



Annual Report 2015 to the Chief Executive

by

The Commissioner on
Interception of Communications
and Surveillance

June 2016



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

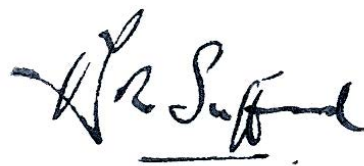
CONFIDENTIAL

Dear Sir,

Annual Report for the Year 2015

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 2015, together with its Chinese translation.

Yours sincerely,



(A. R. Suffiad)
Commissioner on Interception of
Communications and Surveillance

Encl: Annual Report for 2015

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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
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, Ordinance	Interception of Communications and Surveillance Ordinance
interception	interception of communications

JM	journalistic material
LEA	a law enforcement agency under the Ordinance, namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department or Independent Commission Against Corruption
LPP	legal professional privilege
LPP information	information protected by legal professional privilege
non-ICSO purpose	purpose which is not related to ICSO
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 media
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 2015
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 Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance (Cap. 589) ('Ordinance' or 'ICSO'), the Commissioner on Interception of Communications and Surveillance ('Commissioner') is required to submit to the Chief Executive an annual report ending on 31 December in each year. I was appointed as the Commissioner on 17 August 2015 for a term of three years and this is my first annual report. This report covers the period 1 January to 31 December 2015 which overlaps the term of office of my predecessor, Mr D. G. Saw, the second Commissioner whose term expired on 16 August 2015.

1.2 The Ordinance provides a statutory regime to regulate the conduct of interception of communications, through the post or through the use of telecommunications facilities, and covert surveillance by the use of surveillance devices (collectively called 'statutory activities') by public officers of the four law enforcement agencies ('LEAs'), namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption. The regulation is to ensure that these statutory 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 under section 63 of the Ordinance and other relevant requirements.

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.

1.5 An important function of the Commissioner is to oversee the compliance by the LEAs and their officers with the relevant requirements of the scheme of the ICSO. When this function is engaged, the objects and spirit of the Ordinance must be at the forefront of the oversight. Another function of the Commissioner is to make recommendations to the Secretary for Security on the COP and to the LEAs on their arrangements to better carry out the objects of the Ordinance and the provisions of the COP.

1.6 About ten years have elapsed since the inception of the Ordinance and the establishment of the office of the Commissioner in August 2006. It is apparent that much has been achieved in the regulation of the statutory activities conducted under the Ordinance over the past years. This must be attributed to the dedication of my predecessors to their responsibilities as the Commissioner. I would like to acknowledge the significant contribution made by my predecessors and the staff in the operation of the Secretariat, Commissioner on

Interception of Communications and Surveillance ('Secretariat'). Well-established mechanisms and procedures have been put in place in the Secretariat to assist the Commissioner in performing his various functions under the Ordinance. I will not hesitate to pledge that I will discharge the oversight and review functions of the Commissioner with full commitment in like manner as the two former Commissioners.

1.7 Soon after I assumed office, I have met with the heads of the four LEAs, namely, the Commissioner of Customs and Excise, the Commissioner of Police, the Director of Immigration and the Commissioner, Independent Commission Against Corruption. I was briefed by them and their senior officers on the operation of the ICSO in their respective agencies. I was assured of their determination to uphold the objects of the ICSO and to ensure strict compliance with the ICSO, the COP and other relevant requirements.

1.8 From August to December 2015, I had meetings as well as correspondence with the senior officers of the Security Bureau discussing the legislative amendments proposed under the Interception of Communications and Surveillance (Amendment) Bill 2015, which aimed to amend the Ordinance to give effect to the first Commissioner's recommendations.

1.9 I am very glad to see that the Bill was passed on 16 June 2016 and the enactment took effect on 24 June 2016. The legislative amendments strengthen the power of the panel judges and the Commissioner and also enhance the effectiveness of the regulatory regime and the clarity of a number of provisions in the Ordinance. For the Commissioner, with the express power to listen to and inspect the protected products, my staff and I are able to better check the veracity of the contents of the recordings stated in the reports submitted by the LEAs. At the time of compiling this report, we are yet to examine the recordings

of the protected products. We will commence the checking once the necessary logistical arrangements, which are in progress, are completed.

1.10 In October 2015, I also met with the panel judges to exchange views on a number of issues, including application for issue/renewal of authorizations under the ICSO and reporting requirements, with a view to enhancing the procedural arrangements. The views of the panel judges were subsequently conveyed to the LEAs. Further enhancement of the operation of the ICSO scheme is expected.

1.11 As my predecessors, I shall continue to work together with the LEAs to devise measures to tackle existing and anticipated problems in relation to the operation of the ICSO. Recommendations on the COP will also be made should the need arise. This engagement is significant for the benefits of the society in respect of protection of privacy and other rights of individuals. Regarding the recommendations made by the former two Commissioners, I note that the Security Bureau and the LEAs have either accepted them in full or adopted alternative ways to address the Commissioners' concerns or rectify the problems identified.

1.12 In this annual report, I have continued the practice of providing the utmost transparency of my work as the Commissioner, while taking care not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security. I must point out that it is crucial not to reveal information that might be useful to 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.

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 1,430 written applications for interception made by the LEAs, of which 1,428 were granted and two were refused by the panel judges. Among the successful applications, 691 were for authorizations for the first time ('fresh applications') and 737 were for renewals of authorizations that had been granted earlier ('renewal applications').

Reasons for refusal

2.3 The two refused applications were fresh applications, which were refused because the materials provided to support the allegations put forth were inadequate/insufficient.

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 of any person, 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. 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 68% 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 about 44 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, has a responsibility to discontinue an interception (and also covert surveillance) 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 620. Another 88 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 was 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 legal professional privilege ('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 130 arrests but only four section 58 reports were made to the panel judge. The panel judge allowed the interception operations related to the four section 58 reports to continue subject to additional conditions to guard against the risk of obtaining LPP information. As regards the other arrest cases, decisions were made by the LEAs concerned to discontinue the interception operations 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 33 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. It has to be pointed out that under section 61 of the Ordinance, any telecommunications interception product shall not be admissible in evidence in any proceedings before any court other than to prove that a relevant offence has been committed. Therefore, whatever is obtained by way of interception can only be used by way of intelligence. The intelligence gathered from interception very often leads to a fruitful and successful conclusion of an investigation. During the report period, a total of 112 persons, who were subjects of prescribed authorizations, were arrested as a result of or further to interception operations. In addition, 158 non-subjects were also arrested consequent upon the interception operations.

Procedure of oversight for interception

2.16 The LEAs' compliance with the requirements of the Ordinance in respect of the interception cases reported in 2015 was reviewed by the following ways:

- (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 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 journalistic material 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 originals 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 738 applications for interception, including granted authorizations and refused applications, and 320 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 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 During the report period, there was no case of wrong or unauthorized interception revealed by the various forms of checking (the wrong interception case mentioned in Chapter 6 was an outstanding case carried forward from 2014).

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 LEA 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 the report period, there were a total of:
- (a) 37 written applications for Type 1 surveillance including 14 fresh and 23 renewal applications; and
 - (b) 13 written applications for Type 2 surveillance, all of which being fresh applications.
- 3.4 No application for Type 1 or Type 2 surveillance was refused.

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 due to an imminent risk of death or serious bodily harm of any person, 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 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 the report period, there were three oral applications for Type 2 surveillance, all of which were granted and confirmed within 48 hours from the issue of the authorization. No oral application for Type 1 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 the report period was 28 days whereas the shortest one was about four days. Overall, the average duration for such authorizations was about 20 days. In the report period, the longest approved duration of Type 2 surveillance granted was about 31 days while the shortest one was less than a day. The overall average duration of Type 2 surveillance executive authorizations was about six days.

Offences

3.11 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

3.12 During the report period, 18 Type 1 surveillance operations were discontinued under section 57 of the ICSO before the natural expiration of the prescribed authorizations. The grounds for discontinuance were mainly that the subject was arrested or the surveillance had been carried out. 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 18 discontinuance cases, 14 prescribed authorizations concerned were subsequently revoked by the panel judge. For the remaining four 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 authorizations.

3.13 As regards Type 2 surveillance cases, during the report period, 16 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 anticipated event to be monitored did not materialize. 13 of the prescribed authorizations concerned were subsequently revoked by the authorizing officer. For the remaining three cases, the prescribed authorizations concerned had expired by the time the authorizing officer received the discontinuance reports. While the authorizing officer could only note the discontinuance instead of revoking the prescribed authorizations, the authorizing officer in one of these three cases wrongly revoked the prescribed authorization after its expiry and details of the case are mentioned in paragraph 3.25(b) below.

3.14 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 the report period, the LEAs were aware of the arrest of a total of 23 subjects under Type 1 surveillance but only three reports were made to the panel judge under section 58 seeking continuation of prescribed authorizations. In these three cases, the panel judge allowed the surveillance operations to continue subject to an additional condition imposed to guard against the risk of obtaining LPP information. As regards Type 2 surveillance, during the report period, no report was made to the authorizing officer 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.

3.15 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 the LEAs were appreciative of the risk of obtaining LPP information after an arrest.

Authorizations with five or more previous renewals

3.16 There were three authorizations for Type 1 surveillance 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 surveillance operations. All these cases were checked and found in order. On the other hand, no authorization for Type 2 surveillance had been renewed for more than five times.

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 at the time of 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 34 persons who were subjects of the prescribed authorizations were arrested. In addition, 16 non-subjects were also arrested in consequence of such operations.

Procedure of oversight for covert surveillance

3.19 The LEAs' compliance with the requirements of the Ordinance in respect of covert surveillance cases reported in 2015 was reviewed by the following 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 covert 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, 50 applications for Type 1 surveillance and 32 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 the 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 17 related documents/matters had been checked.

3.24 For cases where surveillance devices have been withdrawn under a prescribed authorization but no surveillance operation is carried out, the Commissioner would examine the following matters:

- (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.

Such cases are included for examination in the inspection visits, at which the relevant case documents are checked and the LEAs concerned are requested to answer queries where necessary. In the report period, the examination of these cases did not reveal any sign of use of surveillance devices for any unauthorized purposes.

3.25 Generally speaking, the covert surveillance cases checked 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, it was noted that in respect of an oral application for Type 2 surveillance, there was a malfunction in the computerised device management system ('DMS') in the device store of the LEA and so manual register had to be used for the issue of devices. However, there was no reference to this in the Review Form. The LEA admitted that the malfunction should have been included in the Review Form. It was also noted that there were no guidelines for the reviewing officer to conduct review on surveillance operations. To address the issue, the LEA devised a set of guidelines to assist its officers to conduct the review and complete the Review Form properly.

