the REP-11 report, the section 58 report, the determination by the panel judge, the listener's notes, the written summaries, the call data, the ATR, etc. I made the following findings:

- (a) the interception after revocation of the prescribed authorization and before the disconnection of the facility was conducted without the authority of a prescribed authorization. The unauthorized interception lasted 22 minutes; and
- (b) no call was intercepted during the period of unauthorized interception.

6.13 As I had not listened to the interception product, no finding could be made as to the veracity of the record of the conversations of the relevant call as stated in the REP-11 report and whether there were any other communications subject to LPP in the interception product listened to by the LEA officers.

6.14 Technically speaking, the unauthorized operations resulting from the time gap between the revocation of a prescribed authorization and the actual discontinuance of an operation under similar circumstances are unavoidable. My predecessor recommended that the ICSO should be amended to address the issue. In this regard, I note that the Administration has accepted the recommendation and

proposed to amend the ICSO to the effect that if a prescribed authorization has been revoked by the relevant authority in similar cases, the LEA shall take immediate steps to discontinue the operation in question as soon as reasonably practicable. Any interception or surveillance products obtained after the revocation but before the actual discontinuance of the operation would be by the amendment to the legislation deemed to have been obtained pursuant to a prescribed authorization. The COP would also be updated to stipulate a timeframe within which discontinuation should normally be effected. Any LEA which fails to discontinue the operation within the stipulated benchmark timeframe would be required to make a report to the Commissioner to explain the reasons for the delay.

**Report 3: Omission of information in device request form**

6.15 An LEA first reported in July 2013, followed by an investigation report in September 2013 an irregularity detected during the review of a prescribed authorization for Type 1 surveillance.

6.16 The background to this incident was that in May 2013, the LEA submitted an application for Type 1 surveillance and after approval was granted by the panel judge, an officer of the technical support team ('the Officer') was tasked to deliver two device request forms ('the Two Forms') submitted by the investigation team to his supervisor ('the Supervisor') for his approval on the deployment of technical support team staff in the operation. The Supervisor told the Officer that the deployment of technical support team staff was approved and then signed on the Two Forms. Whilst the Supervisor had crossed out the words "*is not*" in the sentence "*Request is / is not\* approved. (\*Please delete as appropriate)*" in one of the Two Forms to indicate that the request for the deployment was approved, he omitted to do so in the

other one ('the omission'). Thereafter, the LEA officers proceeded to conduct the Type 1 surveillance and the omission was not detected.

6.17 In June 2013, the investigation team submitted a review folder containing a Review Form and the Two Forms through the chain of command to the Reviewing Officer for review of the prescribed authorization. The Reviewing Officer completed the review in late June 2013 and indicated that there was an irregularity arising from the said omission by the Supervisor.

6.18 The LEA's investigation showed that the Supervisor had not been aware of the omission until the LEA made enquiry with him. He acknowledged that he should have completed the Two Forms properly and the omission was due to his inadvertent oversight. The Officer also acknowledged that he should have checked the Two Forms before proceeding to assist in the Type 1 surveillance.

6.19 The LEA considered that the Supervisor's omission in the relevant device request form was unsatisfactory and attributable to his lack of vigilance. Nevertheless, as the omission only existed in one of the Two Forms presented to him for signature relating to the same operation, this lent support to his assertion that the omission was inadvertent and that he had indeed approved the deployment concerned. In addition, the Officer should have checked the Two Forms after they were signed by the Supervisor, given the purpose of the Officer's trip to meet the Supervisor was to seek the latter's approval in relation to the deployment of technical support team staff. The LEA recommended that the Supervisor and the Officer be advised by a senior officer on the need to exercise vigilance in handling any ICSO-related documentation, and that for the other five officers involved in the incident and the review process who were unaware of the omission at the material time, the case be brought to their attention



for enhancing their vigilance in execution/review of ICSO operations in the future. In light of the incident, the LEA adopted a new procedure whereby, prior to participation by technical support team staff in any covert operation pursuant to an approval given in the relevant device request form, the form must be checked by an officer of the technical support team to see if the approval is properly documented. The LEA also issued a reminder to its officers on the need to ensure the proper completion of ICSO-related documentation.

6.20 Having reviewed the case, I considered that the LEA's proposed action against the Supervisor and the Officer was acceptable. As regards the other five officers concerned, they should be reminded to be more vigilant in execution/review of ICSO operations. The improvement measures taken by the LEA were appropriate.

***Report 4: An omission of a subject's alias in the affirmation in support of an application for a Type 1 surveillance operation***

6.21 An LEA first reported in December 2013, followed by an investigation report in February 2014 an omission in the affirmation in support of an application for Type 1 surveillance.

6.22 The background to this incident was that whilst an interception operation on a subject was ongoing, the Section Head overseeing Teams A and B ('Section Head') and the Supervisor of Team A ('Supervisor A') intended to conduct Type 1 surveillance on the subject. The subject had an alias which was stated in the affirmations in support of the interception applications in accordance with paragraph 114 of the COP. At the time, Team A was heavily committed in another major investigation, as a consequence the

Assistant Head of Department ('Assistant HoD') decided to transfer the case to Team B.

