

# Annual Report 2018

## to the Chief Executive

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by

The Commissioner on Interception of  
Communications and Surveillance

June 2019

# 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 Mrs Carrie Lam Cheng Yuet-ngor, GBM, GBS  
The Chief Executive  
Hong Kong Special Administrative Region  
People's Republic of China

**CONFIDENTIAL**

Dear Madam,

## **Annual Report for the Year 2018**

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 2018, together with its Chinese translation.

Yours sincerely,



(A. R. Suffiad)

Commissioner on Interception of  
Communications and Surveillance

Encl: Annual Report for 2018

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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	a 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-1 report	report on arrest of subject of interception or covert surveillance made on form REP-1
REP-11 report/ REP-13 report	report on material change in circumstances or initial material inaccuracies under a prescribed authorization made on form REP-11 or form REP-13

Reported LPP Call	a call with LPP likelihood, heightened LPP likelihood or LPP information and is reported to the panel judge by way of an REP-11 report on such
Secretariat	Secretariat, Commissioner on Interception of Communications and Surveillance
section	section of the Ordinance
statutory activity	interception of communications and/or covert surveillance activity referred to in the Ordinance
the report period	the period from 1 January to 31 December 2018
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 the PJO 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 2018.

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 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 crime 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 Various ways of checking the compliance of the LEAs with the relevant requirements, including the examination of the protected products, continued to operate smoothly in 2018.

1.7 As an on-going commitment since I assumed the office of the Commissioner, I continue to render my views to the Security Bureau on the arrangements for better operation of the ICSO and make recommendations to the LEAs for tackling existing and anticipated problems in relation to the ICSO. This engagement is significant for the benefits of the society in respect of protection of privacy and other rights of individuals.

1.8 During the periodical visits to the LEAs on checking of files and documents and after the examination of protected products, I reminded the LEAs to stay vigilant on the protection of legal professional privilege ('LPP') information or handling of journalistic material ('JM'). The LEAs had taken cautious approaches in conducting covert operation and handling protected products in order to guard against the obtainment of information subject to LPP and JM. In the report period, there was an upsurge in the number of reported new cases that were likely to involve LPP information. Details are given in Chapter 4 of this report. Despite the upsurge, there was no actual obtainment of LPP information in any of the cases. This is a good indication of the heightened alertness of the LEA officers in protection of LPP information.

1.9 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 1,343 written applications for interception made by the LEAs, of which 1,337 were granted and six were refused by the panel judges. Among the successful applications, 661 were for authorizations for the first time ('fresh applications') and 676 were for renewals of authorizations that had been granted earlier ('renewal applications').

## **Reasons for refusal**

2.3 Of the six refused applications, three were fresh applications and three were renewal applications. The refusals were mainly due to the following reasons:

- (a) the materials provided to support the allegations put forth were insufficient; and
- (b) lack of useful information obtained from interception operation conducted under previous authorizations.

## **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 83% 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 37 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 582. Another 46 cases involved the cessation of a part, but not all, of the interception approved under a prescribed authorization, so that while the prescribed authorization was partially revoked, the remaining part of the interception approved continued to be in force.

2.12 The grounds for discontinuance were mainly that the interception operation was not or no longer productive, the value to continue the interception operation was considered not proportional to the risk of obtaining LPP information, 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 118 arrests but only 21 section 58 reports, which should be made through a prescribed form (i.e. REP-1 report), were made to the panel judge. The panel judge



allowed the interception operations related to the 21 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.

2.14 Section 58A of the Ordinance provides that, where the relevant authority (a panel judge) receives a report from an LEA on material change in circumstances or material inaccuracies under a prescribed authorization, 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. During the report period, no authorization for interception was revoked by the panel judge under this section of the Ordinance.

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

2.15 There were 12 authorizations for interception with five or more previous renewals within the report period. All the cases with six renewals and some of their further renewals were checked and found in order during periodical visits to the LEAs.

### **Arrests attributable to interception**

2.16 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 crime 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 87 persons, who were subjects of prescribed authorizations, were arrested as a result of or further to interception operations. In addition, 141 non-subjects were also arrested consequent upon the interception operations.

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

2.17 The LEAs' compliance with the requirements of the Ordinance in respect of the interception cases reported in 2018 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**

2.18 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.

2.19 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.

2.20 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**

2.21 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.

2.22 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.

2.23 In addition to matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 829 applications for interception, including granted authorizations and refused applications, and 654 related documents/matters had been checked during the Commissioner's periodical visits to the LEAs in the report period.

### **Examination of interception products**

2.24 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.

2.25           Apart from some specific cases such as LPP and JM cases reported by the LEAs, the Commissioner would also select from the weekly reports, on the basis of the information provided therein or at random, interception products of other cases for examination with a view to checking if those other interception products may contain any LPP information, JM or any information that indicates heightened LPP/JM likelihood 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.

2.26           During the report period, with the basis of selection as mentioned in paragraph 2.25 above, the interception products of 419 selected authorizations had been examined. Two authorizations of 2011 which had been preserved by the LEAs for the Commissioner were also examined. Of these 421 authorizations, no irregularity was found for 417 authorizations. As for the four remaining authorizations, they involved an incident of delay in preservation of protected products, discrepancies made in submitting an REP-11 report to the panel judge, non-reporting of the alias as required under the COP provision and non-reporting of a call with information indicating heightened LPP likelihood as detailed in Cases 6.2, 6.16, 6.17 and 6.18 of Chapter 6 respectively.

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

2.27 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.

2.28 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**

2.29 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 41 written applications for Type 1 surveillance, including 17 fresh and 24 renewal applications. No application for Type 1 surveillance was refused.

3.4 No application for Type 2 surveillance was made by the LEAs during the report period.

## **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, no oral application for Type 1 or Type 2 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 judge 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 31 days whereas the shortest one was less than one day. Overall, the average duration for such authorizations was about 23 days.

## **Offences**

3.11 The major categories of offences for the investigation of which prescribed authorizations were issued or renewed for surveillance during the report period are set out in Table 2(b) in Chapter 8.