- (b) In reviewing a Type 2 surveillance authorization during an inspection visit to an LEA, I noticed that the authorizing officer revoked the prescribed authorization upon receipt of the discontinuance report which was submitted after the expiry of the authorization. I commented that the authorizing officer should have noted the discontinuance report instead of revoking the prescribed authorization. The LEA noted my comment and it also subsequently briefed and reminded the officers concerned on the matter.

Checking of surveillance devices

3.26 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.

3.27 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 lists 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

3.28 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.

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

Removable storage media

3.30 To better control the issue and return of surveillance devices, all the LEAs have adopted the DMS in their device stores. My predecessor previously 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. I note that the LEAs have adopted the use of tamper-proof labels to seal the RSM inside the devices at the time of issue, and that they have also adopted or are making arrangements for the use of QR Code to facilitate the issue and return of the RSM through DMS.

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, reports from the LEAs on three cases relating to surveillance devices for non-ICSO purposes were received. Details of these cases are described below.

A. The information on redeployment of devices for use in a non-ICSO operation was wrongly input into the DMS

3.33 An LEA reported an incident in which a device storekeeper made a wrong record in the DMS that three surveillance devices issued for maintenance purpose were redeployed for use in a non-ICSO operation. In fact, no redeployment of the three surveillance devices was made.

3.34 Some surveillance devices issued initially for a non-ICSO operation were redeployed for use in another non-ICSO operation. When the device storekeeper recorded the redeployment in the DMS, he first viewed the list of devices which had yet to be returned to the device store. At that time, apart from the redeployed devices, the list also included three surveillance devices which were issued for maintenance purpose and also yet to be returned. The device storekeeper wrongly selected all the devices on the list (including those three issued for maintenance) to make the redeployment record. As a result, it was incorrectly recorded in the DMS that the three surveillance devices issued for maintenance purpose were also redeployed for use in the non-ICSO operation. Shortly after making the redeployment record, the device storekeeper realised the mistake. He reported the mistake to his supervisor immediately and admitted his fault. Prompt action was also taken by the device storekeeper to add a remark in the DMS to record the mistake made.

3.35 The LEA concluded that the mistake was due to the carelessness on the part of the device storekeeper and there was no evidence to suggest any malicious act or ulterior motive behind the mistake. The LEA proposed to issue a verbal advice (disciplinary in nature) to the device storekeeper to remind him of the need to be more vigilant in handling surveillance devices and using DMS. All other relevant officers who might have to use the redeployment function in the

DMS were reminded to be careful in selecting the correct items of devices for making redeployment record.

3.36 Having reviewed the case, I agreed with the LEA's findings that the mistake was due to the carelessness of the device storekeeper and there was no evidence to suggest any malicious act or ulterior motive behind the mistake. I considered the proposed disciplinary action against the device storekeeper appropriate.

B. Failure to return devices for non-ICSO purposes before expiry of approved period

3.37 An LEA reported to me a case of irregularity in relation to a failure to return surveillance devices for non-ICSO purposes ('non-ICSO devices') before the expiry of the approved period for the use of the devices ('approved period').

3.38 Several surveillance devices were issued for a non-ICSO operation. On the day of expiry of the approved period, an officer of the device registry concerned of the LEA logged on the DMS and was alerted by the system that the approved period had expired and the devices issued had not been returned. The officer who made the request for the use of the devices ('Requesting Officer'), his supervisor ('Supervising Officer') and the senior officer who approved the request for the use of the devices ('Approving Officer') were informed of the matter. In view of the operational circumstances, the Approving Officer gave a covering approval for the continual use of the devices in the operation.

3.39 According to the LEA's investigation report, the officers concerned failed to take the necessary steps to ensure a timely renewal of approval be obtained for the continual use of the devices. The mechanism notifying parties involved of the expiry of the approved period in a computer system of the LEA did not seem to work effectively on the occasion in question. The alert mechanism in the DMS installed

in the device registry failed to serve its intended purpose as officers of the device registry would not access the system until they were required to log on the DMS to process the issue and/or return of non-ICSO devices or to check the status of devices. The investigation report also stated that the decision of the Approving Officer to give the covering approval, though undesirable, was made under an exceptional circumstance. The LEA recommended that the Requesting Officer, the Supervising Officer, the Approving Officer and the officer-in-charge of the device registry each be given an advice on the need to be more vigilant in the matter.

3.40 I noted from the investigation report that the Supervising Officer did not appear to have a clear understanding of his role and duties in respect of the issue and return of non-ICSO devices. I also observed that the Requesting Officer did not follow the general practice of his office on reminding officers concerned of the expiry of the approved period nor follow the instruction of his supervisor to bring up the matter when the approved period was about to expire. The Supervising Officer and Requesting Officer appeared to have displayed a lax attitude in discharging their duties and this led to the undesirable consequence of granting of covering approval after the expiry of the approved period. I made further enquiries with the LEA on a number of issues and asked for a review as to whether the proposed advice was too lenient for the Supervising Officer and the Requesting Officer. In its reply, the LEA revised the recommended action against the Supervising Officer and the Requesting Officer to verbal warning for their lack of alertness and vigilance.

3.41 Having reviewed the case, I considered that the irregularity was the result of a combination of ineffective notification/alert mechanisms in respect of expiry of the approved period and lack of alertness and vigilance of the LEA officers concerned. I agreed with the LEA that there was no evidence to suggest the officers concerned having deliberately disregarded the expiry of the approved period or

intentionally withheld the return of the devices. The proposed advice to be given to the Approving Officer and the officer-in-charge of the device registry and the revised recommended action (i.e. verbal warning) against the Supervising Officer and the Requesting Officer were acceptable. The improvement measures taken by the LEA, including the adoption of new procedures and enhancement of computer system regarding the notification/alert mechanisms relating to expiry of the approved period, were appropriate.

C. Deletion of unserviceable surveillance devices from inventory lists pending disposal of the devices

3.42 Three surveillance devices in an LEA were issued “for disposal” and they were returned to the respective device stores several days later. In checking the monthly return in respect of device registers and inventory lists of surveillance devices, the LEA found that the entries of the three surveillance devices in the respective inventory lists were crossed out on the day they were returned to the device stores notwithstanding that there were no details about disposal of the devices. The LEA submitted a report on the findings of its investigation into this seeming abnormality.

3.43 According to the report from the LEA, the coordinator of the device stores concerned found that the three surveillance devices in question were unserviceable. Before arrangement was made for their disposal, the three surveillance devices were issued from the respective device stores and sent to a technical division which previously owned these devices for confirmation of their ownership. In requesting and recording the issue of the surveillance devices, “for disposal” was entered as the purpose of the issue in the request memo and the device registers. Several days later, the technical division confirmed that the three surveillance devices were not on its inventory record and also advised that the devices were not serviceable. The three surveillance devices

were returned to the device stores and the return was recorded in the device registers. Having considered the reply of the technical division, the officer, who was responsible for recommending disposal of surveillance devices, then decided to go ahead with disposal of the three surveillance devices. To prevent any issue of the three surveillance devices by mistake, the officer crossed out their entries in the inventory lists and instructed the relevant device storekeepers to store the devices separately and securely pending disposal.

3.44 In the LEA's report, in respect of movement records of surveillance devices in the device registers, the LEA considered that in this case a remark should have been added at the time of issue to explain the purpose of issue in more detail and at the time of return to record the advice of the technical division. A suitable remark should also be added to the relevant inventory record to show the condition and status of the devices.

3.45 After the incident, the device store managers and device storekeepers of the division concerned were reminded of the need to make clear record and remarks in the device registers if the issue of devices was for a special reason other than normal non-ICSO operations or purposes. All device store managers had also been reminded that deletion of the inventory record of unserviceable or obsolete surveillance devices should only be made after approval for disposal was obtained from the proper authority and a suitable remark should be made in the inventory list. They were also reminded that the surveillance device concerned should be put aside in a secure place in the device store with a suitable label "Pending Disposal" so that the device would not be issued by mistake. The LEA would amend the relevant guidelines to clarify the procedures.

3.46 I noted the LEA's findings and improvement measures.

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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 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 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 For 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 Regarding cases with assessment that there was likelihood of involving LPP information, the panel judges would impose additional conditions if they granted the authorization or allowed it to continue. 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.

4.5 There is a set of reporting and preservation requirements for cases involving LPP information. In particular, in the report period, for interception operations involving telephone calls, when an LEA encountered a call with LPP likelihood, heightened LPP likelihood or LPP information, the LEA was required to submit an REP-11 report to the panel judge in respect of this call. This was named a 'Reported LPP Call' irrespective of whether LPP information had indeed been obtained. The reporting officer had to disclose in the report the number of times the Reported LPP Call had 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 were 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 were intercepted before or after the Reported LPP Call. If there were such 'other calls', the reporting officer was also required to state whether they had 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 recorded 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 were 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. LEAs were required to make similar arrangements also for cases where journalistic material ('JM') was involved or likely to be involved.

4.6 In the event that LPP information has been inadvertently obtained in covert surveillance operations, 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.

Outstanding LPP case in 2014

4.7 It was reported in paragraph 4.20 of the Annual Report 2014 that there was one LPP heightened likelihood case of which crime investigation was still in progress. The relevant interception

operation was discontinued in 2015. The review of this case had been completed and nothing untoward was found.

LPP reports received in 2015

4.8 In the report period, LEAs submitted notifications, in accordance with the COP, on 22 new LPP cases. In 17 of these cases, the LEAs submitted REP-11 or section 58 reports to the panel judges on the subsequent change of circumstances relating to LPP involvement or likelihood. These 17 cases included:

- (a) one case of obtaining of LPP information; and
- (b) 16 cases of heightened likelihood of obtaining LPP information:
 - (i) 13 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
 - (ii) three cases where the concerned LEA discontinued the operations of its own accord.

For the remaining five LPP cases, it was assessed at the time of application that the operations sought to be authorized would likely obtain information which might be subject to LPP and the panel judges had imposed additional conditions in the prescribed authorizations.

4.9 In the review of these LPP cases, all the relevant documents and records including the prescribed authorization, the REP-11 report, section 58 report, the determination by the panel judge, the notes, the written summaries, the communication data, the ATRs, etc were checked by the Commissioner and his staff. For cases where the panel judge

allowed the prescribed authorizations to continue subject to additional conditions, we had 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. In respect of interception of telephone calls, we had also checked 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. At the time of compiling this report, the Commissioner and his staff are yet to examine the recordings of the protected products.

One case of obtaining of LPP information

4.10 The case where LPP information was obtained involved an interception operation which was assessed to have a likelihood of obtaining LPP information as the subject was on bail in connection with an offence unrelated to the crime under investigation. The panel judge approved the application and imposed additional conditions to guard against the risk of obtaining LPP information.

