

Annual Report 2016 to the Chief Executive

by

The Commissioner on
Interception of Communications
and Surveillance

June 2017



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 2016

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 2016, together with its Chinese translation.

Yours sincerely,



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

Encl: Annual Report for 2016

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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 (Cap. 589)
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 in circumstances or 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 2016
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. This report covers the period 1 January to 31 December 2016.

1.2 The ICSO came into operation in August 2006 and was amended with the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016 in June 2016. The ICSO 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 ICSO ^{Note 1} 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 With the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016, the Commissioner and his delegated officers have the express power to examine the protected products and this opened a new chapter in the Commissioner's oversight work. The cases subject to the said examination include cases which concern non-compliance or irregularity, cases involving information subject to legal professional privilege ('LPP') or journalistic material ('JM')

^{Note 1} To tie in with the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016 in June 2016, the Secretary for Security has also revised the COP. The revised COP took effect at the same time as the amendment Ordinance.

or a likelihood of obtaining such information, and cases chosen on a random basis. Furthermore, under the amended Ordinance, all protected products which are subject to immediate destruction under sections 23(3)(a), 24(3)(b), 26(3)(b)(i) and 27(3)(b) of the ICSO should be retained and provided for the Commissioner's examination when required before they are destroyed.

1.7 In accordance with section 53A of the Ordinance, I have delegated my power to examine protected products in writing to certain designated officers in the Secretariat, Commissioner on Interception of Communications and Surveillance ('Secretariat'). Officers to whom I have delegated the power to examine protected products are not empowered to further delegate the power to other persons. To ensure that the work on examining protected products can be conducted effectively and smoothly, I met with the subject officers of the relevant LEAs to discuss the logistical arrangements. Within the Secretariat, internal guidelines and procedures on the performance of examination of protected products, including security and supervision measures to forestall unauthorized access or leakage of information, have been instituted. The delegated officers were provided with the necessary training before they commenced the examining work. Since October 2016, I as well as the delegated officers have conducted regular visits to the LEAs to examine the protected products. More information about the examining work will be given in the ensuing chapters.

1.8 In the report period, I also had correspondence and meeting with the panel judges on matters relating to the reporting requirements for LPP and JM cases and the arrangements for making application for authorization/renewal with a view to facilitating the consideration of the applications and reports submitted by LEAs. The LEAs were subsequently informed of the revised requirements and arrangements.

1.9 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.

1.10 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 1,417 written applications for interception made by the LEAs, of which 1,416 were granted and one was refused by the panel judges. Among the successful applications, 735 were for authorizations for the first time ('fresh applications') and 681 were for renewals of authorizations that had been granted earlier ('renewal applications').

Reasons for refusal

2.3 The refused application was a fresh application, which was refused because the materials provided to support the allegation put forth, in the view of the panel judge, were inadequate/insufficient to justify infringing the privacy of the subject.

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 65% 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 42 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 or a part of an interception (and also covert surveillance or a part of covert surveillance) if he is of the opinion that a ground for discontinuance of the prescribed authorization or a part 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 or the relevant part of the prescribed authorization concerned.

2.11 The number of authorizations for interception revoked fully under section 57 during the report period was 631. Another 76 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 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 131 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 21 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 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 116 persons, who were subjects of prescribed authorizations, were arrested as a result of or further to interception operations. In addition, 91 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 2016 was reviewed by the following ways:

- (a) checking of the weekly reports submitted by the LEAs and the Panel Judges' Office ('PJO');
- (b) examination of the contents of the LEAs' files and documents during periodical visits to the LEAs;
- (c) examination of interception products at the LEAs' offices; and
- (d) 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 JM from the proposed operation, etc. Case background, progress of the investigation, identity and particulars of the subject and others as well as other sensitive information are not required and therefore obliterated or sanitised 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, clarification and explanation were sought from the LEAs and/or the PJO as and when necessary.

Examination of documents and information during periodical visits

2.20 Should the Commissioner perceive a need, clarification and explanation on the weekly report forms would also be sought in the periodical 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 in circumstances, reports on material inaccuracies, case files and internal review documents, etc. Such 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 619 applications for interception, including granted authorizations and refused applications, and 238 related documents/matters had been checked during the Commissioner's periodical visits to the LEAs in the report period.

Examination of interception products

2.23 Having the express power to examine the protected products after the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016, the Commissioner and his delegated officers have carried out the relevant examinations since October 2016. Each such examination was conducted at the LEAs' offices and only those parts of the interception products to which LEA officers had accessed previously would be examined by the Commissioner and his delegated officers.

2.24 Apart from some specific cases such as LPP and JM cases reported by the LEAs, the Commissioner would also select, on a random basis, interception products of other cases for examination with a view to checking if those other interception products may contain any LPP information or JM not reported by the LEAs. Such examination would also enable the Commissioner to identify whether there were any irregularities or concealment of unauthorized acts violating the ICSO, such as checking if the person using the telecommunications facilities as authorized by a prescribed authorization was actually the subject of the

prescribed authorization and if any discontinuance of interception operation was to avoid exposure or detection of inadvertent mistakes or acts done without authority. If there were questions or doubts arising from the examination of the interception products, the Commissioner would require the LEA concerned to provide clarification or explanation.

2.25 During the report period, a total of 60 authorizations had been selected at random for examination of the interception products and nothing untoward was found.

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

2.26 Apart from checking the weekly returns from the LEAs against those from the PJO, and examining case files, documents and interception products at the LEAs' offices, other measures have also been adopted for further checking the interceptions conducted by the LEAs.

2.27 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

2.28 During the report period, there was no case of wrong or unauthorized interception revealed by the various forms of checking.

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) 23 written applications for Type 1 surveillance including 19 fresh and four renewal applications; and
 - (b) six written applications for Type 2 surveillance including four fresh applications and two renewal 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 was one oral application for Type 2 surveillance, which was 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 of prescribed authorizations (fresh authorizations as well as renewals) for Type 1 surveillance granted by the

panel judges and Type 2 surveillance by the authorizing officers allowed under the Ordinance is three months. The longest approved duration of Type 1 surveillance granted in the report period was about 28 days whereas the shortest one was about one day. Overall, the average duration for such authorizations was about 14 days. In the report period, the longest approved duration of Type 2 surveillance granted was 21 days while the shortest one was one 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, 19 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 reported discontinuance cases, ten prescribed authorizations concerned were subsequently revoked fully by the panel judge under section 57. Eight other 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. For the remaining case, it involved discontinuance of a part of the covert surveillance where the panel judge, upon receipt of the discontinuance report, revoked the relevant part of the prescribed authorization concerned while the remaining parts of the covert surveillance were allowed to continue. The panel judge subsequently revoked the remaining parts of that prescribed authorization upon receipt of a further discontinuance report on the covert surveillance from the LEA.

3.13 As regards Type 2 surveillance cases, during the report period, five Type 2 surveillance operations were discontinued under section 57 before their natural expiration. The ground for discontinuance was mainly that the surveillance had been carried out. Four of the prescribed authorizations concerned were subsequently revoked by the authorizing officer. For the remaining case, the prescribed authorization concerned had expired by the time the authorizing officer received the discontinuance report and thus the authorizing officer could only note the discontinuance instead of revoking the prescribed authorization.

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, there was only one Type 1 surveillance operation involving LEA being aware of the arrest of subjects. The LEA concerned was aware that three subjects of the surveillance operation had been arrested but no report was made to the panel judge under section 58 seeking continuation of prescribed authorization. The prescribed authorization concerned was discontinued pursuant to section 57. As regards Type 2 surveillance, during the report period, the LEAs were not aware of any arrest of the subjects of covert surveillance and hence no report was made to the authorizing officer under section 58 seeking continuation of prescribed authorizations.

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 During the report period, no authorization for Type 1 or 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 15 persons who were subjects of the prescribed authorizations were arrested. In addition, two 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 2016 was reviewed by the following ways:

- (a) checking of the weekly reports submitted by the LEAs and the PJO;
- (b) examination of the contents of the LEAs' files and documents during periodical visits to the LEAs;
- (c) examination of surveillance products at the LEAs' offices; and
- (d) 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 the 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.

Examination of documents and information during periodical visits

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

3.22 During the year, 17 applications for Type 1 surveillance and 22 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 periodical 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 seven applications for Type 2 surveillance (including one application in 2015 and six applications in 2016) and six 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 periodical 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 was still area for improvement in respect of drafting of application documents. During a visit to an LEA, I noted that it was not mentioned in the statement in writing in support of the application for a Type 2 surveillance authorization as to how a particular piece of intelligence was obtained by the applicant. I advised

that when similar cases arose in future, the applicant should state clearly in the statement in writing/affidavit/affirmation how intelligence of such kind was made known to him so that the relevant authority could have knowledge of all relevant circumstances and factors before making a decision as to whether the application should be granted or refused.