6.23 In anticipation of the case transferral, the Section Head instructed an officer of Team B ('Officer') to draft an affirmation in support of an application for the intended Type 1 surveillance. Subsequently, the Officer emailed his draft affirmation, which did not include the subject's alias ('the omission'), to Supervisor A and the Section Head for comments. The Officer also emailed to the LEA's Central Registry (responsible for ICSO matters) to request for checking of previous ICSO applications in respect of the subject, without mentioning the subject's alias. The Supervisor of Team B ('Supervisor B') later emailed the draft revised by the Officer via the Section Head to the Assistant HoD, who approved the making of the application. The application was subsequently granted by the panel judge. About a week later, the LEA discovered the omission and submitted an REP-11 report on the omission to the panel judge who noted the report.

6.24 According to the LEA's investigation report, the subject was fully identified by her full name and Hong Kong Identity Card number in the Type 1 surveillance affirmation and the omission was duly reported to the panel judge during the validity of the authorization, and as a consequence it was unlikely that the omission had affected the validity of the prescribed authorization for Type 1 surveillance by virtue of sections 63(5) and 64(1) of the ICSO. The LEA considered that the omission was primarily attributable to the Officer and, to a certain extent, to Supervisor B. They were responsible for ensuring proper and complete presentation of facts in the draft affirmation and would have detected the omission had they been more vigilant in the process. For Supervisor A, had he studied the draft affirmation more carefully,



he would have detected the omission. The LEA also stated that the omission was partly attributable to the Section Head. As for the Assistant HoD, being in overall command of the investigating team concerned, he should have exercised caution when deciding to transfer the case from Team A to Team B, which, as it turned out, was transferred back to Team A shortly afterwards.

6.25 The LEA proposed that the officers involved be each given an advice by a senior directorate officer on the need to be more vigilant in handling ICSO-related documentation and/or considering transferral of cases involving ICSO operations. The LEA also recommended that its officers be reminded to be more vigilant in handling ICSO-related documentation and to avoid transferring cases involving ICSO operations between investigating teams as far as practicable. The relevant guiding notes had also been revised to alert the officers to include in the application any relevant alias of the subject.

6.26 Having reviewed the case, I made the following findings:

- (a) paragraph 114 of the COP had not been complied with, which requires that if known, an application for a prescribed authorization should include in the affirmation the identity of any person who is to be the subject of the interception/surveillance and any alias that he uses which is relevant to the investigation. Nevertheless, by virtue of sections 63(5) and 64(1) of the ICSO, I agreed that the omission itself did not affect the validity of the prescribed authorization for Type 1 surveillance in the present case;
- (b) the LEA's proposed action against the officers involved was acceptable; and

- (c) while the improvement measures recommended/taken by the LEA were appropriate, the LEA should consider further improving its internal procedure for checking of previous ICSO applications and the report of the name/alias of the subject in the affirmation.

***Report 5: Omission of an assessment of likelihood of obtaining LPP/JM information in the affirmation in support of an application for interception***

6.27 This case was non-compliance with a requirement for application for issue of a prescribed authorization for interception. Part 1(b)(ix) of Schedule 3 to the Ordinance requires an applicant seeking authorization of interception to state in the affidavit in support of the application the likelihood that any information which may be subject to LPP, or may be the contents of any JM, will be obtained by carrying out the interception ('LPP/JM assessment'). In December 2013, I received an initial report from an LEA reporting that a fresh application for interception was refused by a panel judge because of omission of the LPP/JM assessment in the affirmation in support of the application. At the time of the application, there was no information indicating that there would be likelihood of obtaining LPP information or information which may be the contents of any JM. The officer responsible for drafting the application omitted to state this assessment in the affirmation concerned. One day after the refusal of the application, the LEA submitted a new application for issue of a prescribed authorization for the same interception. An LPP/JM assessment was provided in the new application, which was approved by the panel judge.

6.28 In February 2014, the LEA submitted a full investigation report to me under section 54 of the Ordinance. The investigation

revealed that the omission was caused by negligence on the part of the officers involved in the drafting, checking and vetting of the application. The non-compliance originated with the drafting officer who failed to include the LPP/JM assessment in the draft application document. The application was checked and vetted by the checking officer, the Team Head and subsequently the Applicant who has the prime responsibility for the accuracy and completeness of information in the ICSO application. The omission was unfortunately not noticed throughout the checking process. The LEA advised me that it would put in place measures to prevent this happening again. While the LEA proposed a verbal warning for these four officers, the report was silent as to the accountability of three more senior officers who were also involved in the processing of the application. I subsequently wrote to the LEA asking it to look into these officers' accountability for the non-compliance and advise me of its findings and recommendation. In its reply, the LEA proposed to issue a verbal advice (disciplinary in nature) to these officers to remind them to be more vigilant in checking the content of ICSO applications to ensure that they contain all the essential elements as required by the Ordinance. In making this proposal, the LEA said that on the presumption that the accuracy and completeness of information had been ensured, the Endorsing Officer, the Assistant Head of Department and Division Head (the more senior officers) had focused on examining the matters advanced that justified the interception operation when checking and endorsing the application.

6.29 I have reviewed the case and have no objection to the proposed disciplinary actions. The improvement measures to be taken by the LEA to prevent a recurrence were appropriate. The LEA has been advised accordingly.