## **Revocation of authorizations**

3.12 During the report period, 16 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, 15 prescribed authorizations concerned were subsequently revoked fully by the panel judge under section 57. The remaining prescribed authorization had already expired by the time the panel judge received the discontinuance report. Thus, the panel judge could only note the discontinuance reported instead of revoking the prescribed authorization.

3.13 There was no discontinuance of Type 2 surveillance operation during the report period.

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

were seven Type 1 surveillance operations involving LEAs being aware of the arrest of subjects. The LEAs concerned were aware that 13 subjects of the Type 1 surveillance operations had been arrested but no report was made to the relevant authority under section 58 seeking continuation of prescribed authorizations. The covert surveillance operations concerned were discontinued pursuant to section 57.

3.15 The LEAs' voluntary selection of the section 57 procedure to discontinue the covert surveillance operation as soon as reasonably practicable instead of resorting to the section 58 process of reporting an arrest with a wish to continue with the operation, similar to the situation for interception, demonstrates that the LEAs were appreciative of the risk of obtaining LPP information after an arrest.

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

3.16 During the report period, one authorization for Type 1 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.

#### **Arrests attributable to covert surveillance**

3.18 As a result of or further to surveillance operations, a total of 22 persons who were subjects of the prescribed authorizations were arrested. Twelve 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 2018 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, 29 applications for Type 1 surveillance (including one application reported in 2017 and 28 in 2018) and 49 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, one application for Type 2 surveillance that was reported in 2017 and two 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 surveillance devices being used for any unauthorized purposes.

3.25 I observed from one of the covert surveillance cases checked in periodical visits that the officers of an LEA were still not vigilant enough in performing ICSO-related duties. Details of this case are set out in the ensuing paragraph.

3.26 Sections 58A(1) and (2) of the Ordinance provide that, if an LEA officer becomes aware that there is a material inaccuracy in the information supporting the application for the issue or renewal of a prescribed authorization, a report on the matter must be provided to the relevant authority. During the report period, an LEA identified a material inaccuracy in the affirmation in support of an application for the renewal of a prescribed authorization pertaining to a Type 1 surveillance operation. An REP-11 report was therefore submitted to the panel judge for rectification. In reviewing the REP-11 report and the related application documents during a periodical visit to the LEA, I noted that the information provided in the fresh application was correct while the inaccuracy reported appeared only in the renewal application. I reminded the LEA the need to adopt a vigilant approach in preparing ICSO application documents as the slightest mistake could have far-reaching consequences. I also required that ICSO application documents should be checked by multiple tiers of officers and appropriate measures should be put in place to ensure the particulars of an application to be accurate and consistent across its fresh application and all subsequent renewals. The LEA took my advices. The officers of the LEA were reminded to stay vigilant and cautious throughout the application process and they were since provided with checklists that highlighted areas prone to careless mistakes and requiring attention when preparing ICSO application documents.

### **Examination of surveillance products**

3.27 In accordance with section 53(1)(a) of the Ordinance, the Commissioner and his delegated officers have the express power to check

the protected products obtained by the LEAs through covert surveillance. 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 from the weekly reports, on the basis of the information provided therein or at random, other cases for examination with a view to checking if the surveillance products of these cases may contain any LPP information, JM or any information that indicates heightened LPP/JM likelihood 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 under covert surveillance as authorized by a prescribed authorization was actually the subject 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           During the report period, the surveillance products of nine selected authorizations were examined. Nothing untoward was found for eight authorizations. The review for one authorization is still on-going when this report is being compiled. Besides, five authorizations had been selected for examination of their protected products but no checking was made as no surveillance operation had been conducted or no recording had been made during the surveillance operation.

## **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 view the items physically and be briefed, if need be, as to how they may be used for conducting covert surveillance operations.

3.33 During the report period, a total of five 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 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. The LEAs have also adopted the use of QR Code to facilitate the issue and return of the RSM through DMS. In response to my views that information showing whether RSM is issued or returned with a surveillance device and whether the tamper-proof label sealing the RSM inside the device is intact upon return of the device should be clearly documented in the device register, the LEAs have adopted a revised format of device register to include such information.

### **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, two reports were received from an LEA on cases relating to surveillance devices for non-ICSO purposes and both cases involved RSM. Details of these cases are described below.

***Omission of record on the DMS for the issue of an RSM***

3.37 The LEA reported to me an incident in which the issue of an RSM was not recorded by the DMS. The RSM was intended to be used along with a surveillance device for a non-ICSO operation and the two items were issued through the DMS.

3.38 In processing issue of surveillance devices and RSM, the issuing officer is required to scan the QR codes of the items to be issued and go through certain steps on the DMS. It is an established practice of the LEA that the approving officer will witness the whole issuing process conducted by the issuing officer and verify the information inputted into the DMS before granting approval through the system. In this case, while the issuing officer failed to record the issue of the RSM on the DMS properly, the approving officer did not follow the established practice and had only checked the surveillance device before granting the approval. Upon completion of the issuing process, the DMS generated a Record of Issue showing the items issued on that occasion. The issuing officer soon discovered from the Record of Issue that the issue of the RSM had not been recorded on the DMS and then reported the matter to the approving officer. The RSM together with the surveillance device were therefore immediately returned to the device store without being used. The LEA concluded that the two officers had inadvertently slipped in their alertness and vigilance in processing the issue of the two items

through the DMS but there was no evidence suggesting that any officers might have deliberately disregarded the procedure of issuing surveillance devices and RSM. The LEA proposed that an advice (non-disciplinary) be issued by a senior officer to each of the two officers. The LEA also made an enhancement to the DMS.

3.39 I have reviewed the case. The omission of record for the issue of an RSM with a surveillance device reflected the lack of vigilance of both the approving officer and the issuing officer in performing their duties. The failure of the approving officer to check each item physically before granting the approval and the oversight of the issuing officer in recording the issue of an RSM on the DMS even when there was an alert message from the system were both considered unsatisfactory. I noted the LEA's proposed actions against the two officers concerned and the enhancement measure.

