

Commissioner on Interception of Communications and Surveillance

Annual Report 2015

Summary

1. The Interception of Communications and Surveillance Ordinance (Cap. 589) ('the Ordinance' or 'ICSO') came into force on 9 August 2006 and was amended in June 2016. Mr. A. R. Suffiad was appointed as the Commissioner on Interception of Communications and Surveillance ('Commissioner') on 17 August 2015 for a term of three years. Pursuant to section 49 of the Ordinance, Mr. Suffiad submitted his first annual report, i.e. Annual Report 2015, to the Chief Executive on 30 June 2016. The report covers the period 1 January 2015 to 31 December 2015 which overlaps the term of office of Mr. D. G. Saw, the second Commissioner whose term expired on 16 August 2015. The following is a summary of the report.

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

Independent Commission Against Corruption.

3. During the report period, a total of 1,481 prescribed authorizations (including fresh and renewed authorizations) were issued. Among them, 1,428 were judge's authorizations for interception, 37 were judge's authorizations for Type 1 surveillance, and 16 were executive authorizations for Type 2 surveillance (three of which consequent on oral applications) issued by designated authorizing officers of the LEAs. These authorizations included 36 cases that had been renewed more than five times.

4. During the report period, two applications for interception were refused. Reasons for refusal are stated in paragraph 2.3 of Chapter 2 of the report. No application for Type 1 or Type 2 surveillance was refused.

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

6. A total of 280 persons were arrested in 2015 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. The LEAs have adopted the use of tamper-proof labels to seal the removable storage media ('RSM') inside the surveillance devices at the

time of issue, and they have also adopted or are making arrangements for the use of Quick Response Code to facilitate the issue and return of the RSM through the computerised device management system.

8. The Ordinance makes specific reference to legal professional privilege ('LPP') and journalistic material ('JM') for particular caution when interception or covert surveillance is to be authorized and carried out. The COP provides that the LEAs should notify the Commissioner of cases that are likely to involve LPP information/JM as well as other cases where LPP information/JM has been obtained.

9. 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, 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 concerned LEA is required to give the Commissioner a similar notification of each of such occurrences.

10. For 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 were stringent and effective in safeguarding the important right of individuals to confidential legal advice.

11. 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 one case of obtaining of LPP information and 16 cases of heightened likelihood of obtaining LPP information. For the remaining five LPP cases, it was assessed at the time of application that the operations sought to be authorized would likely obtain LPP information and the panel judges had imposed additional conditions in the prescribed authorizations. Details of the Commissioner's reviews of the LPP cases are given in Chapter 4 of the report. As regards JM, in the report period, the Commissioner did not receive any report on cases involving JM or likelihood of obtaining JM.

12. During the report period, 11 applications for examination were received. 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. After making all necessary enquiries, the Commissioner or his predecessor found all the nine cases not in the applicants' favour and accordingly notified each of them in writing. Under the Ordinance, the Commissioner is not allowed to provide reasons for his determination. The Commissioner has observed that there were occasions that the applicants felt that their purpose of applying for examination had not been achieved as the Commissioner or his predecessor could not disclose the reasons for their determinations. It is hoped that the public will understand that the 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. There should not be any doubt that the Commissioner carries out his duties and functions under the Ordinance with utmost good faith and sincerity.

13. Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person when the Commissioner discovers a case in which interception or covert surveillance has been carried out by an officer of any of the four LEAs covered by the Ordinance without a prescribed authorization. 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. During the report period, the Commissioner 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. The Commissioner informed the relevant person of the right to apply for an examination in respect of the unauthorized interception. At the time of writing the report, the Commissioner has not received any response from the relevant person.

14. 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 on the conduct of Type 1 surveillance outside the ambit of a prescribed authorization (i.e. Report 4 in Chapter 6), the other eight cases were submitted not under section 54 of the Ordinance. Moreover, the review of one of the outstanding cases brought forward from the Annual Report 2014 has been completed while the reporting of the other outstanding case will be made after the relevant court proceedings have concluded. These are set out in Chapter 6 of the report. Three other cases relating to surveillance devices for non-ICSO purposes are covered in Chapter 3 of the report.

15. During the report period, disciplinary actions were taken against six officers in the form of verbal advice, verbal warning or written

warning for cases mentioned in Chapters 4 and 6 of the Annual Report 2014 and Chapter 6 of the report. Table 12 in Chapter 8 of the report sets out the details.

16. To better carry out the objects of the Ordinance, a number of recommendations were made in the report period to the LEAs under section 52 of the Ordinance. Details of the recommendations are given in Chapter 7 of the report.

17. The Commissioner has set out in Chapter 9 of the report an assessment of the overall performance of the LEAs in their compliance with the relevant requirements of the ICSO during the report period. In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. While an outstanding case carried forward from the Annual Report 2014 was concerned with wrong interception as reported in Chapter 6 of the report, 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 of the report, cases checked during the year were found to be generally in order although some areas for improvement were required. There was no sign of abuse of surveillance devices for any unauthorized purposes. In the handling of LPP and JM cases, the LEAs continued to adopt a very cautious approach. 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 of the report.

18. The Commissioner was disappointed to note the non-compliance case in Report 4 of Chapter 6 of the report. 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.

19. Overall, the Commissioner is 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. The Commissioner stresses 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 and that any failure to adhere to these requirements is unacceptable. The Commissioner also observes 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.

20. The Commissioner is 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. Under the amended ICSO, the Commissioner and his designated 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 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. The Commissioner believes 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.

21. In the report, the Commissioner expresses his gratitude to the panel judges, the Security Bureau, the LEAs and the communications services providers as he would not be able to perform his functions as the Commissioner without their assistance and co-operation.

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