### ***Other reports***

6.30 Of the other five reports submitted by the LEAs, four were incidents of technical problems of the computerised systems/equipment; and one case which related to a clerical mistake made in the application document. These cases have been reviewed and nothing untoward was found. I was satisfied with the prompt action taken by the LEAs in the investigation of the cases and their appropriate follow up actions to fix the problems.

### **Comments received after release of Annual Report 2012**

6.31 After the Annual Report 2012 was tabled in the LegCo in November 2013, there was a comment suggesting that I was more lenient towards LEAs than my predecessor. I wish to make the point that I have been performing my duties as the Commissioner strictly according to the legislation and my review findings on cases were made on the basis of the law and facts of the case. Whether incidents reported to me are more or less serious than others previously considered and whether the consequences for the LEA officers concerned are more or less serious are in the main part determined by the facts of each case. Thus, there can be no hard and fast rules in place to determine the outcome. A careful reading of my previous and present reports will show that this is the approach I have taken consistently.

## **CHAPTER 7**

### **RECOMMENDATIONS TO HEADS OF LAW ENFORCEMENT AGENCIES**

7.1 Section 52(1) provides that if the Commissioner considers that any arrangements made by any department should be changed to better carry out the objects of the Ordinance, the Commissioner may make such recommendations to the head of the department as he thinks fit.

7.2 Through discussions with the LEAs during the 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. The recommendations made during the report period are set out below:

*(a) Better control of the use of RSM*

Other LEAs should follow the same arrangements adopted by an LEA that tamper-proof labels would be used to seal the RSM inside the devices at the time of issue and QR Code would be used to facilitate the issue and return of the RSM through DMS.

*(b) Recording of the reason for making post-entry records in DMS*

The reason for making post-entry records in DMS should be recorded in the system.



- (c) *Better wording used in Records of Issue and Records of Return for surveillance devices*

The prescribed wording 'Device Authorized' used in the Records of Issue and Records of Return generated by the DMS should be changed to 'Type of Device Authorized' to make its meaning clearer.

- (d) *A new function in the computerised application system to withdraw an application for authorization*

A function should be added to the computerised application system to allow applicants to withdraw an application and the Endorsing Officer or Approving Officer to note the withdrawal.

- (e) *Sufficient information provided in an application for Type 2 surveillance*

Applicants should provide sufficient information in their written statement in support to justify applications for Type 2 surveillance and the standard of information provided should be the same as Type 1 applications. Authorizing officers should take a critical approach when considering Type 2 applications and when necessary, seek clarification and explanation from the applicant before they come to any determination.



- (f) *Comprehensive information and full versions of events included in the Review Form for review by the Reviewing Officer of the LEA*

Any deviation from normal procedures should be mentioned in the Review Form for the attention of the Reviewing Officer so that he could assess whether there were any irregularities or areas for improvement. This also facilitates the Commissioner to exercise his oversight function effectively.

- (g) *Reporting of the relevant statutory activities in an application for authorization*

In the application documents, the discontinuance of a statutory activity on the accomplice of the subject for the same investigation case should be specifically stated with reasons.

- (h) *Detailed and accurate description of the reason for discontinuance*

Detailed and accurate description of the reason for discontinuance of a statutory activity should be given in a discontinuance report.

- (i) *Standardization of shorthand/symbols used in the listener's notes*

For consistency and easier comprehension, the shorthand/symbols used in the listener's notes should be standardized.

- (j) *Better procedure for checking of previous ICSO applications and the report of the name/alias of the subject*

The LEA concerned should consider further improving its internal procedures for checking of previous ICSO applications and the report of the name/alias of the subject in the affirmation.

## **CHAPTER 8**

### **STATUTORY TABLES**

8.1 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 – 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)].

**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>Judge's Authorization</b>	<b>Emergency Authorization</b>
(i)	Number of authorizations issued	602	0
	Average duration	30 days	-
(ii)	Number of authorizations renewed	763	Not applicable
	Average duration of renewals	31 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	41	Not applicable
(vi)	Number of applications for the issue of authorizations refused	2	0
(vii)	Number of applications for the renewal of authorizations refused	5	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



**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)]**

		<b>Judge's Authorization</b>	<b>Executive Authorization</b>	<b>Emergency Authorization</b>
(i)	Number of authorizations issued	25	13	0
	Average duration	5 days	3 days	-
(ii)	Number of authorizations renewed	9	0	Not applicable
	Average duration of renewals	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	2	0	0
(vii)	Number of applications for the renewal of authorizations refused	2	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

**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)]**

<b>Offence</b>	<b>Chapter No. of Laws of Hong Kong</b>	<b>Ordinance and Section</b>
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Manufacture of dangerous drugs	Cap. 134	Section 6, 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
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
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
Conspiracy to defraud	—	Common Law

**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)]**

<b>Offence</b>	<b>Chapter No. of Laws of Hong Kong</b>	<b>Ordinance and Section</b>
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Operating a gambling establishment	Cap. 148	Section 5, Gambling Ordinance
Criminal intimidation	Cap. 200	Section 24, Crimes Ordinance
Living on earnings of prostitution of others	Cap. 200	Section 137, Crimes Ordinance
Keeping 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
Robbery	Cap. 210	Section 10, Theft Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance
Conspiracy to defraud	—	Common Law

**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)]**

	<b>Number of persons arrested</b> <sup>Note 1</sup>		
	<b>Subject</b>	<b>Non-subject</b>	<b>Total</b>
Interception	85	167	252

**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)]**

	<b>Number of persons arrested</b> <sup>Note 2</sup>		
	<b>Subject</b>	<b>Non-subject</b>	<b>Total</b>
Surveillance	21	23	44

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Note 1 Of the 252 persons arrested, 35 were attributable to both interception and surveillance operations that had been carried out.