#### ***Reported loss and subsequent recovery of an RSM***

3.40 In the second case, two RSM were issued with a surveillance device for use in a training course. One of the RSM, which served as backup and had not been used, was reported lost after the training course. The course participant concerned retrieved the missing RSM in his backpack a few days later and then returned it to the LEA. The LEA confirmed that the RSM concerned contained no data or image. The reported missing of the RSM and the subsequent recovery of it were properly recorded on the DMS. The LEA considered that there was no indication of ill intent or ulterior motive involved in the matter. The LEA also believed that, had the course participant made a more complete search of his backpack in the first instance, he would probably have found the RSM without the occurrence of the missing of RSM. I noted the LEA's findings.

## **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. 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 judge would impose additional conditions if he granted the authorization or allowed it to continue. These additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice.

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 encounters a call with heightened LPP likelihood or LPP information, the LEA is required to submit an REP-11 report to the panel judge in respect of this call. This is named 'Reported LPP Call' irrespective of whether LPP information has indeed been obtained. The reporting officer has to disclose in the report the number of times the Reported LPP Call has been listened or re-listened to, the respective date and time and duration of each such listening or re-listening and the identity of each of the listeners.

In addition, in the report to the Commissioner, the reporting officer should also state whether there are any other calls between the telephone number involved in the Reported LPP Call and the subject's telephone number under interception, irrespective of whether such calls are intercepted before or after the Reported LPP Call. If there are such 'other calls', the reporting officer is also required to provide information on whether they have been listened to and if so, for how long and the identity of the listeners. In order to provide such information, the reporting officer should consult the relevant audit trail report ('ATR') that records accesses to the intercepted calls together with the corresponding call data when preparing the REP-11 report and the notification to the Commissioner. For LPP cases involving interception, the LEA should preserve all the interception products which are still available at the time of discovery of 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 Ordinance. LEAs are required to make similar reporting and preservation arrangements also for cases where JM is 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. Similarly, the dedicated unit is required to screen out any JM that has been inadvertently obtained and withhold such materials from the investigators.

## **LPP reports received in 2018**

4.7 In the report period, LEAs submitted notifications, in accordance with the COP, on 183 new cases that were likely to involve LPP information (LPP cases). However, in the report period, there was no actual obtainment of LPP information in any of the cases.

4.8 Amongst these 183 new LPP cases, 11 cases were assessed at the time of application that the operations sought to be authorized would likely obtain information subject to LPP and the panel judge imposed additional conditions in the prescribed authorizations in all these cases. There was no subsequent change in circumstances one way or another relating to LPP likelihood for these 11 cases.

4.9 For the remaining 172 cases <sup>Note 1</sup>, the LEAs submitted REP-11 or section 58 reports to the panel judge on the subsequent change in circumstances relating to LPP involvement or likelihood. These 172 cases included:

- (a) one case of obtaining information suspected to be subject to LPP; and
- (b) 171 cases of heightened likelihood of obtaining LPP information:
  - (i) in 109 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 58 cases the concerned LEA discontinued the operations of its own accord; and

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Note 1 Some of these cases were assessed at the time of application that the operations sought to be authorized would likely obtain information subject to LPP and some were not.



- (iii) in four cases which involved two operations each, the prescribed authorization for one operation in each of the four cases was discontinued by the LEA of its own accord, while the other operations were allowed by the panel judge to continue/to be conducted subject to additional conditions imposed to guard against the risk of obtaining LPP information.

4.10 Of the 183 new LPP cases, the authorized operations for 154 cases were discontinued in the report period. I had completed the review of these 154 cases. 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 summaries, the communication data, the ATRs, etc. were checked by me and my staff. For cases where the panel judge allowed the prescribed authorizations to continue subject to additional conditions, we checked whether the LEAs 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 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 products after the discontinuance or revocation of the prescribed authorizations.

4.11 The protected products of the 154 LPP cases were also examined by me and my delegated officers. When examining 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 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 information suspected to be subject to LPP***

4.12 The case where the LEA concerned reported the obtainment of information suspected to be subject to LPP involved an interception operation. At the grant of the prescribed authorization concerned, the interception operation was assessed to have a likelihood of obtaining LPP information. The panel judge imposed additional conditions on the prescribed authorization to guard against the risk of obtaining LPP information.

4.13 As the interception progressed, one day, the LEA encountered a call which indicated heightened LPP likelihood. Having considered the REP-11 report submitted by the LEA, the panel judge allowed the prescribed authorization to continue subject to revised additional conditions. Subsequently, a message was intercepted and the information contained therein was suspected to be subject to LPP. The LEA submitted to the panel judge an REP-11 report and a discontinuance report with the contents of the suspected LPP information detailed separately in an annex to the REP-11 report. The panel judge revoked the prescribed authorization accordingly.

4.14 After reviewing the case, I did not find any irregularity. As regards the message which contained information suspected to be subject to LPP, I have examined its contents and considered that the information

concerned was not LPP information. Nonetheless, I appreciated that the LEA had erred on the side of caution in handling information which might be subject to LPP.

***142 cases of heightened LPP likelihood and 11 cases of assessed LPP likelihood***

4.15 The review of the 153 heightened/assessed LPP likelihood cases had been conducted in accordance with the mechanism as stated in paragraphs 4.10 and 4.11 above. Of these 153 cases, 17 cases were related to the incidents referred to in Cases 6.1, 6.3, 6.4, 6.6, 6.7, 6.9, 6.10, 6.11, 6.12, 6.13, 6.14 and 6.19 <sup>Note 2</sup> of Chapter 6 and one case was related to non-compliance detected by me in early 2019 (details of which will be provided in the next annual report). Nothing untoward was found for the remaining 135 cases.

***29 on-going cases of heightened LPP likelihood***

4.16 As the authorized operations for 29 cases of heightened LPP likelihood reported in 2018 are still on-going beyond the report period, details about my review of these cases will be reported in the next annual report.

**Obligations of LEAs regarding JM cases**

4.17 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

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<sup>Note 2</sup> This incident involved six LPP cases.

any JM has been obtained or will likely be obtained through interception or covert surveillance operations. The reporting, preservation and screening requirements for cases involving JM are as those set out in paragraphs 4.5 and 4.6 above.