3.26 In response to my views given in the course of checking of covert surveillance cases during the periodical visits, improvement measures were also implemented to facilitate my review of the cases as set out below:

- (a) In view of the fact that questions were often raised about the significant difference in the time of return of surveillance devices within the same surveillance operation as such information was not clearly stated in the relevant documents, an LEA had taken action to remind its officers to provide details on any significant events or matters occurred in the covert surveillance operations in the Review Forms.
- (b) In a prescribed authorization for covert surveillance, the relevant authority may authorize the use of certain surveillance devices and specify conditions on the use of any of the devices authorized. In reviewing a Type 1 surveillance operation where the panel judge did not authorize the use of certain capability of a surveillance device, it was noted that neither the corresponding register nor the recording system of surveillance devices could demonstrate whether such capability of the surveillance device had been applied during the surveillance operation. To enable more effective checking of the deployment of surveillance devices in covert surveillance operations, the LEA concerned had made enhancement to the recording system of surveillance devices and its officers were required

to state clearly in the register whether the conditions imposed by the relevant authority on the use of surveillance devices had been fully complied with.

Examination of surveillance products

3.27 With the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016 in June 2016, the Commissioner and his delegated officers have the express power to check the protected products obtained by the LEAs through covert surveillance under section 53(1)(a) of the amended Ordinance. The examination of surveillance products was conducted at the LEAs' offices.

3.28 Apart from some specific cases such as LPP and JM cases, the Commissioner would also select, on a random basis, surveillance products of other cases for examination with a view to checking if those other surveillance products may contain any LPP information or JM not reported by the LEAs. Such examination would also enable the Commissioner to identify whether there were any irregularities or concealment of unauthorized acts violating the ICSO, such as checking if the persons under covert surveillance as authorized by a prescribed authorization were actually the subjects of the prescribed authorization, if any information subject to LPP in the surveillance products had been screened out by the dedicated units before the products were passed to the investigators, and if any discontinuance of surveillance operation was to avoid exposure or detection of inadvertent mistakes or acts done without authority. If there were questions or doubts arising from the examination of the surveillance products, the Commissioner would require the LEA concerned to provide clarification or explanation.

3.29 All the surveillance products that were obtained during the report period and preserved for my examination had been checked and nothing untoward was found.

Checking of surveillance devices

3.30 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.

3.31 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

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

- (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.

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

Removable storage media

3.34 To better control the issue and return of surveillance devices, all the LEAs have adopted the computerised device management system ('DMS') in their device stores. In addition, the LEAs have adopted the use of tamper-proof labels to seal the removable storage media ('RSM') (e.g. memory cards, discs and tapes) inside the surveillance devices at the time of issue to avoid any possibility of these RSM being substituted, or in any way tampered with. I note that the LEAs 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

3.35 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.

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

A. Return of two surveillance devices was not recorded by the DMS

3.37 An LEA reported to me an incident in which the return of two surveillance devices issued for non-ICSO purposes was not recorded by the DMS.

3.38 In processing return of surveillance devices to a device store, the device storekeeper is required to scan the bar codes of the devices so as to enable the DMS to recognise which devices are returned. Upon completion of the return process, the DMS will generate a Record of Return showing the surveillance devices returned on that occasion and any other devices which were issued under the same device request memo but not returned on that occasion. Both the device storekeeper and the officer returning the surveillance devices should sign on the Record of Return as an authentication.

3.39 On a morning, a device storekeeper, when conducting a routine checking of device registers at the start of day shift, discovered that there was no return record on two surveillance devices ('Device A' and 'Device B'), which had been issued for non-ICSO purposes, in the device register concerned. In addition, the Records of Return in respect of the device request memos concerned did not indicate that the two surveillance devices had been returned. However, the two surveillance devices were found to be present in the device store concerned when the device storekeeper conducted an immediate inventory check.

3.40 Device A and Device B were issued in the morning of the preceding day respectively for two non-ICSO operations ('Operation A' and 'Operation B'). For each of these two operations, two surveillance devices were issued under a device request memo. The two devices issued for Operation A (including Device A) were returned by a Returning Officer ('Returning Officer A') at around 2000 hours on the same day when they were issued, and the two devices issued for Operation B (including Device B) were returned by another Returning Officer ('Returning Officer B') about an hour later. The return of all the four surveillance devices were evidenced by the records made in the Occurrence Book of the device store concerned and the Handing/Taking Over Certificates for changing shifts. The LEA could not find any malfunction of the DMS which might have been the cause of the incident. According to the statements given by Returning Officer A and Returning Officer B to account for the incident, both officers noticed that the device storekeeper who processed the return of the devices in question ('Device Storekeeper') had scanned the bar codes of all the surveillance devices returned by them. The Device Storekeeper also made a statement that he had scanned the bar codes of all the devices returned into the DMS. However, all the three officers were unaware that the return of Device A and Device B was not recorded in the respective Records of Return.

3.41 The LEA concluded that Device A and Device B had physically been returned to the device store by the time the concerned officers signed on the relevant Record(s) of Return. It was an oversight that the Device Storekeeper, Returning Officer A and Returning Officer B did not recognise the missing of correct return record(s) when they signed on the Record(s) of Return. There was neither malicious intent nor unauthorized use of the surveillance devices.

3.42 The LEA proposed a number of remedial/improvement measures to prevent recurrence of similar incidents. It also recommended that the Device Storekeeper, Returning Officer A and

Returning Officer B be sternly reminded to be more mindful when executing their duties, particularly in handling the withdrawal and return of surveillance devices.

3.43 I noted the LEA's findings and remedial/improvement measures. The proposed actions against the three officers concerned were acceptable.

B. Loss of a surveillance device

3.44 An LEA reported to me that a surveillance device and its associated accessories were reported lost after they were withdrawn for use in a training exercise. After investigation, it was suspected that the lost items might have accidentally fallen off from a vehicle when the officer who was assigned to personally take charge of the device boarded or alighted from the vehicle. The LEA concluded that the loss of the items was due to the negligence of the officer and proposed to issue a written admonishment to him. The officer would also be required to make compensation for the loss in accordance with the relevant procedures on loss of government properties. Besides, the LEA proposed to issue a verbal advice (disciplinary) to the officer's supervisor for his failure to properly supervise his team members in ensuring the safe keeping of surveillance devices. The LEA had also reminded the supervisory officers concerned to ensure the safe custody of all surveillance devices taken out for operations.

3.45 Having reviewed the case, I agreed with the LEA's findings and considered the proposed disciplinary actions appropriate.

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 in writing the likelihood that any information which may be subject to 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 in circumstances, the officer concerned has to promptly report to the relevant authority the altered LPP assessment. The reporting requirement regarding material change in circumstances is stipulated under section 58A of the ICSO after the legislative amendment of the Ordinance in June 2016. The report to the panel judge is made by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, by way of an REP-13 report to the

authorizing officer. 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 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. In the report made under section 58A or section 58, the officer has to provide the details of all relevant circumstances, including 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 in accordance with the COP.

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 in 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, 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, in the report to the Commissioner, 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 provide information on 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 and the notification to the Commissioner. For all LPP cases involving interception, the LEA should preserve the interception products of all intercepted communications when such products were still available at the time of discovery of the communications with LPP likelihood, heightened LPP likelihood or LPP information, the transcripts, summaries, notes, ATRs, etc. The preserved records should not be destroyed without the prior consent of the Commissioner as stated under section 59(1)(c) of the amended Ordinance. LEAs were required to make similar reporting and preservation arrangements also for cases where 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 LEA's notification, the Commissioner may review the information passed on by the

dedicated unit to the investigators to check that it does not contain any information subject to LPP that should have been screened out.

LPP reports received in 2016

4.7 In the report period, LEAs submitted notifications, in accordance with the COP, on 46 new LPP cases. In 32 of these cases, the LEAs submitted REP-11 or section 58 reports to the panel judges on the subsequent change in circumstances relating to LPP involvement or likelihood. These 32 cases included:

- (a) one case of obtaining of LPP information; and
- (b) 31 cases of heightened likelihood of obtaining LPP information:
 - (i) in 19 cases the panel judge allowed the continuation of the prescribed authorization subject to additional conditions imposed to guard against the risk of obtaining LPP information;
 - (ii) in 11 cases the concerned LEA discontinued the operations of its own accord; and
 - (iii) in one case which involved two operations, the first operation was discontinued by the LEA of its own accord while the prescribed authorization for the second operation was allowed by the panel judge to continue subject to additional conditions imposed to guard against the risk of obtaining LPP information.

For the remaining 14 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.

4.8 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 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 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, and whether there was any listening or re-listening to the interception product after the discontinuance or revocation of the prescribed authorizations.

4.9 Starting from October 2016, the protected products of LPP cases were also examined by the Commissioner and his delegated officers. In the examination of these products (and also those for JM cases), we particularly checked the following:

- (a) whether the contents of the communications or information reported in the relevant REP-11/REP-13 report and notification to the Commissioner tallied with what was listened to or viewed by the LEA officers; and
- (b) whether there was any other communication or information that was subject to LPP or indicated heightened LPP likelihood (or contained JM or indicated heightened JM likelihood) but had not been reported to the relevant authority.