4.11 After the commencement of the interception operation, the LEA encountered two calls which indicated heightened LPP likelihood. The panel judge, having considered the REP-11 reports concerned, allowed the authorization to continue with the same additional conditions or further additional conditions imposed to guard against the risk of obtaining LPP information. As the interception progressed, on one occasion, part of an intercepted call containing LPP information was listened to by the listener. An REP-11 report and a discontinuance report were submitted to the panel judge who duly revoked the authorization.

4.12 During review of the case, our checking of data revealed that the 'other calls' (about 70 in total) made between the subject's two facilities and the facilities used by the person who was involved in the Reported LPP call on the second occasion were not stated accurately in the REP-11 report concerned. While three 'other calls' were omitted, one call was wrongly reported as an 'other call'. Investigation by the LEA concluded that the errors were due to the carelessness of the officer who checked the information on the 'other calls' and drafted the REP-11 report. Also, the officer who signed the REP-11 report did not notice the errors. The LEA proposed that these two officers should be given a verbal advice (disciplinary in nature) to pay attention to details when checking 'other calls' in future.

4.13 Having reviewed the case, I agreed with the LEA's findings on the cause of the errors and considered that the proposed disciplinary actions against the two officers concerned were appropriate. As I had not listened to the interception products, no finding could be made as to the veracity of the contents of the conversations of the relevant calls as stated in the REP-11 reports and whether there were any other communications subject to LPP in the interception products listened to by the LEA officers. Subject to these qualifications, no irregularity was found in this case except the errors regarding the reporting of 'other calls'.

***16 cases of heightened LPP likelihood
and five cases of assessed LPP likelihood***

4.14 Of the 21 heightened/assessed LPP likelihood cases, three heightened LPP likelihood cases were related to the non-compliance/incidents reported in Reports 1, 2 and 4 of Chapter 6.

4.15 The review of the heightened/assessed LPP likelihood cases had been conducted in accordance with the mechanism as stated in paragraph 4.9 above. Nothing untoward was found except those

mentioned in Reports 1, 2 and 4 of Chapter 6. As we had not checked the recordings of the protected products, no finding could be made as to the veracity of the contents of the communications with LPP likelihood or heightened LPP likelihood as stated in the REP-11 reports. Similarly, no finding could be made as to whether any preceding communications 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.

Obligations of LEAs regarding JM cases

4.16 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. The reporting and preservation requirements for cases involving JM are as those set out in paragraph 4.5 above.

JM reports received in 2015

4.17 In 2015, the Commissioner did not receive any report on cases involving JM or likelihood of obtaining JM.

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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 LEAs. 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 the Commissioner refuses to carry out an examination by reason of section 45(1) of the Ordinance. 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) of the Ordinance 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) of the Ordinance 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.

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 devices suspected to be used included those which could directly read or control their minds. 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, leaflets containing the necessary information for making an application are available to prospective applicants.

Applications received in 2015

5.8 During the report period, there were 11 applications for examination. Of these applications, one application could not be entertained because matters raised in the application were not within the ambit of the function of the Commissioner and one application was subsequently not pursued by the applicant. Of the remaining nine applications, one alleged interception and eight claimed a combination of interception and covert surveillance. Since none of the nine applications came within the ambit of the exceptions covered by section 45(1) or section 45(2), the Commissioner carried out an examination provided for in section 44 of the Ordinance in respect of each case.

5.9 After making all necessary enquiries, I or my predecessor found all the nine cases not in the applicants' favour and accordingly notified each of the applicants in writing of the findings, with four of such notices issued during the report period and five 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 of the Ordinance 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. 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, I gave a notice to a relevant person pursuant to section 48(1) of the Ordinance for interception conducted by an LEA without the authority of a prescribed authorization. I informed the relevant person of the right to apply for an examination in respect of the unauthorized interception. At the time of writing this report, I have not received any response from the relevant person.

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 I have observed that there were occasions that the applicants felt that their purpose of applying for examination had not been achieved as I or my predecessor could not disclose the reasons for our 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.

CHAPTER 6

REPORTS OF NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS

Reporting of non-compliance, irregularities and incidents

6.1 By virtue of section 54 of the ICSO, where the head of any LEA considers that there may have been any case of failure by the LEA or any of its officers to comply with any relevant requirement, he 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 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.

Outstanding cases brought forward from Annual Report 2014

6.5 In my predecessor's Annual Report 2014, there were two outstanding cases. They are dealt with in the ensuing paragraphs.

Outstanding case (i) : Interception of a wrong facility [Paragraphs 6.6 to 6.19 of Annual Report 2014]

6.6 The case involved an unauthorized interception of a facility (Facility 1) for about four days and it was a case of non-compliance. My predecessor had reviewed the LEA's investigation findings and he had also required the LEA to conduct a further investigation to ascertain clearly whether the non-compliance was the consequence of inadvertent/careless mistakes or otherwise and to review its proposed actions to be taken against all officers concerned. The LEA reported its further findings to my predecessor in May 2015. Upon my predecessor's request, the LEA submitted a further report to address a few issues in the report on further findings. The results of the review of these reports are given in paragraphs 6.7 to 6.14 below.

6.7 The LEA stated in its further findings that the reasoning of the officer-in-charge of the operations ('OC') and his supervisor ('Supervisor') for not mentioning the physical surveillance operation on a meeting in the affirmation in support of the interception application was unsound and their judgment flawed. The LEA concluded that whilst the OC and the Supervisor were primarily responsible for the non-compliance, there was no evidence suggesting any bad faith or deliberate disregard of the relevant requirements of the ICSO on their part. In this regard, as I indicated to the LEA, although I could not draw inferences that there was any bad faith or ulterior motive of the OC and the Supervisor, the attitude of these two officers in handling ICSO-related matters was far from satisfactory and could even be said to be a total disregard of the spirit of the ICSO.

6.8 The LEA's report on further findings revealed that the verification process regarding the interception of the correct facility (Facility 2) was highly unsatisfactory. The officer responsible for making assessment of the available intelligence retrospectively signed the verification form concerned after the panel judge granted the prescribed authorization, adding a handwritten note on the form that the facility was verbally verified before the submission of the application to the panel judge. This was totally unacceptable. The LEA should remind its officers that in any event, the verification form should be fully completed and its details should be verified before the submission of the application to the panel judge for a prescribed authorization. Full information and circumstances should also be given in respect of any remark or amendment to any part of the verification form.

6.9 The LEA also reported an incident on an incorrect statement contained in the affirmation supporting the application for interception on another facility used by the subject ('Incorrect Statement'). The Incorrect Statement included an inaccurate description of the source of the information supporting the application. The applicant of the interception application ('Applicant') was the author of the Incorrect Statement (same/similar wording also appeared in the affirmations/affidavits supporting other related interception and surveillance applications). The LEA considered that as the Incorrect Statement was due to the lack of vigilance of the OC, the Supervisor and the Applicant in checking the information contained in the affirmation, it should not be regarded as a breach of any of the relevant requirements of the ICSO. While I agreed that the Incorrect Statement itself did not constitute a breach of the ICSO as there was no evidence showing the wilful intention of the three aforementioned officers in making a false statement nor there being information considered to be misleading and thus affecting the decision of the application by the panel judge, the lack of vigilance of the officers concerned was neither satisfactory nor acceptable.

6.10 The LEA admitted that its investigation on the case should have covered the questions raised by my predecessor in a more thorough manner and detailed/more detailed explanations from the officers concerned should have been sought. I pointed out to the LEA that its selective and piecemeal approach in conducting the investigation was highly undesirable and disappointing and this was not conducive to the review of the case.

6.11 It was greatly disappointing to note from the reports that quite a number of the LEA officers were so forgetful and not being able to recall or recollect the details of various important events in relation to the case. Also, the officers gave different or even contradictory versions of explanations. These situations rendered it difficult to have a complete and clear apprehension of the case and its causes.

6.12 While in-depth inquiries had been made into the various issues and suspicions in this case and the faults and deficiencies of the LEA officers discovered throughout the investigation, I was not able to find sufficient evidence of any ill will or ulterior motive relating to any of the LEA officers concerned. Nevertheless, the chain of incidents revealed that various officers concerned failed to perform their respective ICSO duties with prudence, diligence and professionalism. They reflected the lax attitude of the officers concerned, in particular the OC and the Supervisor, in adhering to the spirit of the ICSO and the established departmental procedures. This was highly unsatisfactory. The LEA should endeavour to ensure that the officers who are required to conduct covert operations acquaint themselves with the relevant requirements under the ICSO and be vigilant in the conduct of the operations.

6.13 With the premises stated above, the following actions as finally recommended by the LEA against the officers concerned for their respective failures in this entire case were noted:

- (a) one written warning and two advices to the officer responsible for making assessment of the available intelligence;
- (b) two written warnings and one verbal warning to the OC;
- (c) two written warnings and one verbal warning to the Supervisor;
- (d) one verbal warning and two advices to the Applicant;
- (e) an advice to the Assistant Head of Department concerned; and
- (f) an advice each to four other officers concerned.

6.14 The LEA had proposed further improvement measures to address the inadequacy in the interception verification and application procedures. These measures were considered appropriate.

***Outstanding case (ii) : An incident report relating to section 61 of the ICSO
[Paragraph 6.41 of Annual Report 2014]***

6.15 This incident was first reported by an LEA in late 2014. Similar to the situation stated in the last annual report, the court proceedings that were relevant to the incident were still ongoing at the time of writing this annual report. To avoid the risk of prejudicing the administration of justice, it is inappropriate to report on the review of the case in this report. The reporting of this case can only be made when the relevant court proceedings have concluded.

Cases occurring in 2015

6.16 In 2015, the Commissioner received from LEAs reports of non-compliance/irregularities/incidents relating to nine ICSO cases. Except one case which was reported under section 54 of the Ordinance, the other eight cases were submitted not under section 54 of the Ordinance. The review on these nine cases had been completed and they are set out below.

Report 1 : Omission of the additional conditions in a prescribed authorization

6.17 A prescribed authorization was granted for interception of two facilities used by a then unidentified subject ('the first authorization'). At the grant of the authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. Subsequent to the commencement of operation, the identity of the subject was ascertained which revealed that the subject had been arrested for an offence unrelated to the crime under investigation and was on bail pending further enquiries. The LEA submitted an REP-11 report to the panel judge to report the identification of the subject, the subject's arrest and the heightened LPP likelihood arising from the arrest ('the first REP-11 report'). In the report, the LEA requested the panel judge to allow the authorization to continue and proposed additional conditions to guard against the risk of obtaining LPP information. At the same time of the submission of the first REP-11 report, the LEA submitted to the panel judge an application for interception of one additional facility used by the same subject ('the third facility'). In view of the subject's bail status, the same additional conditions to guard against the risk of obtaining LPP information as in the first REP-11 report ('the additional conditions') were proposed in the affirmation in support of the application. The panel judge allowed the continuation of the first authorization subject to the additional conditions

proposed and granted the authorization for the interception of the third facility ('the second authorization') in which, however, the additional conditions were missing.