### **JM reports received in 2018**

4.18 In 2018, I received notifications on four new cases with heightened likelihood of obtaining JM submitted in accordance with the COP, for which REP-11 reports were submitted to the panel judge.

#### ***Four cases of heightened JM likelihood***

4.19 For the four cases of heightened likelihood of obtaining JM, the panel judge imposed additional conditions for three cases after receipt of the REP-11 reports while the operation for one case was discontinued by the LEA of its own accord.

4.20 I conducted a review of the JM cases in accordance with a mechanism which was similar to that of checking LPP cases as detailed at paragraphs 4.10 and 4.11 above.

4.21 Checking of the relevant documents and records of these four heightened JM likelihood cases did not reveal any irregularity. The protected products were also checked and nothing untoward was found.

### **Examination of the protected products in past cases**

4.22 Apart from cases reported in the report period, since October 2016, the Commissioner and his delegated officers have also examined the protected products of LPP/JM cases that were reported before 2016. In the report period, preserved protected products of 31 LPP cases that were reported before 2016 had been checked.

Nothing untoward was found for 30 cases while LEA was required to provide explanation for one case which is detailed in paragraphs 4.23 to 4.25 below.

4.23           The 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 operation involved was assessed to have a likelihood of obtaining LPP information at the grant of the prescribed authorization. Checking of the protected products in 2018 revealed that a call indicating a heightened LPP likelihood was not reported to the panel judge. In response to my request for explanation on the non-reporting identified, the LEA explained that the officer concerned did not consider the call as having heightened LPP likelihood at that material time according to the general understanding of heightened LPP likelihood among the LEA officers. Hence, the call was not reported to the panel judge as having heightened LPP likelihood.

4.24           I relayed my disagreement to the LEA's assessment on the LPP likelihood of the case. The LEA agreed to my assessment on the LPP likelihood and reported that the LEA had implemented a new measure since January 2017 to enhance the reporting and assessment mechanism regarding communications with contents that might indicate heightened LPP likelihood. The LEA had also reminded all the officers involved to remain vigilant at all times when handling calls that might indicate a heightened likelihood of obtaining information subject to LPP.

4.25           After reviewing this case and having considered all relevant factors, I accepted the LEA's explanation as I could not find any evidence of deliberate neglect or sinister motive of the officer concerned.

## **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 A number of applicants did not understand the basis of an application for examination under the Ordinance. 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 would also fail 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, guidelines containing the



necessary information for making an application are available in the Secretariat office for prospective applicants.

### **Applications received in 2018**

5.8 During the report period, there were 11 applications for examination. Two applications were subsequently not pursued by the applicants. Of the remaining nine applications, two alleged interception, one alleged covert surveillance and six claimed a combination of interception and covert surveillance. Since none of the nine applications came within the ambit of the exceptions covered by section 45(1) or section 45(2), 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 nine cases not in the applicants' favour and accordingly notified each of the applicants in writing of the findings, with six of such notices issued during the report period and three thereafter. By virtue of section 46(4) of the Ordinance, the Commissioner is not allowed to provide reasons for his determination or to inform the applicants whether or not the alleged or suspected interception or covert surveillance had indeed taken place.

### **Notification to relevant person**

5.10 Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person whenever, during the performance of the functions under the Ordinance, the Commissioner discovers any interception or covert surveillance carried out by an officer of any one of the four LEAs covered by the Ordinance without a prescribed authorization. However, section 48(3) provides that the Commissioner shall only give a notice when he considers that doing so would not be prejudicial to the prevention or detection of crime or the protection of public security. Section 48(6) also exempts the Commissioner from his

obligation if the relevant person cannot, after the use of reasonable efforts, be identified or traced, or where he considers that the intrusiveness of the interception or covert surveillance on the relevant person is negligible.

5.11 Consideration of the application of section 48 may arise under a number of situations. For example, the interception of telephone communications on a telephone number other than that permitted by a prescribed authorization issued by a panel judge constitutes an unauthorized interception. The Commissioner will then consider whether he should, as obliged by section 48 of the Ordinance, give a notice to the relevant person of the wrong interception. If and when the notice is given, the relevant person 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 where the applicants expressed strong discontent at not being given the details of 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**

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

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

6.1 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). 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 irregularity 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 or provide explanation 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 2017**

6.5 In my Annual Report 2017, there was one outstanding case. It is dealt with in the ensuing paragraph.

#### ***Outstanding case : An incident report relating to section 61 of the ICSO [Paragraph 6.6 of Annual Report 2017]***

6.6 This incident was first reported by an LEA in late 2014. The court proceedings that were relevant to the incident have not concluded at the time of writing this report. The reporting of this case can only be made when the relevant court proceedings have concluded to avoid the risk of prejudicing the administration of justice.

### **Cases occurring in 2018**

6.7 In 2018, there were 27 cases of non-compliance/irregularity/incident while none of them involved report submitted under section 54 of the Ordinance. The review of 26 cases had been completed and details of the review are set out below. For the remaining case, as the review is still on-going, details about my review will be reported in the next annual report.

#### ***Case 6.1 : Non-reporting of a call which might indicate heightened LPP likelihood***

6.8 The incident was related to a case of heightened likelihood of

obtaining LPP information referred to in Chapter 4.

6.9 At the grant of the prescribed authorization concerned, the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception progressed, one day, an officer listened to part of a call in which the subject mentioned a matter which might indicate heightened likelihood of obtaining LPP information. Though being doubtful about the truthfulness of the matter, the officer took a cautious approach to report the contents of the call to his supervisor ('Supervisor') for instruction. To ascertain the authenticity of the matter mentioned in the call, the Supervisor conducted a relevant check, but the checking result did not support the matter. In the light of the checking result, the Supervisor did not consider that LPP likelihood was heightened and, therefore, did not further report the contents of the call to a senior officer.