One case of obtaining of LPP information

4.10 The case where LPP information was obtained involved a Type 1 surveillance operation. The panel judge assessed the operation sought to be authorized to have a likelihood of obtaining LPP information and imposed additional conditions to guard against the risk of obtaining LPP information when he approved the application.

4.11 Surveillance operation was carried out on a monitored meeting. The LEA conducted a screening of the surveillance product in accordance with paragraph 123 of the COP and the conditions specified in the prescribed authorization.

4.12 The LEA reported the inadvertent obtaining of possible LPP information to the panel judge by way of an REP-11 report. A similar notification with a sanitised copy of the REP-11 report was submitted to me. I conducted a review of the Type 1 surveillance case, including checking the protected products. The record of the conversations of the relevant meeting as stated in the REP-11 report concerned was correct and LPP information was inadvertently obtained. The checking of the edited copy of the surveillance product confirmed that the LPP information had been screened out. I found no irregularity in this case.

4.13 In the course of examination of this case, I have also reviewed the reporting arrangement regarding obtainment of LPP information or possible LPP information. To provide better protection of LPP information and to ensure that the number of persons to whom LPP information will be disclosed is limited to the minimum, I recommended to LEAs that, when reporting to the relevant authority on the obtainment of LPP information or suspected LPP information, the contents of the LPP information or suspected LPP information should not be stated in the main body of the REP-11/REP-13 report. Instead, the contents of the LPP information or suspected LPP information should be

detailed in an annex to the REP-11/REP-13 report. The annex should be placed in a separate sealed envelope, which would be opened by the relevant authority personally. When notifying me of the obtainment of LPP information or suspected LPP information under the COP, LEAs should also adopt similar arrangement.

***31 cases of heightened LPP likelihood
and 14 cases of assessed LPP likelihood***

4.14 Of the 45 heightened/assessed LPP likelihood cases, one heightened LPP likelihood case was related to the incident reported in Report 2 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 paragraphs 4.8 and 4.9 above. In checking the relevant documents and records, nothing untoward was found except the case stated in paragraph 4.16 below which was also involved in Report 2 of Chapter 6.

4.16 In an interception case with heightened LPP likelihood, I noted from the documents relating to a prescribed authorization that there was intelligence suggesting that the subject had lost his mobile phone. As the other intelligence obtained soon after the learning of the possible loss of mobile phone confirmed that the subject was still using the facility under interception, the LEA concerned did not report such matter to the panel judge. It was considered that loss of mobile phone would constitute a material change in circumstances and such situation or intelligence suggesting such situation should be reported to the panel judge by way of an REP-11 report in accordance with section 58A of the ICSO. The LEA was advised accordingly.

4.17 The protected products of the heightened/assessed LPP likelihood cases reported in 2016 had been examined. Other than the four cases stated in paragraphs 4.18 to 4.28 below, nothing untoward was found.

Case 1 : Discrepancy concerning the contents of 'other calls' in the REP-11 report

4.18 In an REP-11 report submitted to the panel judge to report on an LPP call, the LEA concerned also reported that prior to the Reported LPP Call, there were a number of calls between the subject's telephone number under interception and another telephone number of the other party involved in the Reported LPP Call. The LEA stated that when listening to these calls, there was no information which was subject to LPP or indicated heightened LPP likelihood. However, according to the protected products examined, the contents of three of these calls contained information indicating heightened LPP likelihood. The LEA was requested to explain the discrepancy.

4.19 In its reply to me, the LEA explained that the responsible officers concerned did not pick up the information indicating heightened LPP likelihood in two of the calls and this missing could be attributed to the pause of listening at the juncture the utterance was made. For the third call, the LEA initially considered that there might be an irregularity in respect of detection of heightened LPP likelihood. The LEA submitted an incident report and an investigation report on the third call in January and March 2017 respectively. Details about my review of this case would be reported in the next annual report.

Case 2 : Reporting of a possible LPP call

4.20 At the grant of the authorization concerned, the identity of the subject was unknown. Several days after the start of the interception operation, the LEA concerned identified the subject and then discovered the arrest of the subject. On the following day, the LEA submitted to the panel judge a section 58 report and an REP-11 report to seek approval for the continuation of the prescribed authorization and to report the subject's identity respectively. The panel judge noted the

REP-11 report and allowed the prescribed authorization to continue subject to additional conditions to guard against the risk of obtaining LPP information. From the protected products checked, it was noted that an intercepted call which was listened to at a time earlier than the time of learning of the arrest stated in the section 58 report already revealed information indicating that the subject was arrested. The LEA concerned was requested to provide explanation on this.

4.21 According to the LEA's explanation, the officer concerned reported to his supervisor the contents of the call which indicated somebody was arrested. However, the supervisor considered that the indication of arrest mentioned in the call referred to another person based on her recollection of the intelligence obtained from another operation, and for this reason, she had not reported the indication of arrest to her senior immediately. When the subject's identity was confirmed later, which led to the confirmation that the subject was arrested, the supervisor immediately reported the matter to her senior. Preparation for the submission of section 58 report and REP-11 report followed afterwards.

4.22 The LEA concluded that there was no ill intent or foul play involved in the decision of the supervisor not to report to her senior the mentioning of the indication of arrest immediately after her knowing of this. However, the LEA considered that the supervisor could have handled the information in the call in a more cautious manner. The LEA had already advised its officers that for similar cases in future, they should adopt a more prudent approach by reporting the relevant information in an REP-11 report to the panel judge as a material change in circumstances. While I accepted the LEA's explanation as I could not find reasons to dispute it, I agreed with the LEA's view on the handling of similar cases in future. The need to be more vigilant when information that may indicate heightened LPP likelihood is encountered during covert operations was also stressed to the LEA.

Case 3 : Missing of information indicating LPP likelihood

4.23 An interception operation was assessed to have a likelihood of obtaining LPP information at the grant of the authorization. After the commencement of the operation, three calls which indicated LPP likelihood were encountered and they were reported to the panel judge who allowed the interception to continue subject to additional conditions. From the protected products checked, it was noted that apart from the three Reported LPP Calls, there was a call which indicated LPP likelihood but was not reported to the panel judge. The call contained some information indicating LPP likelihood at the end of the part of the call which was listened to by the LEA officer.

4.24 According to the LEA's explanation, the officer concerned considered that the contents of the call in question was not relevant to the investigation and therefore he had not listened to the call in full. The officer probably was not listening to the call at the juncture the utterance which indicated likelihood of obtaining LPP information was made. Thus, the officer was unaware of the likelihood of obtaining LPP information.

4.25 While I found that the LEA's explanation, as supported by the relevant ATR, was plausible, I had advised the head of the LEA to remind its officers to be more vigilant in performing interception operations under the ICSO, for LPP cases in particular. Other than the call mentioned in paragraphs 4.23 and 4.24 above, checking of the protected products of this case did not reveal any other communications that should have been reported to the panel judge.

Case 4 : An earlier call with heightened LPP likelihood

4.26 In notifying me of an LPP call, the LEA also reported that there was an earlier 'other call' relating to the Reported LPP Call and this

'other call' did not contain any LPP information or any information indicating heightened LPP likelihood. However, according to the protected products checked, the contents of this earlier 'other call' contained information suggesting heightened LPP likelihood. The LEA concerned was requested to explain the discrepancy.

4.27 In its reply, the LEA accepted that the officer concerned was not aware of the heightened LPP likelihood from the call. Consequently, this call was not regarded as an LPP call nor reported to the panel judge. The officer admitted that he should be more attentive in carrying out his duty.

4.28 In the light of the LEA's explanation, I had advised the head of the LEA to remind its officers to be more vigilant in performing interception operations under the ICSO. I also pointed out that had the officer concerned been aware of the heightened LPP likelihood arising from the 'other call' and reported it to the panel judge, it could help minimise the risk of inadvertently obtaining LPP information in the period between the time the 'other call' was listened to and that of the Reported LPP Call.

Obligations of LEAs regarding JM cases

4.29 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 paragraphs 4.5 and 4.6 above.

JM reports received in 2016

4.30 In 2016, I received notifications on seven new JM cases submitted in accordance with the COP. They included:

- (a) three cases where it was assessed at the time of application that the operations sought to be authorized would likely obtain JM and the panel judges had imposed additional conditions in the prescribed authorizations; and
- (b) four cases of heightened likelihood of obtaining JM, for which REP-11 reports were submitted to the panel judge.

4.31 For the four cases of heightened likelihood of obtaining JM, the panel judge imposed additional conditions for two cases after receipt of the REP-11 reports while the LEA concerned discontinued the operation of its own accord for one case. For the remaining case which involved two operations, the panel judge allowed one of the operations to continue subject to additional conditions while the LEA discontinued the other operation of its own accord.

4.32 I conducted a review of these seven heightened/assessed JM cases in accordance with a mechanism which was similar to that of checking LPP cases as detailed at paragraphs 4.8 and 4.9 above.