6.18 Three days later, two REP-11 reports (one in respect of the first authorization and one in respect of the second authorization) were submitted to the panel judge to request lifting of the additional conditions as the subject was released unconditionally in respect of the arrest mentioned in the first REP-11 report and the application for the second authorization. The panel judge lifted the additional conditions as requested in the two REP-11 reports.

6.19 In submitting a report in accordance with the COP to my predecessor reporting the changes in the likelihood of obtaining LPP information in relation to the arrest of the subject, the LEA also reported the absence of the additional conditions in the second authorization. My predecessor requested the LEA to conduct a full investigation into the matters.

6.20 The investigation by the LEA revealed that the second authorization was a time-critical case in which there was an immediate need to obtain an authorization to conduct interception to obtain intelligence from the third facility used by the subject and that the first REP-11 report had to be submitted with the application concurrently. Given the urgency of the case, the applicant had to prepare the application documents within a tight time schedule.

6.21 The investigation pointed out that enhancement was made to the computerised application system for prescribed authorizations about a month before the application for the second authorization. In this enhanced application system, the entry for LPP likelihood was set to 'No' by default. If 'Yes' was selected for LPP likelihood, the additional conditions to guard against the risk of obtaining LPP information would

be generated automatically in the affirmation in support of the application and the draft authorization (i.e. JF-1 form) ('the two forms'). However, if 'No' was selected in the first place and the two forms were already created, the two forms would not be revised automatically to add the additional conditions when the LPP likelihood was changed to 'Yes' subsequently. An applicant was required to delete and redo the two forms in order to generate the additional conditions in the two forms.

6.22 The application for the second authorization was the first application assessed to have LPP likelihood after the enhancement of the application system. In preparing the application for the second authorization, the applicant overlooked the fact that the LPP likelihood was set to 'No' by default in the application system. After realising the omission of the additional conditions in the two forms, the applicant took action to delete the old affirmation but forgot to do the same for the JF-1 form. This resulted in the omission of the additional conditions in the JF-1 form. Having considered the affirmation in support of the second authorization, the panel judge granted the authorization without noticing the omission of the additional conditions. The applicant, not noticing the omission of the additional conditions in the second authorization, carried out the interception of the third facility in the same way as the other two facilities authorized by the first authorization (i.e. as though the additional conditions existed) and requested the panel judge to lift the additional conditions in the relevant REP-11 reports after the release of the subject.

6.23 The LEA concluded that the mistakes were caused by the carelessness and oversight of the applicant and proposed to issue a verbal warning to the applicant for his negligence in not including the additional conditions in the JF-1 form and not noticing the omission of the additional conditions in the second authorization. In proposing the disciplinary action against the applicant, the LEA took into account the facts that the applicant was under great time pressure to prepare the

application for the second authorization and the first REP-11 report and that the new feature of auto-generation of the additional conditions in the two forms caused the applicant some confusion in the technical process of drafting the two forms. After the incident, the LEA removed the default setting of the LPP likelihood in the computerised application system so that applicants must consciously select the correct option when preparing an application.

6.24 Having reviewed the case, I agreed to the LEA's conclusion that the mistakes were due to the carelessness and oversight of the applicant. There was no evidence of any malicious act or ulterior motive. My checking confirmed that despite the omission of the additional conditions to guard against the risk of obtaining LPP information in the second authorization, the interception of the third facility was carried out in such a manner as though the additional conditions had been imposed. There was no non-compliance in this case. The LEA's proposed disciplinary action against the applicant was appropriate. Although the omission arose from the carelessness and oversight of the applicant, I wrote to remind the panel judges to exercise vigilance to ensure that any draft authorization (i.e. JF-1 form) prepared by the LEAs was properly prepared before appending their signature thereon.

6.25 In reporting the identification of the subject through the first REP-11 report, the applicant used the same report to notify the panel judge of the subject's previous arrest and the assessment on the LPP likelihood. I considered that it was more appropriate to report the arrest and the assessment on the LPP likelihood separately through the prescribed form for reporting on arrest of subject. This can avoid ambiguity as to whether the reporting requirement under section 58(1) of the ICSO has been complied with. The LEA was advised accordingly.

Report 2 : Delay in arranging for preservation of interception products

6.26 At the grant of the prescribed authorization concerned, the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception progressed, on a day immediately before a long holiday, a listener listened to a call which, though not related to the investigation under the authorization, indicated heightened likelihood of obtaining LPP information. The listener immediately reported the matter to his supervisor ('the Officer'). The matter was also reported to the officer-in-charge of the interception unit concerned. On resumption of duty on the first working day after the long holiday, the Officer submitted an REP-11 report to the panel judge to report the matter and seek approval to continue with the authorization. The panel judge allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.

6.27 As far as LPP cases were concerned, LEAs were required by the Commissioner to preserve, amongst others, recordings of the interception products available at the time of discovery of an LPP call for the Commissioner's review function. In submitting a report in accordance with the COP to my predecessor reporting the LPP case, the LEA also reported that the Officer did not make arrangement for preservation of the relevant recordings of the interception products on the day when the heightened LPP likelihood was detected. The preservation was made only on the same day of submission of the REP-11 report. The delay led to destruction of the recordings of interception products obtained for a few days, which should have been preserved. My predecessor requested the LEA to conduct a full investigation into the matter.

6.28 There were guidelines issued by the LEA on preservation of recordings of interception products for LPP cases, which stipulated that the recordings should be preserved from the time when they were still

available at the time of discovery of the relevant LPP call. During the investigation by the LEA, the Officer explained that the delay in preservation was due to his misunderstanding of the guidelines. He thought that he had followed the guidelines as long as the arrangement for preservation was made at the time when the related REP-11 report was submitted to the panel judge. He did not realise that the arrangement for preservation had to be done on the day of discovery of the LPP call.

6.29 The investigation by the LEA could not find any evidence to rebut the Officer's explanation about his misunderstanding of the guidelines and there was also no indication as to any ill intention or foul play behind the delay. However, the LEA considered the Officer's misunderstanding of the preservation requirement, which showed his lack of the required sensitivity and vigilance in carrying out ICSO-related duties, disappointing and unacceptable. The LEA proposed to issue a verbal warning to the Officer for his failure to preserve all the recordings of the interception products available on the day of discovery of the LPP call in accordance with the guidelines. Besides, the LEA also proposed to issue a verbal warning to the officer-in-charge of the interception unit concerned for his failure to ensure that all the procedures for the handling of LPP cases were followed properly.

6.30 To prevent recurrence of any possible misunderstanding of the preservation requirement, the LEA revised the guidelines to expressly set out the requirement that the arrangement for preservation of the recordings of the interception products should be made on the day of discovery of the relevant LPP call.

6.31 I have reviewed the case. There was no evidence by which I could disagree with the finding of the LEA that there was no ill intention or foul play behind the delay. The proposed disciplinary actions against the two officers concerned were appropriate. This was not the first time

that the Officer was found not exercising due care in the performance of duties under the ICSO. The repeated mistakes committed by the Officer reflected badly on his attitude towards the ICSO-related work he was entrusted to handle, which cast doubt on his suitability and reliability to performing duties under the ICSO. Before completion of my review of this case, the LEA informed me that the Officer had been discharged from ICSO-related duties.

Report 3 : Incorrect status of surveillance operation recorded in the device registers

6.32 An LEA reported an incident involving some mistakes made in the device registers regarding the status of a Type 2 surveillance operation when surveillance devices were returned.

6.33 A prescribed authorization was issued upon oral application for a Type 2 surveillance operation for a time-critical investigation case. Surveillance devices were issued from a total of three device stores (Store A, Store B and Store C) for the surveillance operation. On the fourth day of the operation, it was decided that the surveillance devices issued from Store A and Store B should be returned to the device stores as they were no longer necessary. At that time, the applicant of the authorization was very busy with the investigation case and gave a verbal instruction to the two device store managers concerned for the return of the surveillance devices. However, the two device store managers misinterpreted the message given by the applicant of the authorization that the surveillance operation was already discontinued. As a result, it was recorded incorrectly in the relevant device registers of the DMS that the operation was already discontinued when the surveillance devices were returned. The investigation by the LEA showed that the two device store managers had the impression that when all the surveillance devices issued from their device stores were no longer necessary, that

meant the operation, as far as the deployment of the surveillance devices was concerned, was discontinued.

6.34 The surveillance operation was discontinued on the fifth day. When arranging for the return of the surveillance devices to Store C after the discontinuance of the operation, the applicant of the authorization told the relevant officer that the discontinuance was yet to be approved. Thus, the relevant officer took it that the surveillance operation was not yet discontinued. Consequently, it was recorded incorrectly in the device register of the DMS that the surveillance operation was not discontinued when the surveillance devices were returned to Store C. As indicated by the investigation of the LEA, this mistake was due to the misunderstanding of the applicant of the authorization that the discontinuance of a surveillance operation had to be 'approved' by the authorizing officer who issued the authorization. In fact, the discontinuance of a surveillance operation did not need prior approval of the authorizing officer. The requirement was that when a Type 2 surveillance operation was discontinued, a report should be submitted to the authorizing officer under section 57 of the ICSO to report the discontinuance.

6.35 The LEA concluded that no malicious intent was involved and the mistakes were due to misunderstanding or misinterpretation of the meaning of discontinuance by different officers, which caused confusion as to the status of the surveillance operation when surveillance devices were returned. The LEA explained that the pressure and difficulties faced by the officers in the time-critical investigation case concerned were immense and they constituted a valid mitigating factor. The LEA had taken action to remind the applicant of the authorization and the other relevant officers of the exact meaning of discontinuance and to be more careful when reporting the status of surveillance operation in future. It would also enhance the relevant training so as to prevent recurrence of similar mistakes in future.

6.36 Having reviewed the case, I agreed with the LEA's findings. There was no evidence of misconduct on the part of the officers concerned. However, I noted that some officers in the LEA had not received DMS training before taking up the role of device store managers. I considered this situation unsatisfactory. In response to my concern, the LEA revised its training policy to ensure that all officers who were to be appointed as device store managers were properly trained before.

Report 4 : Type 1 surveillance conducted outside the ambit of a prescribed authorization

6.37 An LEA reported to the Commissioner a case of possible non-compliance relating to the conduct of Type 1 surveillance outside the ambit of a prescribed authorization. Subsequently, the LEA submitted a full investigation report on the case ('Investigation Report') to the Commissioner pursuant to section 54 of the ICSO and provided additional information/clarifications in a further report ('Further Report').