Note 2 Of the 44 persons arrested, 35 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 261.

**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) & (ii)]**

(i)	Number of device retrieval warrants issued	0
	Average duration	-
(ii)	Number of applications for device retrieval warrants refused	0

**Table 5**

**Summary of reviews conducted by the Commissioner under section 41  
[section 49(2)(d)(i)]**

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
<p><b><u>Section 41(1)</u></b> Reviews on compliance by departments and their officers with relevant requirements, as the Commissioner considers necessary</p>		
(a) Regular reviews on weekly reports	208	<p>Interception &amp; Surveillance</p> <p>LEAs are required to submit weekly reports to the Secretariat providing relevant information on authorizations obtained, applications refused and operations discontinued in the preceding week, for checking and review purposes. During the report period, a total of 208 weekly reports were submitted by the LEAs.</p>
(b) Periodical inspection visits to LEAs	28	<p>Interception &amp; Surveillance</p> <p>In addition to the checking of weekly reports, the Commissioner had paid 28 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 878 applications and 356 related documents/matters had been checked.</p> <p>(See paragraphs 2.22, 3.22, 3.23 and 3.28 of this report.)</p>



<b>Number of reviews conducted under section 41(1)</b>		<b>Interception/ Surveillance</b>	<b>Summary of reviews</b>
(c) LPP cases reviewed by the Commissioner	35	Surveillance & Interception	<p><u>First case of possible obtaining of LPP information</u></p> <p>At the grant of a prescribed authorization for Type 2 surveillance, the operation was not assessed to have a likelihood of obtaining LPP information. Subsequent to the commencement of the operation, the LEA considered that LPP information might have been inadvertently obtained. An REP-13 report and a discontinuance report were subsequently submitted to the authorizing officer who duly revoked the prescribed authorization.</p> <p>Having reviewed the circumstances of the case, the LEA formed the view that there was a heightened likelihood of obtaining LPP information in an interception related to the same investigation case. An REP-11 report and a discontinuance report in respect of the interception were subsequently submitted to the panel judge who revoked the authorization.</p> <p>The LEA stated in the report of the result of the screening of surveillance product that a certain part of the audio recording might contain LPP information, while the remaining conversation largely concerned the matters under investigation.</p> <p>On the basis of the information provided by the LEA, it was arguable that LPP information had been obtained in the</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Surveillance	<p>surveillance operation. Nevertheless, the matter was handled by the LEA in compliance with paragraph 121 of the COP. As the Commissioner had not listened to the surveillance and interception products, no finding could be made as to:</p> <p>(a) the veracity of the record of the conversations of the relevant meeting as stated in the REP-13 report and the report on screening of the surveillance product prepared by the LEA; and</p> <p>(b) whether there were any communications subject to LPP in the surveillance and interception products listened to by the LEA officers.</p> <p>Subject to these qualifications, no irregularity was found.</p> <p>(See paragraphs 4.8 – 4.13 of Chapter 4.)</p> <p><u>Second case of possible obtaining of LPP information</u></p> <p>At the grant of a prescribed authorization for Type 2 surveillance, the operation was not assessed to have a likelihood of obtaining LPP information. Subsequent to the commencement of the operation, the LEA considered that LPP information might have been inadvertently obtained. An REP-13 report and a discontinuance report were subsequently submitted to the</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>authorizing officer who duly revoked the prescribed authorization.</p> <p>After the screening of the relevant surveillance product, the LEA found that no LPP information had been obtained.</p> <p>On the basis of the information provided by the LEA, the Commissioner agreed that no LPP information had been obtained in the surveillance operation. As the Commissioner had not listened to the surveillance product, no finding could be made as to:</p> <ul style="list-style-type: none"> <li>(a) the veracity of the record of the conversations of the relevant meeting as stated in the report on screening of the surveillance product prepared by the LEA; and</li> <li>(b) whether there were any other communications subject to LPP in the surveillance product listened to by the LEA officers.</li> </ul> <p>Subject to these qualifications, no irregularity was found.</p> <p>(See paragraphs 4.14 – 4.17 of Chapter 4.)</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception & Surveillance (33 reviews)	<p><u>Other cases</u> All the relevant documents and records were checked and nothing untoward was found except the inadvertent unauthorized interception mentioned in Report 2 of Chapter 6.</p> <p>(See paragraphs 4.7, 4.18 - 4.21 of Chapter 4.)</p>
(d) Incidents/ irregularities reviewed by the Commissioner	9	Surveillance	<p><u>Report 1</u> A Type 2 surveillance operation was discontinued but upon the return of surveillance devices, it was erroneously represented in the device register that the operation would continue as the storekeeper mistakenly selected the checkbox of 'Continue' when processing the return of the devices through the DMS. The LEA considered that the mistake was due to carelessness or a momentary lack of concentration of the storekeeper. The storekeeper had been reminded to be more vigilant in handling ICSO-related duties and follow proper procedures in the control of surveillance devices. The Commissioner considered that there was no evidence of improper conduct on the part of the storekeeper and agreed that she should be reminded to be more vigilant in her duties.</p> <p>(See paragraphs 6.6 - 6.9 of Chapter 6.)</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception	<p><u>Report 2</u></p> <p>At the grant of the prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. In the course of the operation, the LEA considered that there was a heightened likelihood of obtaining LPP information through continued interception as a result of the Reported LPP Call and the subsequent revelation of the subject's arrest by another LEA. The LEA then submitted an REP-11 report and a section 58 report to the panel judge, requesting to continue with the interception. The panel judge considered that the conditions for the continuance of the prescribed authorization were not met and revoked the prescribed authorization. The facility was disconnected 22 minutes after revocation of the prescribed authorization.</p> <p>Having conducted a review, the Commissioner made the following findings:</p> <p>(a) the interception after revocation of the prescribed authorization and before the disconnection of the facility was conducted without the authority of a prescribed authorization. The unauthorized interception lasted 22 minutes; and</p>