4.33 In checking the relevant documents and records of these JM cases, no irregularity was found. The protected products were also checked and nothing untoward was found.

Examination of the protected products in past cases

4.34 As mentioned in paragraph 4.5 above, LEAs should preserve interception products and records pertaining to LPP and JM cases for examination by the Commissioner. In the report period, preserved

records of 14 LPP cases that were reported before 2016 had been checked. Among these past cases, nothing untoward was found for 11 cases while LEAs were required to provide explanations for three cases.

Past case 1 : Discrepancy in the reporting of a Reported LPP Call

4.35 The first past case requiring explanation after the checking of the protected products concerned an LPP case involving interception in 2012. Checking of the protected products revealed a discrepancy relating to the time of intercepting an LPP call reported in the relevant REP-11 report. In response to my request for explanation on the discrepancy identified, the LEA made a detailed enquiry into the matter and reported its findings to me in March 2017. Details about the review of this case would be reported in the next annual report.

Past case 2 : Reporting of information indicating LPP likelihood in a Reported LPP Call

4.36 The second past case requiring explanation was a case with heightened LPP likelihood in 2015. The interception operation was assessed to have likelihood of obtaining LPP information at the time of application. Additional conditions were imposed by the panel judge in the prescribed authorization. As the interception progressed, a telephone call which indicated heightened LPP likelihood was encountered and the LEA submitted an REP-11 report to the panel judge to report the change in circumstances. From the checking of the protected products, it was noted that some information indicating LPP likelihood had been revealed at a juncture of the Reported LPP Call which was earlier than that reported in the REP-11 report. On this discrepancy, the LEA explained that the officer concerned had difficulty in catching each and every word of the conversation due to the circumstances of the call. While I accepted the LEA's explanation, I had advised the head of the LEA to remind its officers to be more vigilant in performing

interception operations under the ICSO.

Past case 3 : Reporting of an earlier call with LPP likelihood

4.37 Another past case for which explanation was sought after the checking of the protected products related to a case with heightened LPP likelihood in 2014. The interception concerned was not assessed to have a likelihood of obtaining LPP information at the time the prescribed authorization was granted. Likelihood of obtaining LPP information was subsequently heightened when a call with LPP likelihood was intercepted and listened to. This call was then reported to the panel judge. Checking of the protected products of the case revealed that prior to the Reported LPP Call, there was also a call containing some information which indicated heightened LPP likelihood but this call was not reported to the panel judge. The LEA concerned was requested to provide explanation for not reporting this earlier call to the panel judge. The LEA submitted an incident report as it considered that there might be an irregularity in respect of the reporting of the heightened LPP likelihood and this was followed by an investigation report submitted in March 2017. Details about my review of this case would be reported in the next annual report.

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 2016

5.8 During the report period, there were 19 applications for examination. Four applications were subsequently not pursued by the applicants. Of the remaining 15 applications, four alleged interception, one alleged covert surveillance and ten claimed a combination of interception and covert surveillance. Since none of the 15 applications came within the ambit of the exceptions covered by section 45(1) or section 45(2), I carried out an examination provided for in section 44 of the Ordinance in respect of each case.

5.9 After making all necessary enquiries, I found all the 15 cases not in the applicants' favour and accordingly notified each of the applicants in writing of the findings, with nine of such notices issued during the report period and six 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 ^{Note 2} 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

Note 2 The clarity of the meaning of "relevant person" was enhanced after the legislative amendment in 2016. As stated in section 48(7) of the amended Ordinance, the meaning of "relevant person" covers the subjects in scenarios where [i] the interception or covert surveillance is continued after the prescribed authorization or the relevant part of the prescribed authorization has ceased to have effect; [ii] a person who is not the intended subject of the interception or covert surveillance under the prescribed authorization is treated as such; and [iii] the interception or covert surveillance is carried out in the absence of any prescribed authorization.

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, no notice pursuant to section 48 of the Ordinance was issued.

Prohibition against disclosure of reasons for determination

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

5.14 During the year, I have observed that there were occasions that the applicants felt that their purpose of applying for examination had

not been achieved as I could not disclose the reasons for my determinations. It is hoped that the public will understand that this statutory prohibition is designed to forbid the disclosure of any information which might prejudice the prevention or detection of crime or the protection of public security, preventing any advantage from being obtained by criminals or possible criminals over the LEAs in the latter's efforts in fighting crimes and in protecting the safety of the community in Hong Kong. There should not be any doubt that the Commissioner carries out his duties and functions under the Ordinance with the utmost good faith and sincerity.

CHAPTER 6

REPORTS OF NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS

Reporting of non-compliance, irregularities and incidents

6.1 Before the amendment of the ICSO in June 2016, by virtue of section 54 of the Ordinance, 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). Section 54 of the Ordinance was amended in June 2016 to the effect that the head of any LEA is also required to submit to the Commissioner a report with details of the case even if the failure to comply with any relevant requirement is not due to the fault of the LEA or any of its officers. 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 Besides, there is a mechanism on reporting and monitoring of covert operations in place whereby the LEAs are required by the Commissioner to report cases of irregularities or even simply incidents which are not covered by section 54 of the Ordinance for his consideration and scrutiny so that any possible non-compliance will not escape his attention.

6.3 For cases of non-compliance, irregularity or incident discovered upon examination of documents, information and protected products during visits to LEAs, 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 case brought forward from Annual Report 2015

6.5 In my Annual Report 2015, there was an outstanding case. It is dealt with in the ensuing paragraph.

***Outstanding case : An incident report relating to section 61 of the ICSO
[Paragraph 6.15 of Annual Report 2015]***

6.6 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 2016

6.7 In 2016, the Commissioner received from LEAs reports of irregularities/incidents relating to 11 ICSO cases. All were submitted not under section 54 of the Ordinance. The review of these 11 cases had been completed and they are set out below.

Report 1 : Omission of information in the statement in writing

6.8 An LEA reported an incident concerning a statement in writing ('statement') in support of an application for renewal of an executive authorization.

6.9 With a view to continuing a Type 2 surveillance operation on the subjects in a crime investigation, the officer-in-charge of the investigation concerned ('Oi/C') drafted the related application documents and submitted them to his immediate supervisor ('Immediate Supervisor') for seeking the latter's endorsement of making the application. The documents included, inter alia, a statement which contained a number of questions for an applicant to set out the necessary information relating to the renewal.

6.10 Having gone through the draft application documents, the Immediate Supervisor advised the Oi/C to put an answer "nil" to a particular question in the statement ('question A') and also to make some other textual amendments to the statement. However, the Oi/C forgot to input the answer "nil" to question A ('omission'). In addition, he had provided a confusing answer to a follow-up question of question A ('question B') in the same statement ('confusion'). The Immediate Supervisor did not make any comment on this answer when he went through the statement.

6.11 Considering that the amendments to the statement were not substantial, the Oi/C did not provide a copy of the revised statement to the Immediate Supervisor and the Immediate Supervisor did not ask for it for further checking either. The application was then submitted to the authorizing officer ('AO'). Although the AO noticed the omission, he assumed the blank answer to question A in the statement to be "nil" by relying on his own interpretation and by drawing inference from the information provided in the other parts of the statement. He did not find the answer to question B unreasonable. He granted the executive authorization without making any clarification with the Oi/C. The Type 2 surveillance operation was discontinued before the expiry of the executive authorization and the authorization was revoked by the AO. In the course of compiling a review folder for the Type 2 surveillance, the Oi/C discovered the omission and the confusion and reported the matters

in a Review Form to the Reviewing Officer. The LEA reported to me the incident and subsequently submitted an investigation report.

6.12 According to the LEA's investigation report, the omission was attributable to the lack of vigilance on the part of the Oi/C, the Immediate Supervisor and the AO, while the Oi/C had the primary responsibility to ensure that the application documents contained all the necessary and accurate information. Had the officers acted vigilantly and/or checked the statement carefully, the omission would have been detected and rectified before the authorization was issued. Nevertheless, there was no evidence of improper conduct of any officers in causing the irregularity. The LEA also considered that the omission did not affect the determination of the AO in the issuance of the executive authorization concerned.

6.13 In the investigation report, the LEA recommended that both the Oi/C and the AO each be given a verbal warning as the former failed to exercise caution and vigilance in preparing the statement and the latter did not exercise care and due diligence in carrying out his duties as an AO. The LEA also recommended that the Immediate Supervisor be given an advice (non-disciplinary) by a senior officer on the need to be more vigilant in ensuring that the application documents contain all the necessary and accurate information. In respect of improvement measures, the LEA reminded its officers to be vigilant in handling ICSO-related documentation and to ensure that all information required therein is complete and accurate. The LEA also enhanced its computerised system so that an application for Type 2 surveillance could not be further processed until all the questions in the statement have been answered. An alert message will appear on the screen of the system when the applicant fails to answer any of the questions in the statement.