Facts of the case

6.38 A prescribed authorization was issued for Type 1 surveillance on the meetings among a number of subjects at public places ('PA'). In the anticipation that there would be a meeting between two of the subjects on a certain day (Day 1), the officer-in-charge of the covert surveillance ('Officer-in-charge') deployed LEA officers (including 'Officer A' and 'Officer B') to stand by with a view to carrying out surveillance operation on the meeting. On Day 1, upon the instruction of the Officer-in-charge (which was relayed to Officer A by Officer B), Officer A carried out covert surveillance when the two subjects were inside a private car ('Operation'). The Operation lasted eight minutes.

6.39 When the Officer-in-charge reported the outcome of the covert surveillance to his immediate supervisor ('Immediate Supervisor') later the same day, he mentioned briefly that the Operation had been conducted (this was contradicted by the Immediate Supervisor who stated that he had no impression that the Officer-in-charge had told him about the Operation). However, there was no mention of the Operation in the affidavits in support of the related renewal applications for interception submitted to the panel judge on the following day (Day 2). When the applicant of the interception applications was made aware of the Operation later on Day 2, he considered that it might have been conducted outside the ambit of the PA.

LEA's findings

6.40 The LEA stated in the Investigation Report that the Operation, which was carried out on the two subjects when no meeting took place at a public place, was conducted not in compliance with the terms of the PA, and therefore, it was unauthorized.

6.41 The LEA recommended that:

- (a) a verbal warning be given to each of Officer A and Officer B for their lack of vigilance and inadequacy in performance in the execution of Type 1 surveillance;
- (b) a written warning be given to the Officer-in-charge for his lack of vigilance and failure to give clear and specific instructions leading to the non-compliance, his lack of alertness in failing to realise that the Operation was conducted outside the ambit of the PA, and his failure to give a clear and detailed report on the conduct of covert surveillance under the PA to the Immediate Supervisor; and

- (c) an advice be given to the Immediate Supervisor on the need to be more vigilant in overseeing the conduct of covert surveillance.

Further enquiries

6.42 I made further enquiries with and provided comments to the LEA concerning a number of matters pertinent to the Investigation Report. In particular, I commented that the contradictory statements given by the Immediate Supervisor and the Officer-in-charge as to whether the Operation had been reported to the Immediate Supervisor was disconcerting. The Immediate Supervisor had the responsibility to ensure that the covert surveillance was conducted in strict compliance with the terms of the PA. Even if it was true that the Immediate Supervisor had no impression of the Officer-in-charge reporting to him about the Operation, it was rather inconceivable that the Immediate Supervisor would just 'believe', without enquiring further, no action had been carried out by his subordinates while he had given the instruction to consider doing that particular action. It clearly showed that the Immediate Supervisor had adopted a lax attitude on the matter and had not performed his supervisory role adequately. The undesirable consequence was that the Operation was omitted from the affidavits of the related renewal applications for interception. The panel judge was therefore neither presented with the whole picture nor alerted to the possible non-compliance in question at the time of considering the renewal applications. The contradictory statements made by the Officer-in-charge and the Immediate Supervisor also cast concern on whether the latter had any intention to conceal the potentially unauthorized covert surveillance. I also considered the proposed advice to be given to the Immediate Supervisor too lenient.

6.43 The LEA was requested to conduct a review of the case, in particular on whether there was any concealment by any of the officers concerned of the potentially unauthorized covert surveillance and the action to be taken against the Immediate Supervisor.

6.44 Furthermore, I considered that the incident reflected the problem of lack of a mechanism to ensure timely reporting and monitoring of covert operations by the subject officers and their supervisors, which might lead to grave consequences. The LEA was asked what remedial measures had been or would be taken to address this problem. The LEA submitted the Further Report in response to the above matters.

Review by the Commissioner

6.45 Based on the information provided by the LEA, I agreed that this was a case of non-compliance. The conduct of the Operation when no meeting between the subjects was taking place in a public place did not comply with the terms of the PA.

6.46 The LEA stated in the Further Report that due to the inadequate performance and lack of vigilance of the officers concerned, they failed to be aware that the Operation might have been conducted not in compliance with the terms of the PA. I considered the fact that these officers had knowledge of the terms of the PA and they still failed to exercise the necessary vigilance in carrying out the surveillance operation to be very unsatisfactory. It was also disappointing to note that such an apparent non-compliance could not be discovered earlier by the officers concerned and was detected only after the related renewal applications for interception were submitted to the panel judge.

6.47 While I had no objection to the LEA's conclusion in the Further Report that there was no evidence to suggest any concealment of the potentially unauthorized covert surveillance by any of the officers concerned, the Immediate Supervisor's claim that he acted only on his assumption (which turned out to be incorrect) without making enquiries with the Officer-in-charge as to whether covert surveillance was conducted at a public place was inconceivable and such work performance was undesirable.

6.48 In respect of the recommended action against the Immediate Supervisor, the LEA agreed to my comments and revised it from advice to written warning, which I considered acceptable. The proposed disciplinary actions against Officer A, Officer B and the Officer-in-charge were appropriate. In response to my concerns, the LEA had enhanced its training on the conduct of covert surveillance and also introduced a mechanism to ensure timely reporting and monitoring of covert surveillance operations.

Report 5 : Omission of Christian name of a subject in the prescribed authorization

6.49 An LEA first reported an inaccuracy in the name of a subject in a prescribed authorization for Type 1 surveillance and subsequently submitted an investigation report on it.

6.50 In a crime investigation, Type 1 surveillance was intended to be conducted on a subject. According to an official identification document, the subject's full name was 'XY', comprising a Chinese name 'X' and a Christian name 'Y'.

6.51 The officer-in-charge of the investigation ('Oi/C') was responsible for drafting the affirmation in support of an application for the intended Type 1 surveillance ('affirmation'), with his supervisor as the applicant. In the draft affirmation, the Christian name 'Y' of the

subject was described as an alias instead of part of his full name. In the draft prescribed authorization which was also prepared by the Oi/C, the subject was described as 'X' only, i.e. his Christian name 'Y' was missing ('inaccuracy'). The draft affirmation, the draft prescribed authorization and other application documents were submitted through the supervisor of the Oi/C, who failed to notice the above irregularities, to the Assistant Head of Department ('Assistant HoD'), who approved the making of the application. The application was subsequently granted by the panel judge. During the process from the preparation of the Type 1 surveillance application to its subsequent submission to the panel judge, it had gone undetected that the Christian name 'Y' was not set out in the draft prescribed authorization and 'Y' was described as an alias of the subject in the affirmation. About two weeks later, the LEA discovered the inaccuracy and submitted a report on it to the panel judge who noted the report.

6.52 According to the LEA's investigation report, the Hong Kong Identity Card number, the Chinese name 'X' and the Christian name 'Y' of the subject were mentioned in the affirmation and the inaccuracy had been duly reported to the panel judge. The LEA considered that it was unlikely that the inaccuracy would have affected the validity of the prescribed authorization by virtue of sections 63(5) and 64(1) of the ICSO. The Oi/C was considered to be primarily responsible for the inaccuracy in the prescribed authorization and the unclear presentation of the full name of the subject in the affirmation. Had he been more vigilant in the process of preparing the application documents, he would have included the Christian name 'Y' in the draft prescribed authorization and stated the full name 'XY' clearly in the draft affirmation. The supervisor of the Oi/C was also responsible for the aforesaid irregularities as he should ensure that the application documents contained the necessary and accurate information. As the responsibility to verify the identifying particulars of the subject rested with the Oi/C

and his supervisor, the LEA considered that the Assistant HoD should not be held accountable for the inaccuracy.

6.53 The LEA recommended that both the Oi/C and his supervisor each be given an advice by a senior directorate officer on the need to be more vigilant in preparing or dealing with any ICSO-related documentation. The LEA had reminded its frontline officers to be vigilant in preparing ICSO-related documents and to ensure the full name of a subject to be accurately set out in the prescribed authorization. The LEA had also included a guidance note in the template of the relevant ICSO documents so as to further alert the officers to the need of setting out the full name of a subject as appearing in the official identification documents.

6.54 Having reviewed the case, I considered that by virtue of section 64(1) of the ICSO, the inaccuracy did not affect the validity of the prescribed authorization concerned. The LEA's proposed action against the officers involved was acceptable. The improvement measures taken by the LEA were appropriate.

Other reports

6.55 For the reports on the other four cases submitted by the LEAs, three cases were incidents of technical problems of the computerised systems and one case was related to a typographical error in the application document and documentation of making minor amendment in the executive authorization by the authorizing officer. These cases had been reviewed and nothing untoward was found. For cases relating to technical problems of computerised systems, the LEAs had taken appropriate actions to fix the problems.

CHAPTER 7

RECOMMENDATIONS TO HEADS OF LAW ENFORCEMENT AGENCIES

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

7.2 Through discussions with the LEAs during the inspection visits and the exchange of correspondence with them in the review of their compliance with the relevant requirements of the Ordinance, a number of recommendations were made in the report period to the LEAs to better carry out the objects of the Ordinance. The recommendations made are set out below:

(a) Reporting of suspected LPP calls to the panel judges

All suspected LPP calls reported by listeners to their supervisors should be reported to the panel judges for them to make a decision as to whether or not the calls contained any LPP information or indicated heightened LPP likelihood. This could prevent non-compliance caused by any wrong judgement made by LEAs. Listeners should also be given adequate training on how to recognise LPP or suspected LPP calls.

(b) Information on the subscriber of the facility proposed to be intercepted

If the subscriber of the facility proposed to be intercepted is

not the subject of interception, the applicant should provide in the application an explanation on how the relationship between the subscriber and the subject is known to the LEA and information regarding any criminal record of the subscriber.

(c) Reason for discontinuance

The reason for discontinuance of an operation should be stated accurately in the discontinuance report.

(d) Computer log on removal of right of access to interception products

To facilitate the Commissioner's verification, LEAs should develop a computer log on the timing of removal of the right of access to interception products.

(e) Reporting of arrest of the subject

To avoid the ambiguity as to whether the reporting requirement under section 58(1) of the Ordinance has been complied with, reports to the relevant authority under this section following arrest of the subject should be made through the prescribed form.

(f) Strong justifications to support prolonged interception operations

For prolonged interception operations, strong justifications should be provided in an application to support further renewal of an authorization.