<b>Number of reviews conducted under section 41(1)</b>		<b>Interception/ Surveillance</b>	<b>Summary of reviews</b>
			<p>(b) no call was intercepted during the period of unauthorized interception.</p> <p>As the Commissioner had not listened to the interception product, no finding could be made as to the veracity of the record of the conversations of the relevant call as stated in the REP-11 report and whether there were any other communications subject to LPP in the interception product listened to by the LEA officers.</p> <p>The unauthorized operations resulting from the time gap between the revocation of a prescribed authorization and the actual discontinuance of an operation under similar circumstances are unavoidable. The former Commissioner recommended that the ICSO should be amended to address the issue. The Administration has accepted the recommendation and proposed to amend the ICSO to the effect that if a prescribed authorization has been revoked by the relevant authority in similar cases, the LEA shall take immediate steps to discontinue the operation in question as soon as reasonably practicable.</p> <p>(See paragraphs 6.10 – 6.14 of Chapter 6.)</p>



Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Surveillance	<p><u>Report 3</u></p> <p>An LEA supervisor ('the Supervisor') omitted to indicate in one of the two device request forms that the deployment of technical support team staff in a Type 1 surveillance operation was approved. The LEA considered that the Supervisor's omission was unsatisfactory and attributable to his lack of vigilance. In addition, the officer tasked to seek the Supervisor's approval on the deployment of staff ('the Officer') should have checked the two forms after they were signed by the Supervisor. The Commissioner considered that the LEA's proposed action against the Supervisor and the Officer was acceptable, while the other five officers concerned should be reminded to be more vigilant in execution/review of ICSSO operations. The improvement measures taken by the LEA were appropriate.</p> <p>(See paragraphs 6.15 – 6.20 of Chapter 6.)</p>
		Surveillance	<p><u>Report 4</u></p> <p>An LEA officer drafted an affirmation in support of an application for Type 1 surveillance. However, an alias of a subject was not included in the draft ('the omission'). After incorporating comments from other officers, the revised draft was submitted to the Assistant Head of Department, who approved the making of the application. The application was subsequently</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>granted by the panel judge. About a week later, the LEA discovered the omission and submitted an REP-11 report on the omission to the panel judge who noted the report.</p> <p>The LEA proposed that the officers involved be each given an advice by a senior directorate officer on the need to be more vigilant in handling ICSO-related documentation and/or considering transferral of cases involving ICSO operations, and that its officers be reminded to be more vigilant in handling ICSO-related documentation and to avoid transferring cases involving ICSO operations between investigating teams as far as practicable. The relevant guiding notes had also been revised to alert the officers to include in the application any relevant alias of the subject.</p> <p>Having reviewed the case, the Commissioner made the following findings:</p> <p>(a) paragraph 114 of the COP had not been complied with. Nevertheless, by virtue of sections 63(5) and 64(1) of the ICSO, the omission itself did not affect the validity of the prescribed authorization;</p> <p>(b) the LEA's proposed action against the officers involved was acceptable; and</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception & Surveillance (5 reviews)	<p>(c) while the improvement measures recommended/ taken by the LEA were appropriate, the LEA should consider further improving its internal procedure for checking of previous ICSO applications and the report of the name/alias of the subject in the affirmation.</p> <p>(See paragraphs 6.21 – 6.26 of Chapter 6.)</p> <p><u>Other reports</u> The Commissioner has reviewed all these cases and found nothing untoward. He was satisfied with the prompt action taken by the LEAs in the investigation of the cases and their appropriate follow up actions to fix the problems.</p> <p>(See paragraph 6.30 of Chapter 6.)</p>

<b>Number of reviews conducted under section 41(2)</b>	<b>Interception/ Surveillance</b>	<b>Summary of reviews</b>	
<p><b><u>Section 41(2)</u></b>  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</p>			
(a) Report submitted under section 23(3)(b) by the head of department 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 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.