6.14 I made further enquiries with and tendered my views to the LEA on some matters pertinent to the case. In particular, I asked the LEA to provide the rationale for the different actions to be taken against the three officers involved and review whether the proposed action for the Immediate Supervisor was lenient. In reply, the LEA stated that the Immediate Supervisor had largely fulfilled the requirements of his role in processing a Type 2 surveillance application. Considering that the Immediate Supervisor was less culpable than the Oi/C and the AO, the LEA maintained the view that the award of an advice (non-disciplinary) to the Immediate Supervisor was appropriate. On further improvement measures, the LEA informed me that officers concerned had been reminded of the procedures to ensure the accuracy of the final draft of all application documents before these documents are submitted to the AO for determination.

6.15 Having reviewed the case, I considered that by virtue of section 64(1) of the ICSO, the omission did not affect the validity of the executive authorization concerned. The LEA's proposed actions against the officers involved and the improvement measures taken were noted.

Report 2 : Inaccuracy in the affidavit

6.16 An LEA reported an incident concerning an affidavit in support of an application for interception.

6.17 In a crime investigation, Type 1 surveillance was conducted on two meetings on a day (Day 1) pursuant to a prescribed authorization. The first one ('first meeting') was audio and video recorded whereas the second one ('second meeting') was partly audio recorded.

6.18 After the surveillance operation, the LEA discovered that the audio recording of the second meeting had stopped before the officer responsible for conducting the surveillance operation turned off the

device at the conclusion of the meeting ('shortened recording'). The responsible case officer of the investigating team ('Case Officer') learnt of the shortened recording when it was reported to her in the evening of Day 1. While the Case Officer claimed that she had mentioned the matter briefly to her supervisor ('Officer-in-charge') on the following day (Day 2), the Officer-in-charge had no recollection of the Case Officer informing her of the shortened recording. On Day 2, the shortened recording was also brought to the attention of the officer who led the team that supported the conduct of the surveillance operation concerned ('Team Leader'). However, the Team Leader did not inform the Officer-in-charge of the shortened recording. The shortened recording was also not reported to the respective supervisors of the Officer-in-charge and the Team Leader.

6.19 A few days later, the LEA contemplated to apply for interception on another subject of the investigation. The Case Officer drafted the affidavit in which the covert surveillance conducted on the two meetings on Day 1 was mentioned. In the draft affidavit, the Case Officer stated that "the meeting ... on Day 1 was audio and video recorded" ('first sentence'), gave an account of the two meetings and further stated in a sentence relating to the second meeting in a separate paragraph that "the meeting was audio recorded" ('second sentence'). The supervisor of the Officer-in-charge ('Supervisor'), who failed to notice the description of the conduct of the second meeting in the second sentence and did not clarify with the Case Officer, made an amendment to the first sentence to the effect that the two meetings had both been audio and video recorded while the second sentence was left intact. After the Assistant Head of Department concerned approved the making of the application, the draft affidavit was then sent to the officer responsible for processing the interception applications ('Processing Officer'). The Processing Officer further amended the draft affidavit by deleting the second sentence without making enquiries with either the Supervisor or the Case Officer about the conduct of the second meeting. The

Supervisor and the Case Officer had both confirmed the accuracy of the contents in the revised draft affidavit before the application was confirmed by the supervisor of the Team Leader who was then acting in the post designated as the applicant for interception operations in the LEA. Up to the time of submission of the interception application, no one had detected the inaccuracy in the affidavit. Prescribed authorization for the interception application was later granted by the panel judge.

6.20 On the same day of submission of the interception application to the panel judge, the officer who was acting in the post of the supervisor of the Team Leader examined some related documents and noticed the shortened recording. On the day following the discovery of the inaccuracy, the LEA submitted an REP-11 report to the panel judge to rectify the inaccuracy and the panel judge noted the report.

6.21 In the investigation report, the LEA provided an assessment that the shortened recording was attributed to the circumstances under which the surveillance operation on the second meeting was conducted. The LEA considered that the lack of alertness on the part of the officers concerned had led to a delay in the reporting of the shortened recording and the subsequent inaccuracy in the affidavit in support of the interception application.

6.22 The LEA considered that the Case Officer, the Officer-in-charge and the Team Leader had not properly brought the shortened recording to the attention of their supervisors or relevant officers, while the Case Officer, the Supervisor and the Processing Officer had not been vigilant or prudent enough in preparing or vetting the draft affidavit, resulting in provision of inaccurate information in the affidavit. The LEA recommended that the Team Leader, the Case Officer, the Officer-in-charge, the Supervisor and the Processing Officer each be given an advice (non-disciplinary) by a directorate officer on the need to be

more vigilant or prudent in discharging ICSO-related duties and/or handling ICSO-related documents.

6.23 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 for interception concerned. I agreed with the LEA that despite the inadequacy of the officers concerned, there was no evidence to suggest any intention of concealment of the shortened recording by any of them. The LEA's proposed action against the officers involved was acceptable.

6.24 The LEA recommended that the circumstances surrounding the failure to timely report the incident concerning the shortened recording be brought to the attention of its officers so as to remind them of the importance of staying alert and vigilant in discharging ICSO-related duties, which I considered inadequate in preventing recurrence of delay in the reporting of similar incidents. Noting that there was a mechanism on reporting and monitoring of covert surveillance operations in place in the LEA, I advised the LEA to review the existing mechanism and to consider necessary measures to ensure that the officers concerned follow the mechanism and strictly adhere to the procedures.

6.25 The LEA submitted a further report in response to my advice. The mechanism had been revised such that the officers of the LEA were required to report whatever incident that might occur during the covert surveillance operations, even though the incident itself did not amount to an irregularity/non-compliance or possible irregularity/non-compliance. The LEA also introduced a record form to ensure the timely reporting of all the relevant details of each covert surveillance operation by officers and their supervisors. I considered the measures appropriate. I also advised that the officers of the LEA should be reminded of the importance of reporting irregularities or incidents in ICSO-related matters so that any

possible non-compliance could be brought to my attention in the earliest instance.

Other reports

6.26 For the reports on the other nine cases submitted by the LEAs, seven cases were incidents of technical problems of the computerised systems/equipment, and two cases were related to typographical/minor error(s) in the application documents. These cases had been reviewed and nothing untoward was found for eight cases. For one case relating to technical problems of computerised systems, it was noted that the officers concerned should have been more prudent in notifying the panel judge and the Commissioner promptly upon knowing the technical irregularity. The relevant LEA had been so advised accordingly. For cases relating to technical problems of computerised systems/equipment, the LEAs had taken appropriate actions to remedy 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) Arrangement for better protection of LPP information

When reporting to the relevant authority on the obtainment of LPP information or suspected LPP information, LEAs should not state the contents of the LPP information or suspected LPP information in the main body of the REP-11/REP-13 report. Instead, the contents of the LPP information or suspected LPP information should be detailed in an annex to the REP-11/REP-13 report. The annex should be placed in a separate sealed envelope, which would be opened by the relevant authority personally. The arrangement aims to provide better protection of LPP information and to ensure that the number of persons to whom LPP information will be disclosed is limited to the minimum. When notifying the Commissioner of the

obtainment of LPP information or suspected LPP information under the COP, LEAs should also adopt similar arrangement.

(b) Proper record of monitoring of interception

To facilitate the Commissioner's checking, a proper record of monitoring of interception should be made in the transcripts for interception conducted each and every day even when nothing was intercepted on that day or all the interception products obtained on that day were assessed to have no intelligence value.

(c) Provision of a summary of suspects in application documents

A summary of persons involved in the crime under investigation, including information on their role in the crime, should be provided in the application documents. This would facilitate the relevant authority's understanding of cases involving a large number of suspects.

(d) Sources of intelligence

An applicant should state clearly in the application how intelligence was made known to him where the source of which may be of concern to the relevant authority. Hence, the relevant authority could have knowledge of all relevant circumstances and factors before making a decision on the issue 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	735	0
	Average duration	29 days	–
(ii)	Number of authorizations renewed	681	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	21	Not applicable
(vi)	Number of applications for the issue of authorizations refused	1	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	19	4	0
	Average duration	13 days	2 days	—
(ii)	Number of authorizations renewed	4	2	Not applicable
	Average duration of renewals	17 days	11 days	—
(iii)	Number of authorizations issued as a result of an oral application	0	1	0
	Average duration	—	13 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	0	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
Arranging passage to Hong Kong of unauthorized entrants	Cap. 115	Section 37D, Immigration Ordinance
Trafficking in dangerous drug	Cap. 134	Section 4, Dangerous Drugs Ordinance
Manufacture of dangerous drug	Cap. 134	Section 6, Dangerous Drugs Ordinance
Managing a triad society/assisting in the management of a triad society	Cap. 151	Section 19(2), Societies Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Burglary	Cap. 210	Section 11, Theft Ordinance
Handling stolen property/goods	Cap. 210	Section 24, 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
Trafficking in dangerous drug	Cap. 134	Section 4, Dangerous Drugs Ordinance
Using a false instrument	Cap. 200	Section 73, Crimes Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance
Misconduct in public office	—	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 3}		
	Subject	Non-subject	Total
Interception	116	91	207

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 4}		
	Subject	Non-subject	Total
Surveillance	15	2	17

Note 3 Of the 207 persons arrested, 11 were attributable to both interception and surveillance operations that had been carried out.