CHAPTER 8

STATUTORY TABLES

8.1 In accordance with section 49(2) of the Ordinance, 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)]

		Judge's Authorization	Emergency Authorization
(i)	Number of authorizations issued	691	0
	Average duration	29 days	—
(ii)	Number of authorizations renewed	737	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	33	Not applicable
(vi)	Number of applications for the issue of authorizations refused	2	0
(vii)	Number of applications for the renewal of authorizations refused	0	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)]

		Judge's Authorization	Executive Authorization	Emergency Authorization
(i)	Number of authorizations issued	14	13	0
	Average duration	12 days	5 days	—
(ii)	Number of authorizations renewed	23	0	Not applicable
	Average duration of renewals	25 days	—	—
(iii)	Number of authorizations issued as a result of an oral application	0	3	0
	Average duration	—	7 days	—
(iv)	Number of authorizations renewed as a result of an oral application	0	0	Not applicable
	Average duration of renewals	—	—	—
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	3	0	Not applicable
(vi)	Number of applications for the issue of authorizations refused	0	0	0
(vii)	Number of applications for the renewal of authorizations refused	0	0	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	0	Not applicable

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)]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
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
Robbery	Cap. 210	Section 10, Theft 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

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)]**

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
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
Conspiracy to commit forcible detention with intent to procure a ransom/forcible taking or detention of persons with intent to sell them	Cap. 212	Section 42, 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
Perverting the course of public justice	—	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)]

	Number of persons arrested ^{Note 1}		
	Subject	Non-subject	Total
Interception	112	158	270

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)]

	Number of persons arrested ^{Note 2}		
	Subject	Non-subject	Total
Surveillance	34	16	50

Note 1 Of the 270 persons arrested, 40 were attributable to both interception and surveillance operations that had been carried out.

Note 2 Of the 50 persons arrested, 40 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 280.

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)]**

Section 41(1)

Reviews on compliance by departments and their officers with relevant requirements, as the Commissioner considers necessary

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
(a) Regular reviews on weekly reports	208	Interception & Surveillance	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.
(b) Periodical inspection visits to LEAs	27	Interception & Surveillance	In addition to the checking of weekly reports, 27 visits had been made to LEAs during the report period. During the visits, detailed checking on the application files of doubtful cases as identified from the weekly reports was conducted. 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 804 applications and 369 related documents/matters had been checked. (See paragraphs 2.22, 3.22, 3.23 and 3.29 of this report.)
(c) LPP cases reviewed by the Commissioner	23	Interception	<u>Outstanding LPP case in 2014</u> This case was brought forward from Annual Report 2014. The relevant interception operation was

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p>discontinued in 2015. The review of this case had been completed and nothing untoward was found.</p> <p>(See paragraph 4.7 of Chapter 4.)</p> <p><u>One case of obtaining of LPP information</u></p> <p>The interception operation was assessed to have a likelihood of obtaining LPP information. The panel judge approved the application and imposed additional conditions to guard against the risk of obtaining LPP information.</p> <p>After the commencement of the interception operation, the LEA encountered two calls which indicated heightened LPP likelihood. The panel judge, having considered the REP-11 reports concerned, allowed the authorization to continue with the same additional conditions or further additional conditions imposed to guard against the risk of obtaining LPP information. As the interception progressed, on one occasion, part of an intercepted call containing LPP information was listened to by the listener. An REP-11 report and a discontinuance report were submitted to the panel judge who duly revoked the authorization.</p> <p>During review of the case, it was revealed that the 'other calls' (about 70 in total) made between the subject's two facilities and the facilities used by the person who was involved in the Reported LPP call on the second occasion were not stated accurately in the REP-11 report concerned. While three 'other calls' were omitted, one call was wrongly reported as an 'other call'. Investigation by the LEA concluded</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception & Surveillance (21 reviews)	<p>that the errors were due to the carelessness of the officer who checked the information on the 'other calls' and drafted the REP-11 report. Also, the officer who signed the REP-11 report did not notice the errors. The LEA proposed that these two officers should be given a verbal advice (disciplinary in nature).</p> <p>The Commissioner agreed with the LEA's findings on the cause of the errors and considered that the proposed disciplinary actions against the two officers concerned were appropriate. As the Commissioner had not listened to the interception products, no finding could be made as to the veracity of the contents of the conversations of the relevant calls as stated in the REP-11 reports and whether there were any other communications subject to LPP in the interception products listened to by the LEA officers. Subject to these qualifications, no irregularity was found in this case except the errors regarding the reporting of 'other calls'.</p> <p>(See paragraphs 4.9 - 4.13 of Chapter 4.)</p> <p><u>Other cases</u> All the relevant documents and records were checked and nothing untoward was found except those mentioned in Reports 1, 2 and 4 of Chapter 6.</p> <p>(See paragraphs 4.8, 4.9, 4.14 and 4.15 of Chapter 4.)</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
(d) Incidents/irregularities reviewed by the Commissioner	8	Interception	<p><u>Report 1</u></p> <p>A prescribed authorization was granted for interception of two facilities used by a then unidentified subject ('the first authorization'). At the grant of the authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. Subsequently, the identity of the subject was ascertained which revealed that the subject had been arrested and was on bail pending further enquiries. The LEA submitted an REP-11 report to the panel judge to report the identification of the subject, the subject's arrest and the heightened LPP likelihood arising from the arrest ('the first REP-11 report'). In the report, the LEA requested the panel judge to allow the authorization to continue and proposed additional conditions to guard against the risk of obtaining LPP information. At the same time of the submission of the first REP-11 report, the LEA submitted to the panel judge an application for interception of one additional facility used by the same subject ('the third facility'). The same additional conditions to guard against the risk of obtaining LPP information as in the first REP-11 report ('the additional conditions') were proposed in the affirmation in support of the application. The panel judge allowed the continuation of the first authorization subject to the additional conditions proposed and granted the authorization for the interception of the third facility ('the second authorization') in which, however, the additional conditions were missing.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>Three days later, two REP-11 reports (one in respect of the first authorization and one in respect of the second authorization) were submitted to the panel judge to request lifting of the additional conditions as the subject was released unconditionally in respect of the arrest mentioned above. The panel judge lifted the additional conditions as requested in the two REP-11 reports.</p> <p>In submitting a report in accordance with the COP to the former Commissioner reporting the changes in the likelihood of obtaining LPP information in relation to the arrest of the subject, the LEA also reported the absence of the additional conditions in the second authorization. The LEA was requested to conduct a full investigation into the matters.</p> <p>The investigation by the LEA revealed that the second authorization was a time-critical case in which there was an immediate need to obtain an authorization to conduct interception to obtain intelligence from the third facility used by the subject and that the first REP-11 report had to be submitted with the application concurrently.</p> <p>The investigation pointed out that enhancement was made to the computerised application system for prescribed authorizations about a month before the application for the second authorization. In this enhanced application system, the entry for LPP likelihood was set to 'No' by default. If 'Yes' was selected for LPP likelihood, the additional conditions to guard against the risk of obtaining LPP information would</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>be generated automatically in the affirmation in support of the application and the draft authorization (i.e. JF-1 form) ('the two forms'). However, if 'No' was selected in the first place and the two forms were already created, the two forms would not be revised automatically to add the additional conditions when the LPP likelihood was changed to 'Yes' subsequently. An applicant was required to delete and redo the two forms in order to generate the additional conditions in the two forms.</p> <p>The application for the second authorization was the first application assessed to have LPP likelihood after the enhancement of the application system. In preparing the application for the second authorization, the applicant overlooked the fact that the LPP likelihood was set to 'No' by default in the application system. After realising the omission of the additional conditions in the two forms, the applicant took action to delete the old affirmation but forgot to do the same for the JF-1 form. This resulted in the omission of the additional conditions in the JF-1 form. Having considered the affirmation in support of the second authorization, the panel judge granted the authorization without noticing the omission of the additional conditions. The applicant, not noticing the omission of the additional conditions in the second authorization, carried out the interception of the third facility in the same way as the other two facilities authorized by the first authorization (i.e. as though the additional conditions existed) and requested the panel judge to lift the</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>additional conditions in the relevant REP-11 reports after the release of the subject.</p> <p>The LEA concluded that the mistakes were caused by the carelessness and oversight of the applicant and proposed to issue a verbal warning to the applicant. After the incident, the LEA removed the default setting of the LPP likelihood in the computerised application system so that applicants must consciously select the correct option when preparing an application.</p> <p>The Commissioner agreed to the LEA's conclusion that the mistakes were due to the carelessness and oversight of the applicant. There was no evidence of any malicious act or ulterior motive. The Commissioner's checking confirmed that despite the omission of the additional conditions to guard against the risk of obtaining LPP information in the second authorization, the interception of the third facility was carried out in such a manner as though the additional conditions had been imposed. There was no non-compliance in this case. The LEA's proposed disciplinary action against the applicant was appropriate. Although the omission arose from the carelessness and oversight of the applicant, the Commissioner wrote to remind the panel judges to exercise vigilance to ensure that any draft authorization (i.e. JF-1 form) prepared by the LEAs was properly prepared before appending their signature thereon.</p> <p>In reporting the identification of the subject through the first REP-11 report, the applicant used the same</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p>report to notify the panel judge of the subject's previous arrest and the assessment on the LPP likelihood. The Commissioner advised the LEA that it was more appropriate to report the arrest and the assessment on the LPP likelihood separately through the prescribed form for reporting on arrest of subject, so as to avoid ambiguity on whether the reporting requirement under section 58(1) of the ICSO has been complied with.</p> <p>(See paragraphs 6.17 - 6.25 of Chapter 6.)</p> <p><u>Report 2</u> At the grant of the prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. On a day immediately before a long holiday, a listener listened to a call which, though not related to the investigation under the authorization, indicated heightened likelihood of obtaining LPP information. The listener immediately reported the matter to his supervisor ('the Officer'). The matter was also reported to the officer-in-charge of the interception unit concerned. On resumption of duty on the first working day after the long holiday, the Officer submitted an REP-11 report to the panel judge to report the matter and seek approval to continue with the authorization. The panel judge allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.</p> <p>In submitting a report in accordance with the COP to the former Commissioner reporting the LPP</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>case, the LEA also reported that the Officer did not make arrangement for preservation of the relevant recordings of the interception products on the day when the heightened LPP likelihood was detected. The preservation was made only on the same day of submission of the REP-11 report. The delay led to destruction of the recordings of interception products obtained for a few days, which should have been preserved. The LEA was requested to conduct a full investigation into the matter.</p> <p>There were guidelines issued by the LEA on preservation of recordings of interception products for LPP cases, which stipulated that the recordings should be preserved from the time when they were still available at the time of discovery of the relevant LPP call. During the investigation by the LEA, the Officer explained that the delay in preservation was due to his misunderstanding of the guidelines. He thought that he had followed the guidelines as long as the arrangement for preservation was made at the time when the related REP-11 report was submitted to the panel judge. He did not realise that the arrangement for preservation had to be done on the day of discovery of the LPP call.</p> <p>The investigation by the LEA could not find any evidence to rebut the Officer's explanation about his misunderstanding of the guidelines and there was also no indication as to any ill intention or foul play behind the delay. However, the LEA considered the Officer's misunderstanding of the preservation requirement, which showed his lack of the required</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Surveillance	<p>sensitivity and vigilance in carrying out ICSO-related duties, disappointing and unacceptable. The LEA proposed to issue a verbal warning each to the Officer and the officer-in-charge of the interception unit concerned.</p> <p>To prevent recurrence of any possible misunderstanding of the preservation requirement, the LEA revised the guidelines to expressly set out the requirement that the arrangement for preservation of the recordings of the interception products should be made on the day of discovery of the relevant LPP call.</p> <p>The Commissioner considered that there was no evidence by which he could disagree with the finding of the LEA, i.e. there was no ill intention or foul play behind the delay. The proposed disciplinary actions against the two officers concerned were appropriate.</p> <p>(See paragraphs 6.26 - 6.31 of Chapter 6.)</p> <p><u>Report 3</u></p> <p>A prescribed authorization was issued upon oral application for a Type 2 surveillance operation for a time-critical investigation case. Surveillance devices were issued from a total of three device stores (Store A, Store B and Store C) for the surveillance operation. On the fourth day of the operation, it was decided that the surveillance devices issued from Store A and Store B should be returned to the device stores as they were no longer necessary. At that time, the applicant of the authorization was very busy with the investigation case and gave a verbal instruction to the</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>two device store managers concerned for the return of the surveillance devices. However, the two device store managers misinterpreted the message given by the applicant of the authorization that the surveillance operation was already discontinued. As a result, it was recorded incorrectly in the relevant device registers of the DMS that the operation was already discontinued when the surveillance devices were returned. The investigation by the LEA showed that the two device store managers had the impression that when all the surveillance devices issued from their device stores were no longer necessary, that meant the operation, as far as the deployment of the surveillance devices was concerned, was discontinued.</p> <p>The surveillance operation was discontinued on the fifth day. When arranging for the return of the surveillance devices to Store C after the discontinuance of the operation, the applicant of the authorization told the relevant officer that the discontinuance was yet to be approved. Thus, the relevant officer took it that the surveillance operation was not yet discontinued. Consequently, it was recorded incorrectly in the device register of the DMS that the surveillance operation was not discontinued when the surveillance devices were returned to Store C. As indicated by the investigation of the LEA, this mistake was due to the misunderstanding of the applicant of the authorization that the discontinuance of a surveillance operation had to be 'approved' by the authorizing officer who issued the authorization.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Surveillance	<p>The LEA concluded that no malicious intent was involved and the mistakes were due to misunderstanding or misinterpretation of the meaning of discontinuance by different officers, which caused confusion as to the status of the surveillance operation when surveillance devices were returned. The LEA had taken action to remind the applicant of the authorization and the other relevant officers of the exact meaning of discontinuance and to be more careful when reporting the status of surveillance operation in future. It would also enhance the relevant training so as to prevent recurrence of similar mistakes in future.</p> <p>The Commissioner agreed with the LEA's findings. There was no evidence of misconduct on the part of the officers concerned. However, the Commissioner noted that some officers in the LEA had not received DMS training before taking up the role of device store managers. The Commissioner considered this situation unsatisfactory. In response to the Commissioner's concern, the LEA revised its training policy to ensure that all officers who were to be appointed as device store managers were properly trained before.</p> <p>(See paragraphs 6.32 - 6.36 of Chapter 6.)</p> <p><u>Report 5</u> In a crime investigation, Type 1 surveillance was intended to be conducted on a subject. According to an official identification document, the subject's full name was 'XY', comprising a Chinese name 'X' and a Christian name 'Y'.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>The officer-in-charge of the investigation ('Oi/C') drafted an affirmation in support of an application for the intended Type 1 surveillance ('affirmation'), with his supervisor as the applicant. In the draft affirmation, the Christian name 'Y' of the subject was described as an alias instead of part of his full name. In the draft prescribed authorization which was also prepared by the Oi/C, the subject was described as 'X' only, i.e. his Christian name 'Y' was missing ('inaccuracy'). The draft affirmation, the draft prescribed authorization and other application documents were submitted through the supervisor of the Oi/C, who failed to notice the above irregularities, to the Assistant Head of Department, who approved the making of the application. The application was subsequently granted by the panel judge. About two weeks later, the LEA discovered the inaccuracy and submitted a report on it to the panel judge who noted the report.</p> <p>The LEA recommended that both the Oi/C and his supervisor each be given an advice by a senior directorate officer. The LEA had reminded its frontline officers to be vigilant in preparing ICSO-related documents and to ensure the full name of a subject to be accurately set out in the prescribed authorization. The LEA had also included a guidance note in the template of the relevant ICSO documents so as to further alert the officers to the need of setting out the full name of a subject as appearing in the official identification documents.</p> <p>Having reviewed the case, the Commissioner considered that by virtue of section 64(1) of the ICSO,</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception & Surveillance (4 reviews)	<p>the inaccuracy did not affect the validity of the prescribed authorization concerned. The LEA's proposed action against the officers involved was acceptable. The improvement measures taken by the LEA were appropriate.</p> <p>(See paragraphs 6.49 - 6.54 of Chapter 6.)</p> <p><u>Other reports</u> These cases had been reviewed and nothing untoward was found. For cases relating to technical problems of computerised systems, the LEAs had taken appropriate actions to fix the problems.</p> <p>(See paragraph 6.55 of Chapter 6.)</p>