<b>Number of reviews conducted under section 41(2)</b>		<b>Interception/ Surveillance</b>	<b>Summary of reviews</b>
(c) Report submitted under section 54 by the head of department on any case of failure by the department or any of its officers to comply with any relevant requirement	1	Interception	<p><u>Report 5</u>  Part 1(b)(ix) of Schedule 3 to the Ordinance requires an applicant seeking authorization of interception to state in the affidavit in support of the application the likelihood that any information which may be subject to LPP, or may be the contents of any JM, will be obtained by carrying out the interception ('LPP/JM assessment'). A fresh application for interception was refused by a panel judge because of omission of the LPP/JM assessment in the affirmation in support of the application. At the time of the application, there was no information indicating that there would be likelihood of obtaining LPP information or information which may be the contents of any JM.</p> <p>The LEA's investigation revealed that the omission was caused by negligence on the part of the officers involved in the drafting, checking and vetting of the application. The non-compliance originated with the drafting officer who failed to include the LPP/JM assessment in the draft application document. The application was checked and vetted by the checking officer, the Team Head and subsequently the Applicant who has the prime responsibility for the accuracy and completeness of</p>

<b>Number of reviews conducted under section 41(2)</b>	<b>Interception/ Surveillance</b>	<b>Summary of reviews</b>
		<p>information in the ICSO application. The LEA proposed a verbal warning for these four officers and a verbal advice (disciplinary in nature) for three more senior officers who were also involved in the processing of the application, namely the Endorsing Officer, the Assistant Head of Department and Division Head. The LEA indicated that it would put in place measures to prevent the omission happening again.</p> <p>The Commissioner has reviewed the case and has no objection to the proposed disciplinary actions. The improvement measures to be taken by the LEA to prevent a recurrence were appropriate.</p> <p>(See paragraphs 6.27 – 6.29 of Chapter 6.)</p>



**Table 6**

**Number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)]**

<b>Number of cases of irregularities or errors identified in the reviews under section 41(1)</b>	<b>Interception/ Surveillance</b>	<b>Broad nature of irregularities or errors identified</b>
<b>Section 41(1)</b>		
(a) Reviews of LPP cases pursuant to paragraph 121 of the Code of Practice	1	Interception
<p data-bbox="940 674 1342 779"><u>One case of heightened likelihood of obtaining LPP information</u></p> <p data-bbox="940 779 1342 1032">Unauthorized interception of 22 minutes after revocation of the prescribed authorization by the panel judge. This is the Report 2 referred to in item (b) below.</p>	9	Surveillance
		<p data-bbox="940 1077 1342 1317"><u>Report 1</u></p> <p data-bbox="940 1115 1342 1317">A surveillance operation was discontinued but it was erroneously represented in the device register that the operation would continue.</p>
		Interception
<p data-bbox="940 1525 1342 1637"><u>Report 2</u></p> <p data-bbox="940 1637 1342 1854">Unauthorized interception of 22 minutes after revocation of the prescribed authorization by the panel judge. This is the case referred to in item (a) above.</p>	Surveillance	
	<p data-bbox="940 1749 1342 1854"><u>Report 3</u></p> <p data-bbox="940 1854 1342 1989">Omission of information in device request form in relation to a Type 1 surveillance operation.</p>	

Number of cases of irregularities or errors identified in the reviews under section 41(1)	Interception/ Surveillance	Broad nature of irregularities or errors identified
	<p>Surveillance</p> <p>Interception &amp; Surveillance (5 cases)</p>	<p><u>Report 4</u> Omission of subject's alias in the affirmation in support of an application for a Type 1 surveillance operation.</p> <p><u>Other reports</u> These included four incidents of technical problems of the computerised systems/ equipment and one case on clerical mistake made in the application document.</p> <p>(For details, see item (d) under section 41(1) in Table 5 and Chapter 6.)</p>

Number of cases of irregularities or errors identified in the reviews under section 41(2)	Interception/ Surveillance	Broad nature of irregularities or errors identified
<b>Section 41(2)</b>		
(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
(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
(c) Reviews on non-compliance cases as reported by the head of department under section 54	1	<p data-bbox="699 1541 890 1579">Interception</p> <p data-bbox="938 1541 1343 1792"><u>Report 5</u> Omission of an assessment of likelihood of obtaining LPP/JM information in the affirmation in support of an application for interception.</p> <p data-bbox="938 1825 1343 1930">(For details, see item (c) under section 41(2) in Table 5 and Chapter 6.)</p>

**Table 7**

**Number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)]**

Number of applications received	Applications for examination in respect of			
	Interception	Surveillance	Both Interception and Surveillance	Cases that could not be processed
19	1	1	12	5

**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)]**

Number of notices to applicants given by the Commissioner		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)] <sup>Note 3</sup>	14	1	1	12

<sup>Note 3</sup> Of the 14 notices, 11 were issued during the report period and three thereafter.

**Table 9**

**Number of cases in which a notice has been given by  
the Commissioner under section 48 [section 49(2)(d)(v)]**

	<b>Number of cases in which a notice has been given in relation to</b>	
	<b>Interception</b>	<b>Surveillance</b>
Notice to the relevant person by the Commissioner stating that he considers that there has been a case of interception or surveillance carried out by an officer of a department without the authority of a prescribed authorization and informing the relevant person of his right to apply for an examination [section 48(1)]	0	0