Note 4 Of the 17 persons arrested, 11 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 213.

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 visits to LEAs	26	Interception & Surveillance	In addition to the checking of weekly reports, 26 visits had been made to LEAs during the report period for detailed checking of the application files of doubtful cases as identified from the weekly reports. Moreover, random inspection of other cases and checking of surveillance devices would also be made during the visits. Whenever he considered necessary, the Commissioner would seek clarification or explanation from LEAs directly. From the said visits, a total of 643 applications and 266 related documents/matters had been checked. (See paragraph 2.22 of Chapter 2 and paragraphs 3.22 and 3.23 of Chapter 3.)
(c) Examination of protected products at the LEAs' offices	16	Interception & Surveillance	With the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016, the Commissioner

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>and his delegated officers have the express power to examine the protected products. Examination of the protected products commenced in October 2016 and 16 visits had been made to LEAs for the said purpose before the end of 2016. Specific cases such as LPP and JM cases reported by the LEAs and interception products of 60 authorizations selected at random had been examined.</p> <p>(See paragraphs 2.24 and 2.25 of Chapter 2 and paragraph 3.29 of Chapter 3.)</p>
(d) LPP cases reviewed by the Commissioner	46	Surveillance	<p><u>One case of obtaining of LPP information</u></p> <p>The case concerned a Type 1 surveillance. The operation was assessed by the panel judge to have a likelihood of obtaining LPP information and additional conditions were imposed to guard against the risk of obtaining LPP information.</p> <p>After a surveillance operation, the LEA conducted a screening of the surveillance product in accordance with paragraph 123 of the COP and the conditions specified in the prescribed authorization.</p> <p>The LEA reported the inadvertent obtaining of possible LPP information to the panel judge by way of an REP-11 report and submitted a similar notification with a sanitised copy of the REP-11 report to the Commissioner. The Commissioner conducted a review of the Type 1 surveillance case, including checking the protected products. The record of the conversations of the relevant meeting as stated in the REP-11</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p>report concerned was correct and LPP information was inadvertently obtained. The checking of the edited copy of the surveillance product confirmed that the LPP information had been screened out. The Commissioner found no irregularity in this case.</p> <p>The Commissioner also reviewed the reporting arrangement regarding obtainment of LPP information or possible LPP information. Under the new arrangement, when reporting to the relevant authority on the obtainment of LPP information or suspected LPP information, the LEAs should state the contents of the LPP information or suspected LPP information in an annex to the REP-11/REP-13 report. The annex should be placed in a separate sealed envelope, which would be opened by the relevant authority personally. Similar arrangement should be adopted when notifying the Commissioner of the obtainment of LPP information or suspected LPP information under the COP.</p> <p>(See paragraphs 4.10 - 4.13 of Chapter 4.)</p> <p><u>First case of heightened LPP likelihood</u></p> <p>The Commissioner noted from the documents relating to a prescribed authorization that there was intelligence suggesting that the subject had lost his mobile phone. As the other intelligence obtained soon after the learning of the possible loss of mobile phone confirmed that the subject was still using the facility under interception, the LEA concerned did not report such matter to the panel judge.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p>It was considered that loss of mobile phone would constitute a material change in circumstances and such situation or intelligence suggesting such situation should be reported to the panel judge by way of an REP-11 report in accordance with section 58A of the ICSO. The LEA was advised accordingly.</p> <p>(See paragraph 4.16 of Chapter 4.)</p> <p>This LPP case was also involved in an incident concerning an affidavit in support of an application for interception as mentioned in Report 2 of Chapter 6.</p> <p><u>Second case of heightened LPP likelihood</u></p> <p>In an REP-11 report submitted to the panel judge to report on an LPP call, the LEA concerned also reported that prior to the Reported LPP Call, there were a number of calls between the subject's telephone number under interception and another telephone number of the other party involved in the Reported LPP Call. The LEA stated that when listening to these calls, there was no information which was subject to LPP or indicated heightened LPP likelihood. However, according to the protected products examined, the contents of three of these calls contained information indicating heightened LPP likelihood.</p> <p>The LEA explained that the responsible officers concerned did not pick up the information indicating heightened LPP likelihood in two of the calls and this missing could be attributed to the pause of listening at the juncture the utterance was made. For the third</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p>call, the LEA initially considered that there might be an irregularity in respect of detection of heightened LPP likelihood and had submitted an incident report and an investigation report.</p> <p>The review of this case would be reported in the next annual report.</p> <p>(See paragraphs 4.18 and 4.19 of Chapter 4.)</p> <p><u>Third case of heightened LPP likelihood</u></p> <p>When the LEA concerned identified the subject and discovered the arrest of the subject, the LEA submitted to the panel judge a section 58 report and an REP-11 report to seek approval for the continuation of the prescribed authorization and to report the subject's identity respectively. From the protected products checked, it was noted that an intercepted call which was listened to at a time earlier than the time of learning of the arrest stated in the section 58 report already revealed information indicating that the subject was arrested.</p> <p>According to the LEA's explanation, the officer concerned reported to his supervisor the contents of the call which indicated somebody was arrested. However, the supervisor considered that the indication of arrest mentioned in the call referred to another person based on her recollection of the intelligence obtained from another operation, and for this reason, she had not reported the indication of arrest to her senior immediately. When the subject's identity was confirmed later, which led to the confirmation that the subject was arrested, the</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p>supervisor immediately reported the matter to her senior.</p> <p>The LEA concluded that there was no ill intent or foul play involved in the decision of the supervisor not to report to her senior the mentioning of the indication of arrest immediately after her knowing of this. However, the LEA considered that the supervisor could have handled the information in the call in a more cautious manner. The LEA had already advised its officers that for similar cases in future, they should adopt a more prudent approach by reporting the relevant information in an REP-11 report to the panel judge as a material change in circumstances.</p> <p>While the Commissioner accepted the LEA's explanation as he could not find reasons to dispute it, the Commissioner agreed with the LEA's view on the handling of similar cases in future. The need to be more vigilant when information that may indicate heightened LPP likelihood is encountered during covert operations was also stressed to the LEA.</p> <p>(See paragraphs 4.20 - 4.22 of Chapter 4.)</p> <p><u>Fourth case of heightened LPP likelihood</u></p> <p>After the commencement of the operation, three calls which indicated LPP likelihood were encountered and they were reported to the panel judge who allowed the interception to continue subject to additional conditions. From the protected products checked, it was noted that apart from the three Reported LPP Calls, there was a call</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p>which indicated LPP likelihood but it was not reported to the panel judge. The call contained some information indicating LPP likelihood at the end of the part of the call which was listened to by the LEA officer.</p> <p>According to the LEA's explanation, the officer concerned considered that the contents of the call in question was not relevant to the investigation and therefore he had not listened to the call in full. The officer probably was not listening to the call at the juncture the utterance which indicated likelihood of obtaining LPP information was made. Thus, the officer was unaware of the likelihood of obtaining LPP information.</p> <p>While the Commissioner found that the LEA's explanation, as supported by the relevant ATR, was plausible, he had advised the head of the LEA to remind its officers to be more vigilant in performing interception operations under the ICSO, for LPP cases in particular.</p> <p>(See paragraphs 4.23 - 4.25 of Chapter 4.)</p> <p><u>Fifth case of heightened LPP likelihood</u></p> <p>In notifying the Commissioner of an LPP call, the LEA also reported that there was an earlier 'other call' relating to the Reported LPP Call and this 'other call' did not contain any LPP information or any information indicating heightened LPP likelihood. However, according to the protected products checked, the contents of this earlier 'other call' contained information suggesting heightened LPP likelihood.</p> <p>In its explanation to the</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception & Surveillance (40 reviews)	<p>Commissioner, the LEA accepted that the officer concerned was not aware of the heightened LPP likelihood from the call. The officer admitted that he should be more attentive in carrying out his duty.</p> <p>The Commissioner had advised the head of the LEA to remind its officers to be more vigilant in performing interception operations under the ICSO. The Commissioner also pointed out that had the officer concerned been aware of the heightened LPP likelihood arising from the 'other call' and reported it to the panel judge, it could help minimise the risk of inadvertently obtaining LPP information in the period between the time the 'other call' was listened to and that of the Reported LPP Call.</p> <p>(See paragraphs 4.26 - 4.28 of Chapter 4.)</p> <p><u>Other cases</u> All the relevant documents and records were checked and the protected products were examined. Nothing untoward was found.</p> <p>(See paragraphs 4.7 - 4.9 and 4.15 of Chapter 4.)</p>
(e) JM cases reviewed by the Commissioner	7	Interception & Surveillance	<p>All the relevant documents and records were checked and the protected products were examined. Nothing untoward was found.</p> <p>(See paragraphs 4.30 - 4.33 of Chapter 4.)</p>