6.10 Later on the same day, the senior officer, when performing supervisory check on intercepted calls, was aware of the contents of the call. She considered that the matter mentioned in the call might give rise to heightened LPP likelihood. A further check on the matter was conducted on the following working day, which showed that the situation had changed after the first check. The authenticity of the matter mentioned in the call was confirmed, which indicated heightened likelihood of obtaining LPP information. The LEA submitted an REP-11 report to the panel judge to report the heightened LPP likelihood as well as the circumstances on the discovery of the heightened LPP likelihood. The panel judge allowed the prescribed authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.

6.11 When reporting to me the LPP case in accordance with the COP, the LEA also notified me of the incident that the Supervisor did not report the contents of the call to the senior officer. Subsequently, the

LEA submitted an investigation report to me, detailing the results of its investigation into the incident. The investigation by the LEA concluded that the Supervisor had taken the necessary action to verify the matter mentioned in the call and made the judgement in good faith based on the checking result. Although he could have been more cautious in deciding whether the senior officer should be informed of the contents of the call, the Supervisor did not breach any rules and guidelines, nor was there evidence of any improper conduct on his part. To enhance the awareness and professionalism of officers in handling situations involving likelihood of obtaining LPP information, the LEA reminded the Supervisor of the need to take a more cautious and balanced approach in handling LPP situations in future and briefed officers involved in interception duties of the learning points from the incident.

6.12 Having reviewed the case, I agreed with the findings of the LEA's investigation.

***Case 6.2 : Mistake in preservation of interception products of three prescribed authorizations randomly selected for examination of protected products***

6.13 An LEA reported to me an incident of delay in preservation of interception products.

6.14 For interception cases selected from the weekly reports of the LEAs and the PJO for checking of the protected products, the LEAs should arrange for preservation of the interception products that are available at the time of receipt of the notification of preservation requirement from the Secretariat.

6.15 One day, the LEA was informed of the preservation requirement of some prescribed authorizations selected by me as random cases for checking their protected products. Upon receipt of the notification of my preservation requirement, the officer concerned did

not take immediate action to preserve the relevant interception products as she was heavily engaged in other office duties on the same day. The officer discovered on the following day that she had not taken follow-up action on the notification of preservation, and consequently the interception products of three prescribed authorizations obtained on one day, which should have been preserved, were not retained.

6.16 The investigation of LEA concluded that the mistake was due to the oversight of the officer. There was no foul play or ulterior motive involved. Considering all the circumstances of the case and the involvement of the officer in an incident of similar nature in 2017, the LEA proposed to give a verbal warning (disciplinary) to the officer for her failure to preserve the interception products as requested by the Commissioner. The LEA also considered that her direct supervisor should bear supervisory accountability. The LEA proposed to give the direct supervisor a heavier punishment of a written admonishment (disciplinary) for her failure to properly supervise her subordinate in performing ICSO-related duties despite she was verbally advised in another incident of similar nature in 2017. In relation to this incident, the LEA also proposed to remind the Division Head concerned, of her important and fundamental role to give proper guidance, provide appropriate support to subordinates and ensure that sufficient measures had been put in place to monitor the performance of ICSO-related duties. To prevent recurrence of similar mistakes in future, the LEA proposed some remedial measures to tighten up the internal checking and supervision.

6.17 I have reviewed the case. There was no evidence to contradict the findings of the LEA that there was no foul play or ulterior motive involved in this incident. The proposed actions against the officers concerned and remedial measures proposed were considered appropriate. Checking of the protected products of the three prescribed authorizations did not reveal any irregularity.



***Case 6.3 : An officer's failure to report to his supervisor a call indicating heightened LPP likelihood***

6.18 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.19 At the grant of the prescribed authorization concerned, the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception progressed, one day, a supervisory officer, when performing supervisory duty, listened to part of a call and found that the call contained information which indicated heightened LPP likelihood. Checking of the relevant ATR discovered that the call had also been partially listened to by another officer about 15 minutes before his listening to it. In response to the supervisory officer's enquiry, the officer explained that he perceived that the matter that gave rise to heightened LPP likelihood in the call was a lie told by the subject. Therefore, he did not report the call to his supervisor.

6.20 The LEA concerned submitted an REP-11 report to the panel judge to report the heightened LPP likelihood. The officer's failure to report the LPP Call and his explanations were also mentioned in the report. The panel judge allowed the interception operation to continue with additional conditions imposed to guard against the risk of obtaining LPP information.

6.21 When reporting to me the LPP case in accordance with the COP, the LEA also notified me of the non-reporting of the LPP call by the officer. Subsequently, the LEA submitted an investigation report to me, detailing the results of its investigation into the incident and proposing disciplinary action against the officer. The LEA considered that the officer's assessment that the subject was telling a lie was subjective. He lacked the required alertness on heightened LPP likelihood situations. However, there was nothing that indicated any foul play or ulterior motive.

6.22 Since the officer had committed a similar mistake previously, the LEA proposed to issue a verbal warning to the officer on this occasion. Besides, all officers of the LEA involved in interception duties were reminded that they should report to their supervisors without delay calls that might give rise to heightened LPP likelihood.

6.23 Having reviewed the case, I agreed that there was no foul play or ulterior motive involved in this case. The LEA's proposed disciplinary action against the officer was considered appropriate.

***Case 6.4 : Incomplete removal of access right to interception products***

6.24 An LEA reported an incident where the access right to the interception products in respect of an interception operation was not removed completely as required. This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.25 One day, an officer was informed of the arrest of the subject of an interception operation. Pending a decision to discontinue the interception operation, the officer took action to remove the access right to the interception products concerned. However, only part of the access right was removed and part of the access right was still valid.

6.26 Later on the same day, the officer, when reviewing the record of the relevant access right, discovered that part of the access right concerned had not been removed. She reported the matter to her supervisor immediately and then removed the rest of the access right.

6.27 The investigation by the LEA concluded that the failure to remove the access right completely was attributed to a momentary lapse of concentration of the officer. No foul play or ulterior motive was involved. During the period when only part of the access right was

removed, there was no access to the interception products concerned. The LEA proposed to give a verbal advice (disciplinary) to the officer for her failure to remove the access right as required. To prevent recurrence of similar incidents, an enhancement measure to the relevant computer system was implemented.