Section 41(2)

The Commissioner shall conduct reviews on cases in respect of which a report has been submitted to him under section 23(3)(b), 26(3)(b)(ii) or 54

Number of reviews conducted under section 41(2)		Interception/ Surveillance	Summary of reviews
(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.
(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	3	Interception	<u>Outstanding case (i) from 2014</u> This case was brought forward from Annual Report 2014, involving an unauthorized interception of a facility (Facility 1) for about four days and it was a case of non-compliance. Upon the former Commissioner's requests, the LEA reported its further findings in May 2015 and subsequently submitted a further report to address a few issues in

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>the report on further findings.</p> <p>The LEA stated that the reasoning of the officer-in-charge of the operations ('OC') and his supervisor ('Supervisor') for not mentioning the physical surveillance operation on a meeting in the affirmation in support of the interception application was unsound and their judgment flawed. The LEA concluded that whilst the OC and the Supervisor were primarily responsible for the non-compliance, there was no evidence suggesting any bad faith or deliberate disregard of the relevant requirements of the ICSO on their part. Although the Commissioner could not draw inferences that there was any bad faith or ulterior motive of the OC and the Supervisor, the attitude of these two officers in handling ICSO-related matters was far from satisfactory and could even be said to be a total disregard of the spirit of the ICSO.</p> <p>The LEA's report on further findings revealed that the verification process regarding the interception of the correct facility (Facility 2) was highly unsatisfactory. The LEA should remind its officers that in any event, the verification form should be fully completed and its details should be verified before the submission of the application to the panel judge for a prescribed authorization. Full information and circumstances should also be given in respect of any remark or amendment to any part of the verification form.</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>The LEA also reported an incident on an incorrect statement contained in the affirmation supporting the application for interception on another facility used by the subject ('Incorrect Statement'). The Incorrect Statement included an inaccurate description of the source of the information supporting the application. The applicant of the interception application ('Applicant') was the author of the Incorrect Statement. The LEA considered that the Incorrect Statement should not be regarded as a breach of any of the relevant requirements of the ICSO. While the Commissioner agreed that the Incorrect Statement itself did not constitute a breach of the ICSO, the lack of vigilance of the officers concerned was neither satisfactory nor acceptable.</p> <p>While in-depth inquiries had been made, the Commissioner was not able to find sufficient evidence of any ill will or ulterior motive relating to any of the LEA officers concerned. Nevertheless, the chain of incidents revealed that various officers concerned failed to perform their respective ICSO duties with prudence, diligence and professionalism. They reflected the lax attitude of the officers concerned, in particular the OC and the Supervisor, in adhering to the spirit of the ICSO and the established departmental procedures. This was highly unsatisfactory. The LEA should endeavour to ensure that the officers who are required to conduct covert operations acquaint themselves with the relevant requirements under the ICSO and</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>be vigilant in the conduct of the operations.</p> <p>The Commissioner noted the following actions as finally recommended by the LEA against the officers concerned for their respective failures in this entire case:</p> <ul style="list-style-type: none"> (i) one written warning and two advices to the officer responsible for making assessment of the available intelligence; (ii) two written warnings and one verbal warning to the OC; (iii) two written warnings and one verbal warning to the Supervisor; (iv) one verbal warning and two advices to the Applicant; (v) an advice to the Assistant Head of Department concerned; and (vi) an advice each to four other officers concerned. <p>The LEA had proposed further improvement measures to address the inadequacy in the interception verification and application procedures. These measures were considered appropriate.</p> <p>(See paragraphs 6.6 - 6.14 of Chapter 6.)</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>applications was made aware of the Operation later on Day 2, he considered that it might have been conducted outside the ambit of the PA.</p> <p>The LEA stated in the investigation report that the Operation, which was carried out on the two subjects when no meeting took place at a public place, was conducted not in compliance with the terms of the PA, and therefore, it was unauthorized. The LEA recommended that a verbal warning be given to each of Officer A and Officer B; a written warning be given to the Officer-in-charge; and an advice be given to the Immediate Supervisor.</p> <p>The Commissioner made further enquiries with and provided comments to the LEA. In particular, the Commissioner commented that the contradictory statements given by the Immediate Supervisor and the Officer-in-charge as to whether the Operation had been reported to the Immediate Supervisor was disconcerting. The Immediate Supervisor had adopted a lax attitude on the matter and had not performed his supervisory role adequately. With the omission of the Operation in the affidavits of the related applications for interception, the panel judge was neither presented with the whole picture nor alerted to the possible non-compliance when considering the renewal applications. The contradictory statements also cast concern on whether the Immediate Supervisor had any intention to conceal the potentially unauthorized covert surveillance.</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>The Commissioner also considered the proposed advice to be given to the Immediate Supervisor too lenient.</p> <p>The LEA was requested to conduct a review of the case, in particular on whether there was any concealment by any of the officers concerned of the potentially unauthorized covert surveillance and the action to be taken against the Immediate Supervisor.</p> <p>Furthermore, the Commissioner considered that the incident reflected the problem of lack of a mechanism to ensure timely reporting and monitoring of covert operations by the subject officers and their supervisors, which might lead to grave consequences. The LEA was asked what remedial measures had been or would be taken to address this problem. The LEA submitted a further report in response to the above matters.</p> <p>Based on the information provided by the LEA, the Commissioner agreed that this was a case of non-compliance. The conduct of the Operation did not comply with the terms of the PA.</p> <p>The Commissioner considered the fact that the officers concerned had knowledge of the terms of the PA and they still failed to exercise the necessary vigilance in carrying out the surveillance operation to be very unsatisfactory. It was also disappointing to note that such an apparent non-compliance could not be discovered earlier and was detected only after the related renewal applications for interception were submitted to the</p>