(f) Incidents/irregularities reviewed by the Commissioner	11	Surveillance	<p><u>Report 1</u> After considering the statement in writing ('statement') prepared by the officer-in-charge of an investigation</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>concerned ('Oi/C') for continuing a Type 2 surveillance operation, the immediate supervisor of the Oi/C ('Immediate Supervisor') advised the Oi/C to put an answer "nil" to a particular question in the statement ('question A') and also to make some other textual amendments. However, the Oi/C forgot to input the answer "nil" to question A ('omission'). In addition, he had provided a confusing answer to a follow-up question of question A ('confusion').</p> <p>Considering that the amendments to the statement were not substantial, the Oi/C did not provide a copy of the revised statement to the Immediate Supervisor and the Immediate Supervisor did not ask for it for further checking either. The application was then submitted to the authorizing officer ('AO'). Although the AO noticed the omission, he granted the executive authorization without making any clarification with the Oi/C. The omission and confusion were detected by the Oi/C in the course of compiling a review folder for the Type 2 surveillance.</p> <p>According to the LEA's investigation report, the omission was attributable to the lack of vigilance on the part of the Oi/C, the Immediate Supervisor and the AO, while the Oi/C had the primary responsibility to ensure that the application documents contained all the necessary and accurate information. Nevertheless, there was no evidence of improper conduct of any officers in causing the irregularity.</p> <p>In the investigation report, the LEA recommended that both the Oi/C and</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>the AO each be given a verbal warning. The LEA also recommended that the Immediate Supervisor be given an advice (non-disciplinary) by a senior officer. In respect of improvement measures, the LEA reminded its officers to be vigilant in handling ICSO-related documentation and to ensure that all information required therein is complete and accurate. The LEA also enhanced its computerised system so that an application for Type 2 surveillance could not be further processed until all the questions in the statement have been answered.</p> <p>The Commissioner made further enquiries with and tendered his views to the LEA on some matters pertinent to the case. In particular, the Commissioner asked the LEA to provide the rationale for the different actions to be taken against the three officers involved and review whether the proposed action for the Immediate Supervisor was lenient. Considering that the Immediate Supervisor was less culpable than the Oi/C and the AO, the LEA maintained the view that the award of an advice (non-disciplinary) to the Immediate Supervisor was appropriate. On further improvement measures, the LEA had reminded the officers concerned of the procedures to ensure the accuracy of the final draft of all application documents.</p> <p>The Commissioner considered that by virtue of section 64(1) of the ICSO, the omission did not affect the validity of the executive authorization concerned. The Commissioner also noted the LEA's proposed actions against the officers involved and improvement measures</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception & Surveillance	<p>taken.</p> <p>(See paragraphs 6.8 – 6.15 of Chapter 6.)</p> <p><u>Report 2</u> Type 1 surveillance was conducted on two meetings on a day (Day 1) pursuant to a prescribed authorization. The first one ('first meeting') was audio and video recorded whereas the second one ('second meeting') was partly audio recorded.</p> <p>After the surveillance operation, the LEA discovered that the audio recording of the second meeting had stopped before the officer responsible for conducting the surveillance operation turned off the device at the conclusion of the meeting ('shortened recording'). The responsible case officer of the investigating team ('Case Officer') learnt of the shortened recording when it was reported to her in the evening of Day 1. While the Case Officer claimed that she had mentioned the matter briefly to her supervisor ('Officer-in-charge') on the following day (Day 2), the Officer-in-charge had no recollection of the Case Officer informing her of the shortened recording. On Day 2, the shortened recording was also brought to the attention of the officer who led the team that supported the conduct of the surveillance operation concerned ('Team Leader'). However, the Team Leader did not inform the Officer-in-charge of the shortened recording. The shortened recording was also not reported to the respective supervisors of the Officer-in-charge and the Team Leader.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>A few days later, the Case Officer drafted an affidavit for making an application for interception on another subject of the investigation. In the draft affidavit, the Case Officer stated that “the meeting ... on Day 1 was audio and video recorded” (‘first sentence’), gave an account of the two meetings and further stated in a sentence relating to the second meeting in a separate paragraph that “the meeting was audio recorded” (‘second sentence’). The supervisor of the Officer-in-charge (‘Supervisor’) made an amendment to the first sentence to the effect that the two meetings had both been audio and video recorded while the second sentence was left intact. When the draft affidavit was sent to the officer responsible for processing the interception applications (‘Processing Officer’), the Processing Officer further amended the draft affidavit by deleting the second sentence without making enquiries with either the Supervisor or the Case Officer. Subsequently the Supervisor and the Case Officer had both confirmed the accuracy of the contents in the revised draft affidavit. Up to the time of submission of the interception application, no one had detected the inaccuracy in the affidavit. Prescribed authorization for the interception application was later granted by the panel judge.</p> <p>On the same day of submission of the interception application to the panel judge, the officer who was acting in the post of the supervisor of the Team Leader examined some related documents and noticed the shortened recording. On the following day, the LEA submitted an REP-11 report to the panel judge to rectify the inaccuracy.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>In the investigation report, the LEA assessed that the shortened recording was attributed to the circumstances of the second meeting. The LEA considered that the Case Officer, the Officer-in-charge and the Team Leader had not properly brought the shortened recording to the attention of their supervisors or relevant officers, while the Case Officer, the Supervisor and the Processing Officer had not been vigilant or prudent enough in preparing or vetting the draft affidavit, resulting in provision of inaccurate information in the affidavit. The LEA recommended that the Team Leader, the Case Officer, the Officer-in-charge, the Supervisor and the Processing Officer each be given an advice (non-disciplinary) by a directorate officer.</p> <p>The Commissioner considered that by virtue of section 64(1) of the ICSO, the inaccuracy did not affect the validity of the prescribed authorization for interception concerned. The Commissioner agreed with the LEA that despite the inadequacy of the officers concerned, there was no evidence to suggest any intention of concealment of the shortened recording by any of them. The LEA's proposed action against the officers involved was acceptable.</p> <p>The LEA recommended that the circumstances surrounding the failure to timely report the incident concerning the shortened recording be brought to the attention of its officers so as to remind them of the importance of staying alert and vigilant in discharging ICSO-related duties, which the Commissioner considered inadequate in preventing</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception & Surveillance (9 reviews)	<p>recurrence of delay in the reporting of similar incidents.</p> <p>In response to Commissioner's advice, the LEA revised the existing mechanism on reporting and monitoring of covert surveillance operations such that the officers of the LEA were required to report whatever incident that might occur during the covert surveillance operations, even though the incident itself did not amount to an irregularity/non-compliance or possible irregularity/non-compliance. The LEA also introduced a record form to ensure the timely reporting of all the relevant details of each covert surveillance operation by officers and their supervisors. The Commissioner considered the measures appropriate and advised that the officers of the LEA should be reminded of the importance of reporting irregularities or incidents in ICSO-related matters in the earliest instance.</p> <p>(See paragraphs 6.16 - 6.25 of Chapter 6.)</p> <p><u>Other reports</u> There were seven cases involving incidents of technical problems of the computerised systems/equipment, and two cases relating to typographical/minor error(s) in the application documents. These cases had been reviewed and nothing untoward was found for eight cases.</p> <p>For one case relating to technical problems of computerised systems, it was noted that the officers concerned should have been more prudent in notifying the panel judge and the Commissioner promptly</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	1	Interception	<p><u>Outstanding case from 2015</u> This case was first reported by an LEA in late 2014. Similar to the last two annual reports, as the relevant court proceedings were still ongoing, 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 said proceedings have concluded.</p> <p>(See paragraph 6.6 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	5	Interception	<p><u>First case of heightened LPP likelihood</u> Subject's possible loss of mobile phone was not reported to the panel judge as a material change in circumstances.</p> <p>Inaccuracy in an affidavit in support of an application for interception. This is the Report 2 referred to in item (c) below.</p>
		Interception	<p><u>Second case of heightened LPP likelihood</u> Discrepancy concerning the contents of 'other calls' in an REP-11 report on an LPP call.</p>
		Interception	<p><u>Third case of heightened LPP likelihood</u> A call intercepted prior to the time of learning of the arrest of the subject, which revealed information indicating that the subject was arrested, was not reported to the panel judge.</p>
		Interception	<p><u>Fourth case of heightened LPP likelihood</u> A call which contained some information indicating LPP likelihood was not reported to the panel judge.</p>

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
		Interception	<p><u>Fifth case of heightened LPP likelihood</u> An earlier call with heightened LPP likelihood was not reported to the panel judge.</p> <p>(For details, see item (d) under section 41(1) in Table 5 and Chapter 4.)</p>
(b) Reviews of past LPP cases	3	<p>Interception</p> <p>Interception</p> <p>Interception</p>	<p><u>Past case 1</u> Discrepancy relating to the time of intercepting an LPP call reported in the relevant REP-11 report.</p> <p><u>Past case 2</u> Information indicating LPP likelihood had been revealed at a juncture of the Reported LPP Call which was earlier than that reported in the REP-11 report.</p> <p><u>Past case 3</u> An earlier call with LPP likelihood was not reported to the panel judge.</p> <p>(For details, see item (g) under section 41(1) in Table 5 and Chapter 4.)</p>
(c) Other reviews	11	<p>Surveillance</p> <p>Interception & Surveillance</p>	<p><u>Report 1</u> Omission of information in the statement in writing in support of an application for renewal of an executive authorization.</p> <p><u>Report 2</u> Inaccuracy in an affidavit in support of an application for interception. This is the first case of heightened LPP likelihood referred to in item (a) above.</p>