6.28 I had checked the relevant ATRs which confirmed that there was no access to the interception products concerned during the period when the access right was not removed completely. Having reviewed the case, I agreed with the LEA's findings. The proposed disciplinary action against the officer and the enhancement measure to the computer system were considered appropriate.

#### ***Case 6.5 : Irregularities in the handling of protected products***

6.29 An LEA reported an incident where the legal representative of a defendant had failed to return one item of protected product and made unauthorized copy of another item of protected product. The missing protected product was retrieved about one week after the report of its loss.

6.30 The LEA concerned conducted Type 2 surveillance pursuant to an executive authorization with the use of listening device on a subject in a crime investigation and the conversations involving the subject and another accomplice were recorded ('the recordings').

6.31 Subsequently, the subject ('Defendant') was charged by the LEA. As the Defendant was subject to prosecution with the use of the protected product that was obtained pursuant to the executive authorization, the legal representative of the Defendant ('Law Firm') requested the LEA to disclose the relevant protected product to the Defendant.

6.32 Section 59 of the ICSO stipulates that, where any protected product has been obtained pursuant to any prescribed authorization, the head of the department shall make arrangements to ensure that the extent to which the protected product is disclosed or copied, the number of persons to whom any of the protected product is disclosed and the number of copies made of any of the protected product are limited to the minimum that is necessary for the relevant purpose of the authorization. The head of the department shall also make arrangements to ensure that all practicable steps are taken to ensure that the protected product is protected against unauthorized or accidental access, processing, erasure or other use. The LEA was aware of its obligations in safeguarding protected products as stipulated in the ICSO and it sought prior legal advice on the appropriateness, the extent and the procedures on the disclosure of protected product to the Defendant.

6.33 The protected product, which included a disc containing the recordings ('Disc A'), a summary of the recordings ('the Summary') and a transcript of the recordings ('the Transcript'), would be provided to the Law Firm subject to its undertaking of a set of conditions as advised by the Department of Justice. Amongst others, the conditions required the Law Firm not to make any copy of the materials save with the written consent of the LEA and to return the same to the LEA as soon as practicable when the legal proceedings come to an end.

6.34 After the Law Firm had agreed in writing to undertake the conditions, Disc A together with the accessing software, the Summary and the Transcript were sealed in an envelope by an officer of the LEA under the witness of another officer. Upon collection of the sealed envelope at the office of the LEA, the messenger of the Law Firm ('the Messenger') signed an acknowledgement of receipt without opening the envelope and verifying its contents.

6.35 A few days later, the Law Firm requested a copy of the recordings that could be accessed without any special software. The Law Firm returned Disc A to the LEA and another disc that contained the recordings and could be accessed without any special software ('Disc B') was provided to the Law Firm in the same manners subject to the same set of conditions afterwards.

6.36 After the legal proceedings were completed, the Law Firm furnished a letter to the LEA returning Disc B and the Transcript to the LEA and stating that it had never received the Summary.

6.37 Having inspected the documents returned by the Law Firm, apart from the absence of the Summary, the LEA suspected that the Law Firm had replaced two pages of the Transcript with photocopies ('substituted pages') and found that the Law Firm had made a page of photocopy bearing the image of Disc B and the first page of the Transcript copied in reduced scale ('image of protected product').

6.38 The suspected unauthorized production of the substituted pages and the image of protected product may constitute a breach of the conditions undertaken by the Law Firm and thus a possible breach of sections 59(1)(a) and 59(1)(b) of the ICSO.

6.39 The LEA then wrote two letters to the Law Firm requesting written explanations for the loss of the Summary and clarifications on the suspected unauthorized production of copies of the protected product. A few days later, the Law Firm returned the two original pages of the Transcript to the LEA and explained that it had made clean copy of those two pages for returning to the LEA as its staff had written something on the original. The Law Firm also explained that it was the usual practice of the firm to produce images of the materials and documents delivered to other parties for acknowledgement of receipt. In response to the LEA's enquiry on the loss of the Summary, the Law Firm claimed that the Messenger had no opportunity to open the envelope and was unable to

verify the documents contained inside the envelope when he signed the acknowledgement of receipt at the LEA's office. The envelope was then passed to a clerk of the Law Firm ('Clerk') and according to his recollection, he opened the envelope in the presence of the Defendant and did not find the Summary. In the same week, the LEA reported this case of possible non-compliance to me.

6.40 On the next day after its submission of report to me, the LEA received the Summary from the Law Firm. The Law Firm indicated that the Summary was found in the office of the Clerk and it was believed that the Clerk had overlooked the Summary inside the envelope and he had no intention to hide the document.

6.41 The LEA subsequently submitted an investigation report on the incident to me. Having reviewed the case, I considered that the LEA had handled the disclosure of the protected product to the Defendant and the Law Firm with due care and the LEA had taken all practicable steps to ensure that the provisions stipulated in the ICSO were complied with. The entire set of protected product that was provided to the Law Firm had finally been retrieved and all the copies of the protected product that were made by the Law Firm had been handed to the LEA. The LEA was therefore able to fulfil its obligation and arrange for the destruction of the protected product in accordance with section 59(1)(c) of the ICSO.

6.42 I took the view that if the Law Firm had been more cautious in handling the protected product, the suspected loss of the protected product could have been avoided.

***Case 6.6 : An officer's failure to report to her supervisor a call indicating heightened LPP likelihood***

6.43 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.44 At the grant of the prescribed authorization concerned, the interception operation was not assessed to have a likelihood of obtaining LPP information. One day, a supervisory officer, when conducting routine checking, examined the transcripts prepared by an officer in respect of the protected products obtained from the interception operation and found that the contents of a call stated in the transcripts indicated heightened LPP likelihood. The call had been listened to by the officer earlier on the same day. However, the officer did not report the call to her supervisor. In response to enquiry as to the non-reporting, the officer explained that, based on her experience on the monitoring of the interception on the subject, she had thought that the matter mentioned in the call was not true and therefore, there was no change in the LPP likelihood.

6.45 The LEA submitted an REP-11 report and a discontinuance report to the panel judge. In the REP-11 report, the officer's failure to report the call to her supervisor was also mentioned with the officer's explanation. The panel judge noted the REP-11 report and duly revoked the prescribed authorization concerned.