**Table 10**

**Broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)]**

<b>Recommendations made by the Commissioner</b>		<b>Interception/ Surveillance</b>	<b>Broad nature of recommendations</b>
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]	Nil	Not applicable	Not applicable
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the Code of Practice [section 52]	10	Interception & Surveillance	<ul style="list-style-type: none"> <li>(a) Using tamper-proof labels to seal the RSM inside the devices at the time of issue and using QR Code to facilitate issue and return of the RSM through DMS.</li> <li>(b) Recording the reason for making post-entry records in DMS.</li> <li>(c) Changing the wording 'Device Authorized' in the Records of Issue and Records of Return to 'Type of Device Authorized' to make its meaning clearer.</li> <li>(d) Adding a function to the computerised application</li> </ul>



<b>Recommendations made by the Commissioner</b>	<b>Interception/ Surveillance</b>	<b>Broad nature of recommendations</b>
		<p>system to allow applicants to withdraw an application and the Endorsing Officer or Approving Officer to note the withdrawal.</p> <p>(e) Providing sufficient information in an application for Type 2 surveillance.</p> <p>(f) Including comprehensive information and full versions of events in the Review Form for review by the Reviewing Officer.</p> <p>(g) Reporting specifically the discontinuance of a statutory activity on the accomplice of the subject for the same investigation case in the application documents.</p> <p>(h) Giving detailed and accurate description of the reason for discontinuance of a statutory activity in a discontinuance report.</p> <p>(i) Standardizing the shorthand/symbols used in the listener's notes.</p> <p>(j) Improving internal procedures for checking of previous ICSO applications and the report of the name/alias of the subject in the affirmation.</p> <p>(See paragraph 7.2 of Chapter 7.)</p>

**Table 11**

**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)]**

	<b>Number of cases</b>
Interception	0
Surveillance	1

**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)]**

<b>Case number and nature of operation</b>	<b>Brief facts of case</b>	<b>Broad nature of the disciplinary action</b>
<p><u>Case 1</u> Interception</p>	<p>Three officers failed to obtain verification of their understanding or interpretation of the revised additional conditions (which as it transpired was incorrect) and the manner in which they sought clarification from the PJO was unsatisfactory.</p> <p>(See paragraphs 7.6 – 7.9 of Chapter 7 of Annual Report 2012.)</p>	<p>Verbal warning</p>
<p><u>Case 2</u> Interception</p>	<p>An officer failed to verify the accuracy of information in respect of an LPP case before passing the same to the Commissioner or his staff.</p> <p>(See paragraph 5.11 of Chapter 5 of Annual Report 2012.)</p>	<p>Verbal advice</p>

8.2 In accordance with section 49(2)(e), the Commissioner is 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 9.

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## **CHAPTER 9**

### **REVIEW OF COMPLIANCE BY LAW ENFORCEMENT AGENCIES**

#### **Overall compliance**

9.1 As set out in section 40 of the Ordinance, the functions of the Commissioner are to oversee the compliance by departments and their officers with the relevant requirements and to conduct reviews, etc. It is also stipulated under section 49(2)(e) of the Ordinance that the Commissioner shall set out in the annual report an assessment on the overall compliance with the relevant requirements during the report period. My assessment of the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2013 is set out below.

#### **Preparation of applications**

9.2 The first and foremost of the requirements under the Ordinance 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. Whether a prescribed authorization should be granted is expressly based on the necessity and proportionality principles i.e. the interception or covert surveillance is necessary for, and proportionate to, the purpose sought to be furthered by carrying it out upon balancing the relevant factors against the intrusiveness of the interception or covert surveillance on any person who is to be the subject of or may be affected by the interception or covert surveillance; and considering whether the purpose sought to be

furthered by carrying out the interception or covert surveillance can reasonably be furthered by other less intrusive means.

9.3 During the report period, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. A majority of the applications for interception and covert surveillance were granted by the panel judges and the authorizing officers. In 2013, seven out of 1,372 applications for interception and four out of 51 applications for covert surveillance were refused. Apart from one case where the LEA omitted to include an assessment of LPP/JM likelihood in the application, the major reasons for refusal in the other cases include inadequate materials to support allegations advanced; the application for interception was considered non-proportionate to the public interests (i.e. the condition of proportionality was not met); and no or limited information had been obtained from interception operations conducted under previous authorizations.

9.4 I consider that the LEAs should continue to adopt this cautious approach as it will ensure strict compliance with not only the actual requirements of the legislation but also the spirit of same.

### **Reviews by the Commissioner**

9.5 There were different ways by which compliance with the requirements of the Ordinance in respect of interception and covert surveillance by the LEAs was reviewed as set out in paragraph 2.16 of Chapter 2 and paragraph 3.19 of Chapter 3. These included checking of the weekly reports submitted by the LEAs and the PJO, periodical examination of the contents of the LEA files and documents during inspection visits to the LEAs. Where necessary, the LEA concerned



would be requested to respond to queries. For interception operations, counter-checking the facilities intercepted with non-LEA parties such as CSPs and through other means would be done. For covert surveillance operations, there would be checking of the records kept by the surveillance device recording system of the LEAs.

9.6 In the report period, there was one case of inadvertent unauthorized interception (i.e. Report 2 in Chapter 6) which was revealed and reported by the LEA. Apart from this case, there was no other wrong or unauthorized interception revealed by the various forms of checking. In respect of covert surveillance, cases checked during inspection visits were found to be in order while some areas for improvement were identified, namely:

- (a) authorizing officers should take a critical approach when considering Type 2 applications and when necessary, seek clarification and explanation from the applicant before they come to any determination; and
- (b) comprehensive information and full versions of events should be included in the Review Form for the Reviewing Officer to conduct the review properly and for the Commissioner to exercise his oversight function effectively.