Number of cases of irregularities or errors identified in the reviews under section 41(1)	Interception/ Surveillance	Broad nature of irregularities or errors identified
	Interception & Surveillance (9 cases)	<p><u>Other reports</u> These included seven cases involving technical problems of the computerised systems/ equipment and two cases relating to typographical/ minor error(s) in the application documents.</p> <p>(For details, see item (f) under section 41(1) in Table 5 and Chapter 6.)</p>

Section 41(2)

Number of cases of irregularities or errors identified in the reviews under section 41(2)		Interception/ Surveillance	Broad nature of irregularities or errors identified
(a) Reviews on cases in default of application being made for confirmation of emergency authorization within 48 hours as reported by the head of department under section 23(3)(b)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(b) Reviews on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours as reported by the head of department under section 26(3)(b)(ii)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(c) Reviews on non-compliance cases as reported by the head of department under section 54	Nil	Not applicable	As mentioned in Table 5 above, there was only one case brought forward from the previous annual report under this category and it is inappropriate to report on the review of the case in this report due to ongoing court proceedings.

Table 7

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

Number of applications received	Applications for examination in respect of			
	Interception	Surveillance	Both Interception and Surveillance	Cases that could not be processed
19	4	1	10	4

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)] <small>Note 5</small>	15	4	1	10

Note 5 Of the 15 notices, nine were issued during the report period and six 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)]	0	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]	4	Interception & Surveillance	<p>(a) Reporting arrangement for better protection of LPP information.</p> <p>(b) Proper record of monitoring of interception.</p> <p>(c) Provision of a summary of suspects in application documents.</p> <p>(d) Stating the sources of intelligence in applications.</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	0
Surveillance	1

Table 12

Number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such action [section 49(2)(d)(viii)]

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
<p><u>Case 1</u> Interception</p>	<p>An applicant neglected to include additional conditions to guard against the risk of obtaining LPP information in a draft prescribed authorization and did not notice the omission of the additional conditions in the prescribed authorization granted.</p> <p>(See paragraphs 6.17 – 6.25 of Chapter 6 of Annual Report 2015.)</p>	<p>Verbal warning</p>
<p><u>Case 2</u> Interception</p>	<p>(i) An officer failed to preserve all the interception products available on the day of discovery of an LPP call in accordance with the relevant guidelines issued by the LEA concerned.</p> <p>(ii) The officer-in-charge of the interception unit concerned failed to ensure that all the procedures for the handling of LPP cases were followed properly.</p> <p>(See paragraphs 6.26 – 6.31 of Chapter 6 of Annual Report 2015.)</p>	<p>Verbal warning</p> <p>Verbal warning</p>
<p><u>Case 3</u> Interception</p>	<p>(i) An officer failed to state information on ‘other calls’ accurately in a draft REP-11 report on heightened LPP likelihood.</p> <p>(ii) The officer who signed the REP-11 report did not notice the errors mentioned in (i) above.</p> <p>(See paragraphs 4.10 – 4.13 of Chapter 4 of Annual Report 2015.)</p>	<p>Verbal advice</p> <p>Verbal advice</p>

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
<p><u>Case 4</u> Surveillance</p>	<p>(i) An officer carried out covert surveillance outside the ambit of the prescribed authorization.</p> <p>(ii) An officer relayed the instruction from the officer-in-charge mentioned in (iii) below to carry out covert surveillance to the officer mentioned in (i) above. He was not alert that the covert surveillance might have been conducted outside the ambit of the prescribed authorization.</p> <p>(iii) An officer-in-charge of the operation failed to give clear and specific instructions, leading to unauthorized covert surveillance. He also failed to realise that the operation had been conducted outside the ambit of the prescribed authorization, and failed to give a clear and detailed report on the conduct of the operation to his immediate supervisor.</p> <p>(iv) The immediate supervisor of the officer-in-charge mentioned in (iii) above failed to perform his supervisory role adequately, leading to the failure to present the whole picture to the panel judge or alert them to the possible non-compliance at the time of considering related renewal applications for interception.</p> <p>(See paragraphs 6.37 – 6.48 of Chapter 6 of Annual Report 2015.)</p>	<p>Verbal warning</p> <p>Verbal warning</p> <p>Written warning</p> <p>Written warning</p>
<p><u>Case 5</u> Surveillance</p>	<p>(i) An officer-in-charge of the investigation failed to include an answer to a question in the statement in writing in support of a Type 2 surveillance application.</p>	<p>Verbal warning</p>

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	<p>(ii) The authorizing officer of the Type 2 surveillance application failed to exercise care and due diligence in carrying out his duties as an authorizing officer.</p> <p>(See paragraphs 6.8 – 6.15 of Chapter 6.)</p>	Verbal warning

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.

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 2016 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, only one of the 1,417 applications for interception was refused and the reason for refusal was that the materials to support the allegation put forth, in the view of the panel judge, were inadequate/insufficient to justify infringing the privacy of the subject. As regards covert surveillance, all the 29 applications were granted by the panel judges/authorizing officers.

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, examination of the contents of the LEA files and documents as well as the protected products (starting from October 2016 for protected products) during 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 In the report period, there was no case of wrong or unauthorized interception revealed by the various forms of checking. In respect of covert surveillance, cases checked during the year were found to be generally in order although improvements were required in the drafting of application documents and the reporting mechanism on operations conducted. 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 information or JM through the examination of the weekly reports submitted by the LEAs, with sanitised copies of the relevant REP-11/REP-13 reports reporting on any material change in circumstances after the issue of a prescribed authorization including changed LPP and JM risks.

9.8 With the implementation of examination of protected products since October 2016, for the LPP/JM cases, I am able to check the veracity of the gist of the communications or information as stated in the REP-11/REP-13 reports and whether there were any communications or information subject to LPP or with JM that had been accessed by the LEA officers.

9.9 A total of 53 LPP and JM cases that were reported in 2016 had been reviewed. Apart from those specifically mentioned in paragraphs 4.16 and 4.18 to 4.28 of Chapter 4 and Report 2 of Chapter 6, nothing untoward was found for these cases. The LEAs were observed to have recognised the importance of protecting information which might be subject to LPP or JM. They continued to adopt a very cautious approach in handling these cases, save for a few occasions where more vigilance from the LEA officers was expected.

9.10 During the report period, the protected products of past LPP cases were also examined. Three of the 14 cases examined required explanations from relevant LEAs as mentioned in paragraphs 4.35 to 4.37 in Chapter 4. The examination of the protected products of these cases did not reveal anything to justify any deviation from the assessments given by my predecessors or myself on the handling of LPP cases

reported in the past years.

Reports of non-compliance/irregularities

9.11 Under section 54 of the amended 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 to comply with any relevant requirement of the Ordinance, irrespective of whether the failure is due to the fault of the LEA or its officers or not. 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 2016, 11 reports of irregularities/incidents were received from LEAs.

9.12 Overall, I am satisfied with the performance of the LEAs and their officers in their compliance with the requirements of the ICSO in 2016. There is no finding that any of the 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 where officers were not careful in dealing with documents relating to ICSO operations nor vigilant enough in discharging ICSO-related duties. I must stress again that the officers of the LEAs should stay alert and exercise care in different stages of the operations conducted under the ICSO.

Response from LEAs

9.13 Stringent procedures will help ensure compliance with the relevant requirements by the LEA officers in the course of performance of ICSO-related duties. I am pleased to see that in the report period, LEAs were positive to my recommendations in regard to review of existing procedures or new arrangements for better operation of the ICSO regime

and they were also active in implementing measures to facilitate my oversight work.

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. In the report period, relevant parties have also rendered prompt and effective support in response to my requirements on the new procedures and technical arrangements for the examination of the protected products, without which the implementation of my new checking power would not have been effected smoothly. I would like to take this opportunity to thank them and look forward to their continuous support.

Way forward

10.2 The legislative amendments to the ICSO have taken effect for just one year. In particular, the new checking power has been implemented for about nine months since October 2016. I shall keep under review the working arrangements to enhance the effectiveness of the examination of the protected products with a view to achieving the objective of the checking power and exerting effective deterrence against the non-compliance of the LEAs with the Ordinance. The impact of the other legislative amendments on my oversight work will also be kept in view. I understand that the Security Bureau and the LEAs will keep a close watch on the operation and development of the Ordinance. Besides, as I did since I took up this post, I will make recommendations to the relevant parties whenever improvements in the procedures or

practices are discerned to be necessary for or conducive to the better operation of the ICSO regime.