6.46 When reporting to me the LPP case in accordance with the COP, the LEA also notified me of the incident. Subsequently, the LEA submitted an investigation report to me. The LEA considered that the non-reporting of the call by the officer was a combined result of misjudgement of the officer and her lack of the required alertness on possible situations giving rise to heightened LPP likelihood. Despite not reporting the call to her supervisor, the officer recorded the gist of the contents of the call in the transcripts. There was nothing that indicated any foul play or ulterior motive. The LEA proposed to issue a verbal advice (disciplinary) to the officer for her failure to report the call in which there was an indication of heightened LPP likelihood. A remedial training on the understanding of the definition of LPP information and heightened LPP likelihood was given to the officer shortly after the

incident. Officers of the interception unit concerned were reminded of the need to be vigilant in handling calls with possible indication of heightened LPP likelihood and to seek advice from supervisors whenever there was doubt.

6.47 Having reviewed the case, I accepted that there was no foul play or ulterior motive involved in this case. The LEA's proposed disciplinary action against the officer was considered appropriate.

***Case 6.7 : Type 1 surveillance conducted outside the ambit of the prescribed authorization***

6.48 An LEA reported a case of possible irregularity relating to the conduct of Type 1 surveillance outside the ambit of a prescribed authorization. This case was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.49 A prescribed authorization was granted to the LEA for conducting Type 1 surveillance on meetings among Subject A and any one or combination of other subjects including Subject B and Subject C at public places. The Type 1 surveillance was assessed to have a likelihood of obtaining LPP information and thus the panel judge granted the prescribed authorization upon additional conditions that, inter alia, all surveillance products would be directly handed over to a dedicated unit for screening out information protected by LPP. This was to ensure that LPP information would be withheld from the investigators.

6.50 In anticipation that Subjects A, B and C would meet on a certain day ('Meeting Day') in a restaurant, the LEA deployed, amongst others, a senior officer to be the field command ('the Field Command Officer'), an officer ('Officer A') to operate the surveillance device and an officer ('Officer B') to provide technical assistance in the operation.



6.51 On the Meeting Day, due to circumstances and the seating arrangement at that time in the restaurant, Officer A found that he was unable to operate the surveillance device that was designated for the surveillance operation ('the Device') and therefore he signalled Officer B to operate the Device and to commence recording the meeting among Subjects A, B and C ('the Meeting') once it was satisfied that the terms and conditions of the prescribed authorization had been met. About one and a half hours later, when Subject A left, Officer A considered it the end of the Type 1 surveillance operation and signalled Officer B to cease the recording. Officer B hence immediately pressed a button of the Device to stop the recording. After being notified by Officer B of the cessation of the recording, Officer A instantly updated the Field Command Officer. Officer B also informed his immediate supervisor ('the Supervisor') of the time of cessation of recording. Subsequently, Officer B left the restaurant and joined the Field Command Officer. Officer B then pressed another button of the Device to power it off.

6.52 On the afternoon of the Meeting Day, the Supervisor discovered from the system-generated file name of the recording that the recording ended at a time which was about nine minutes after the end of the Meeting. The finishing time of the recording was inconsistent with the time of cessation of recording as reported by Officer B.

6.53 On the day following the Meeting Day, the LEA submitted an REP-11 report to the panel judge reporting on the irregularity concerning the finishing time of the recording and seeking permission from the panel judge for the dedicated unit of the LEA to conduct screening on the part of the recording obtained between the start time and the cessation time of the Meeting. The panel judge allowed the LEA to do so. On the other hand, the LEA sought my consent to

handle and access the surveillance product. A screening was then carried out by the LEA's dedicated unit and the dedicated unit screened the surveillance product up to a point when Subject A was about to leave ('Part A of the recording'). No LEA officers had viewed or listened to the video and audio recording of the surveillance product obtained after the end of the Meeting ('Part B of the recording').

6.54 The LEA subsequently submitted a detailed investigation report to me. I examined the relevant surveillance product, including Part A and Part B of the recording, as well as the Device. The checking revealed that there was unauthorized surveillance on Subject B and Subject C after Subject A had left the Meeting. This was a case of non-compliance. The conduct of surveillance operation on a meeting without the presence of Subject A did not comply with the terms of the prescribed authorization. I requested the LEA to conduct inspection on the Device so as to ascertain the proper functioning of the device and provided additional information to me.

6.55 The LEA later reported to me in its further investigation report that there was no exterior physical damage found on the Device and its recording function worked properly. The LEA also stated that Officer B, despite intending to cause the Device to stop recording at the time when the Meeting ended and his belief of having pressed the relevant button for certain seconds, had not actually pressed and held the button sufficiently long to achieve the intended effect. As a result, the recording continued until the Device was powered off. The LEA was of the view that the unauthorized surveillance was attributed to a human error, namely the inadvertence on the part of Officer B when pressing the button to stop the recording.

6.56 Notwithstanding the human error made by Officer B, the LEA explained that, due to unexpected change in circumstances and

the constraints arising from the seating arrangement in the restaurant, Officer B had to swiftly take over to operate the Device and there was genuine difficulty in operating the Device.

6.57 The LEA recommended that an advice (non-disciplinary) be given to Officer B on the need to be more vigilant in performing ICSO duties, given the fact that he did not properly stop the Device from recording upon the conclusion of the Meeting, resulting in an excessive recording of about nine minutes which was outside the ambit of the prescribed authorization. The LEA considered that no other LEA officers should be held responsible for the unauthorized surveillance.

6.58 To facilitate a better control of the operation of the Device, the LEA had made enhancement to an accessory of the Device and such accessory was ready for use within the same month of the Meeting Day.

6.59 After reviewing the case, I found no evidence showing that there was foul play, ulterior motive or deliberate act involved in the unauthorized surveillance. I agreed with the LEA that the unauthorized surveillance was caused by a human error made in operating the surveillance device concerned. I observed that the LEA had taken a cautious approach in handling the surveillance product that might involve unauthorized surveillance. The recommended action against Officer B as well as the improvement measure made were considered appropriate.