Number of reviews conducted under section 41(2)		Interception/ Surveillance	Summary of reviews
			<p>panel judge.</p> <p>While the Commissioner had no objection to the LEA's conclusion that there was no evidence to suggest any concealment of the potentially unauthorized covert surveillance by any of the officers concerned, the Immediate Supervisor's claim that he acted only on his assumption (which turned out to be incorrect) without making enquiries with the Officer-in-charge as to whether covert surveillance was conducted at a public place was inconceivable and such work performance was undesirable.</p> <p>The LEA revised the recommended action against the Immediate Supervisor from advice to written warning, which the Commissioner considered acceptable. The proposed disciplinary actions against Officer A, Officer B and the Officer-in-charge were appropriate. In response to the Commissioner's concerns, the LEA had enhanced its training on the conduct of covert surveillance and also introduced a mechanism to ensure timely reporting and monitoring of covert surveillance operations.</p> <p>(See paragraphs 6.37 - 6.48 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)]

Section 41(1)

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
(a) Reviews of LPP cases	4	Interception	<u>One case of obtaining of LPP information</u> Inaccuracy in the reporting of 'other calls' in an REP-11 report on heightened LPP likelihood.
		Interception	<u>First case of heightened LPP likelihood</u> Omission of the additional conditions in a prescribed authorization for an interception operation which was assessed to have LPP likelihood. This is the Report 1 referred to in item (b) below.
		Interception	<u>Second case of heightened LPP likelihood</u> Delay in arranging for preservation of interception products upon detecting heightened LPP likelihood. This is the Report 2 referred to in item (b) below.
		Surveillance	<u>Third case of heightened LPP likelihood</u> Type 1 surveillance conducted outside the ambit of a prescribed authorization. This is the Report 4 referred to in item (c) under section 41(2) below. (For details, see item (c) under section 41(1) in Table 5 and Chapter 4.)

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
(b) Other reviews	8	Interception	<u>Report 1</u> Omission of the additional conditions in a prescribed authorization for an interception operation which was assessed to have LPP likelihood. This is the first case of heightened LPP likelihood referred to in item (a) above.
		Interception	<u>Report 2</u> Delay in arranging for preservation of interception products upon detecting heightened LPP likelihood. This is the second case of heightened LPP likelihood referred to in item (a) above.
		Surveillance	<u>Report 3</u> Incorrect status of surveillance operation recorded in the device registers.
		Surveillance	<u>Report 5</u> Omission of Christian name of a subject in the prescribed authorization.
		Interception & Surveillance (4 cases)	<u>Other reports</u> These included three cases of technical problems of the computerised systems and one case relating to a typographical error in the application document and documentation of making minor amendment in the executive authorization by the authorizing officer. (For details, see item (d) under section 41(1) in Table 5 and Chapter 6.)

Number of cases of irregularities or errors identified in the reviews under section 41(2)		Interception/ Surveillance	Broad nature of irregularities or errors identified
			<p>heightened LPP likelihood referred to in item (a) under section 41(1) above.</p> <p>(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
11	1	0	8	2

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)] ^{Note 3}	9	1	0	8

Note 3 Of the nine notices, four were issued during the report period and five thereafter.

Table 9

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

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

Table 10

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

Recommendations made by the Commissioner		Interception/ Surveillance	Broad nature of recommendations
Reports to the Chief Executive on any matter relating to the performance of the Commissioner's functions [section 50]	Nil	Not applicable	Not applicable
Recommendations to the Secretary for Security on the Code of Practice [section 51]	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]	6	Interception & Surveillance	<p>(a) Reporting of suspected LPP calls to the panel judges.</p> <p>(b) Information on the subscriber of the facility proposed to be intercepted.</p> <p>(c) Reason for discontinuance of an operation.</p> <p>(d) Computer log on removal of right of access to interception products.</p> <p>(e) Reporting of arrest of the subject.</p> <p>(f) Strong justifications to support prolonged interception operations.</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)]

	Number of cases
Interception	1
Surveillance	0

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)]

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
<p><u>Case 1</u> Surveillance</p>	<p>A device storekeeper made a mistake in a device register regarding the time of return of surveillance devices issued for a Type 2 surveillance operation.</p> <p>(See paragraphs 6.37 - 6.40 of Chapter 6 of Annual Report 2014.)</p>	<p>Verbal advice</p>
<p><u>Case 2</u> Interception</p>	<p>An officer used an outdated version of the further additional conditions in the REP-11 report which reported on heightened LPP likelihood and requested continuance of the interception operation.</p> <p>(See paragraphs 4.15 - 4.17 of Chapter 4 of Annual Report 2014.)</p>	<p>Verbal advice</p>
<p><u>Case 3</u> Interception</p>	<p>(i) An officer made a wrong assessment on the available intelligence in the investigation.</p>	<p>Written warning</p>

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	<p>(ii) The officer-in-charge of the operations failed to respond appropriately to and make a proper analysis and assessment on the available intelligence in the investigation and carry out ICSO duties in a diligent and attentive manner.</p> <p>(iii) The supervisor of the officer mentioned in (ii) above failed to take appropriate action, attributing in part to the cause of the unauthorized interception, make a proper analysis and assessment on the available intelligence in the investigation and carry out ICSO duties in a diligent and attentive manner.</p> <p>(iv) The applicant of the interception applications created an incorrect statement in the affirmations concerned.</p> <p>(See paragraphs 6.6 – 6.14 of Chapter 6.)</p>	<p>Two written warnings and one verbal warning</p> <p>Two written warnings and one verbal warning</p> <p>Verbal warning</p>

8.2 In accordance with section 49(2)(e) of the Ordinance, 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 the LEAs and their officers with the relevant requirements and to conduct reviews, etc. It is 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 2015 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, most of the applications for interception and covert surveillance were approved by the panel judges and the authorizing officers. For interception, only two applications (out of 1,430) were refused and the reason for refusal was that the materials to support the allegations were inadequate/insufficient. As regards covert surveillance, all the applications (53 in total) were granted.

9.4 In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations.

Reviews by the Commissioner

9.5 There were different ways to review the LEAs' compliance with the requirements of the Ordinance in respect of interception and covert surveillance 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, the records kept by the surveillance device recording system of the LEAs would be checked.

9.6 While an outstanding case carried forward from 2014 was concerned with wrong interception as reported in Chapter 6, there was no case of wrong or unauthorized interception revealed by the various forms of checking in 2015. In respect of covert surveillance, apart from the non-compliance case mentioned in Chapter 6, cases checked during the year were found to be generally in order although some areas for

improvement were required, namely, in the recording of status of surveillance operations, departmental review of surveillance operations and handling of discontinuance reports by the authorizing officer. 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 The COP obliges the concerned LEA to notify the Commissioner of cases that are likely to involve LPP information or JM. The Commissioner is 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 were observed to have recognised the importance of protecting information which might be subject to LPP/JM. They continued to adopt a very cautious approach in handling these cases. The review of the LPP cases reported in 2015 (there were no JM cases in the year) revealed that nothing untoward was found except the non-compliance case in Report 4 in Chapter 6, and the three cases mentioned in paragraphs 4.10 to 4.13 in Chapter 4, and Reports 1 and 2 in Chapter 6.

Reports of non-compliance/irregularities

9.9 Under section 54 of the Ordinance, the head of an LEA is required to submit a report to the Commissioner if he considers 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.

LEAs are also required to report to the Commissioner cases of irregularity or even simply incidents. Hence, all cases of possible non-compliance are brought to the attention of the Commissioner for examination and review without any delay. In 2015, nine reports of non-compliance/irregularities/incidents were received from LEAs.

9.10 I was disappointed to note the non-compliance case in Report 4 of Chapter 6. Owing to the LEA officers' lack of vigilance and inadequacy in performance, a covert surveillance operation was conducted outside the ambit of the prescribed authorization concerned and this was not timely detected nor included in the affidavits in support of related renewal applications for interception. While there was no evidence to suggest any concealment of the potentially unauthorized covert surveillance by any of the LEA officers, the case revealed a number of unsatisfactory areas in the LEA concerned, including failure of the officers in exercising the necessary vigilance in performing ICSO-related duties and lack of a mechanism to ensure timely reporting and monitoring of covert surveillance operations.

9.11 Overall, I am generally satisfied with the performance of the LEAs and their officers in their compliance with the requirements of the ICSO in 2015. 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. Nonetheless, there were still occasions when officers were careless or not vigilant enough in conducting covert operations. I must stress that the officers of the LEAs must develop a responsible mindset and stay alert in the ICSO operations so as to ensure strict compliance with the requirements of the legislation. Any failure to adhere to these requirements is unacceptable. I also observe that some incidents were attributed to subject officers' inadequate acquaintance with the rules and procedures of ICSO operations. LEAs and their officers should continue to exert efforts to improve their performance in ICSO-related duties.

CHAPTER 10

ACKNOWLEDGEMENT AND WAY FORWARD

Acknowledgement

10.1 I would not be able to perform my functions as the Commissioner under the ICSO without the assistance and co-operation of the panel judges, the Security Bureau, the LEAs as well as the CSPs. I would like to express my gratitude to everyone concerned. I also look forward to their continuous support during my term of office.

Way forward

10.2 I am very glad to see that the Interception of Communications and Surveillance (Amendment) Bill 2015 was passed on 16 June 2016 and the enactment took effect on 24 June 2016. The major legislative amendments cover the following areas:

- (a) checking of protected products by the Commissioner;
- (b) power of the relevant authority on partial revocation of a prescribed authorization, revocation of a prescribed authorization on grounds of material inaccuracies or material change in circumstances, revocation of device retrieval warrants, and variation of conditions in prescribed authorizations;
- (c) retention and destruction of protected products;
- (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) clarification of the meanings of certain expressions in the Ordinance.

10.3 Under the amended ICSO, the Commissioner and his staff will have the express power to listen to and inspect the protected products of the covert operations conducted by LEAs under the Ordinance. The empowerment would pose a useful deterrent against any breach or abuse of the Ordinance or concealment of any unauthorized acts by the LEAs and their officers. The internal guidelines and procedures for the performance of this new checking power are being finalised. The checking will commence when the necessary logistical arrangements are completed. The amended ICSO also clearly provides that, inter alia, the Commissioner has the express power and free discretion to examine all protected products of his choice, and that the requirement to destroy protected products should be subject to the Commissioner's power to examine them. This will facilitate an effective oversight by the Commissioner of the LEAs' compliance with the Ordinance.

10.4 I believe that the implementation of the legislative amendments is conducive to the enhancement of the operation of the ICSO regime and ultimately to bringing benefit to the protection of the rights of people in Hong Kong.