There was no sign of abuse of surveillance devices for any unauthorized purposes during the report period.

### **Handling of LPP and JM cases**

9.7 Paragraph 121 of the COP obliges the concerned LEA to notify the Commissioner of cases that are likely to involve LPP information or JM. I am also timeously alerted to cases involving or

possibly involving LPP and JM through the examination of the weekly reports submitted by the LEAs, with sanitized copies of the relevant REP-11/REP-13 reports reporting on any material change of circumstances after the issue of a prescribed authorization including changed LPP and JM risks.

9.8 The LEAs did recognise the importance of protecting information which might be subject to LPP/JM. They continued to adopt a very cautious approach in handling these cases. Nevertheless, in the report period, there was one case of an omission of an LPP/JM assessment in an application for interception operation. Other than this, no irregularities were found.

### **Reports of non-compliance/irregularities**

9.9 Under section 54 of the Ordinance, the heads of LEAs are to submit reports to the Commissioner if they consider that there may have been any case of failure by the department or any of its officers to comply with any relevant requirement of the Ordinance. They are also required to report to the Commissioner cases of irregularity or even simply incidents. Hence, I am able to have all cases of possible non-compliance brought to my attention for examination and review without any delay.

9.10 In 2013, ten reports of non-compliance/irregularities/incidents were received from LEAs. The report on the non-compliance case involving the omission of LPP/JM assessment was submitted by the LEA concerned under section 54 of the Ordinance. As regards the case on an omission of a subject's alias in the affirmation in support of an application for a Type 1 surveillance operation, I had made the finding that paragraph 114 of the COP had not been complied with. It is noted

that under section 63(5), a failure on the part of any person to comply with any provision of the COP is for all purposes not of itself to be regarded as a failure to comply with any provision of the ICSO. In the report period, there is no finding that any of the other cases of irregularities/incidents was due to deliberate disregard of the statutory provisions, the COP or the control of surveillance devices.

9.11 In conclusion, while the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2013 was, in general, satisfactory, I was naturally disappointed to learn of the non-compliance case where the applicant failed to make an assessment of the likelihood of LPP/JM in the application leading to refusal of the application by the panel judge. First, because the failure to include such a fundamental statutory requirement in an application is a serious matter given the reasons why such an assessment is required to be made in any application. Secondly, it was disconcerting to note that the omission was not detected by the LEA throughout the checking process in the preparation of the application by the chain of officers. This suggests to me that the LEAs need to look critically at their processes to prevent similar recurrence. It is also unfortunately a clear example of what I have highlighted in my last annual report; the LEAs need to develop a more focused and responsible mind set in officers at all levels responsible for the operation of the ICSO scheme. It is only when this is done that errors will be prevented. I consider there is a continuous need for the LEAs and their officers to exert more efforts in this aspect of their work and training to further improve their performance in carrying out the ICSO-related duties.

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# **CHAPTER 10**

## **ACKNOWLEDGEMENT AND WAY FORWARD**

### **Acknowledgement**

10.1 I wish to thank the panel judges, the Security Bureau, the LEAs as well as the CSPs for their co-operation and assistance in the performance of my functions as the Commissioner. I am grateful to each and every one of them and look forward to their continued support in the course of my term of office.

### **Way forward**

10.2 The Administration has undertaken a comprehensive review of the Ordinance with the aim of further enhancing the operation of the ICSO regime. In 2013, it has reported its findings and recommendations at a meeting of the Panel on Security of the LegCo. In brief, the Administration planned to take forward a number of legislative proposals to strengthen the power of the panel judges and the Commissioner as well as to enhance the clarity of a number of provisions. These proposals mainly cover the following areas:

- (a) checking of protected products by the Commissioner;
- (b) power of panel judges and authorizing officers on (i) partial revocation of a prescribed authorization; (ii) revocation of prescribed authorization on grounds of material inaccuracies or material change in circumstances; (iii) revocation of device retrieval warrant; and (iv) variation of conditions in prescribed authorizations;

- (c) the proper construction of the terms 'relevant person' and 'duration';
- (d) time gap between the revocation of the prescribed authorization and the actual discontinuance of the operation;
- (e) reporting of non-compliance to the Commissioner; and
- (f) discrepancy in the English and Chinese versions of a provision in section 26 of the ICSO.

10.3 Amongst the several recommendations advised, I am pleased to note that the Administration has accepted the recommendation to empower the Commissioner to check the protected products. It has proposed to amend the ICSO to make an express provision to empower the Commissioner, for the purpose of performing his functions under the ICSO, to require any public officer or any other person to provide protected products for his inspection irrespective of whether the products contain LPP information or not. The proposed measure is, in my view, the primary tool which would expose any malpractices of the LEAs and their officers and likewise act as a forceful deterrent against such malpractices or their concealment. It would greatly assist the Commissioner in performing his statutory duties because it is no longer necessary for the Commissioner to rely solely on the voluntary reporting by the LEAs on any cases of non-compliance and irregularities.

10.4 I understand that the Administration has commenced the law drafting process for an amendment bill in 2013 and it has promised to engage me and the panel judges during the law drafting process. I look forward to the early implementation of the new proposals.