***Case 6.8 : Access to an interception product after a decision to discontinue the related interception operation was made***

6.60 An LEA reported an incident where an officer accessed an interception product after a decision to discontinue the related interception operation had been made.

6.61 The prescribed authorization concerned was the third renewal. As the interception operation was no longer productive, a decision was made by the LEA to discontinue the operation. Pending completion of removal of the access right to the interception products concerned, an officer, despite having been informed of the decision to discontinue the interception operation, mistakenly accessed an interception product obtained from the interception operation. The officer discovered the incident on the spot and reported it to her supervisor immediately.

6.62 The investigation by the LEA concluded that the incident was due to the carelessness of the officer, who was heavily engaged in interception duties at the material time. Due to a momentary mental lapse, the officer failed to recall that a decision was already made to discontinue the interception operation. There was nothing to indicate any foul play or ulterior motive. The LEA proposed to give a verbal advice (disciplinary) to the officer to remind her of the importance of staying vigilant at all times during performance of interception duties.

6.63 During review of the case, I examined the interception product concerned and confirmed that it did not contain any information which was subject to LPP or the contents of JM. I agreed with the LEA's findings and considered the proposed disciplinary action against the officer appropriate.

***Case 6.9 : Accidental access to an interception product***

6.64 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.65 When checking the relevant ATR for preparing an REP-11 report to the panel judge to report a heightened likelihood of obtaining LPP information from an interception operation, the LEA

concerned discovered that an officer had accessed an interception product during the period when monitoring of the interception operation should have been put on hold pending submission of the REP-11 report. In response to enquiry, the officer claimed that she was not aware of the access. The investigation by the LEA found that before the discovery of the heightened LPP likelihood, the interception product in question had already been accessed by the officer when she was monitoring the interception operation. The interception product did not contain any information subject to LPP or information indicating heightened LPP likelihood. The LEA considered that the officer might have pressed the relevant button of the computer system accidentally at the time but she was unaware of it. There was no foul play or ulterior motive involved. In the REP-11 report submitted to the panel judge to report the heightened LPP likelihood, the panel judge was also informed of the accidental access to the interception product. Upon consideration of the REP-11 report, the panel judge allowed the interception operation to continue subject to additional conditions imposed to guard against the risk of obtaining LPP information.

6.66 In the incident report submitted to me, the LEA proposed to give a verbal advice (disciplinary) to the officer to remind her to be more vigilant in performing ICSO-related duties. To prevent recurrence of similar incidents, an enhancement measure was implemented in the computer system involved.

6.67 In reviewing the case, I examined the interception product concerned, which confirmed that it did not contain any information subject to LPP or information indicating heightened LPP likelihood. I agreed that there was no foul play or ulterior motive involved in this case. The LEA's proposed disciplinary action against the officer as well as the enhancement measure in the computer system were considered appropriate.

### ***Case 6.10 : Inaccuracy in the affirmation***

6.68 An LEA reported an incident concerning an affirmation in support of an application for the renewal of a prescribed authorization for Type 1 surveillance. This case was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.69 At the grant of a fresh authorization for Type 1 surveillance, in view of the assessment that the surveillance would likely obtain LPP information, the panel judge granted the authorization upon a set of additional conditions that, inter alia, all surveillance products would be directly handed over to a dedicated unit for screening ('Authorization A').

6.70 Sometime before the expiration of Authorization A, the LEA contemplated to apply for a renewal of the authorization and the officer in charge of the crime investigation ('Officer-in-charge') drafted the affirmation. When preparing the draft affirmation, the Officer-in-charge extracted the relevant information from the supporting affirmation of another authorization and inadvertently copied the undertaking that all surveillance products obtained by a certain type of surveillance device would be directly handed over to a dedicated unit for screening to the draft affirmation. The draft affirmation was then submitted to the supervisor of the Officer-in-charge ('Supervisor') for endorsement as the applicant of the renewal application but he did not detect the inaccuracy in the affirmation. Prescribed authorization for the renewal application ('Authorization B') was later granted by the panel judge subject to the same set of additional conditions as Authorization A.

6.71 A few days later, a Type 1 surveillance operation pursuant to Authorization B was conducted and the surveillance product was handed over to the dedicated unit for screening in compliance with the additional conditions of Authorization B. Before commencing the screening process, an officer of the dedicated unit checked Authorization B and its supporting affirmation and noticed an inconsistency between the

additional condition in Authorization B and what was stated in the affirmation with regard to the requirement on the surveillance products to be screened. On the same day of the discovery of the inconsistency, the LEA submitted an REP-11 report to the panel judge to rectify the inaccuracy in the affirmation in support of Authorization B. The panel judge noted the report and granted permission to the LEA for its dedicated unit to conduct screening of the surveillance product in question.

6.72 The LEA considered that the inaccuracy in the affirmation in support of Authorization B was a typographical error. The LEA also considered that the essence of requiring the dedicated unit to screen all surveillance products as specified in the additional conditions of Authorization B remained unchanged. The LEA recommended that the Officer-in-charge and the Supervisor each be given an advice (non-disciplinary) by a directorate officer on the need to be more vigilant in preparing and checking ICSO application documents and ensuring the accuracy of the ICSO application documents. Besides, the LEA had reminded its frontline officers of the investigating teams of the need to be vigilant in preparing ICSO application documents so as to ensure that the contents of the draft documents, including the terms of conditions proposed therein, were in order before submission to the panel judge.

6.73 Having reviewed the case, I opined that by virtue of section 64(1) of the ICSO, there was no material impact on the validity of the prescribed authorization for Type 1 surveillance concerned. I agreed with the LEA that there was no evidence of improper conduct on the part of any officers in the incident. The LEA's proposed action against the Officer-in-charge and the Supervisor was noted.

#### ***Case 6.11 : Further mistakes in ICSO application documents***

6.74 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.75 A prescribed authorization was granted to an LEA for conducting Type 1 surveillance at the specified premises ('Authorization C'). One day, while preparing an operational log in respect of the installation of surveillance device, an officer of the LEA noticed that one of the particulars about the specified premises had been incorrectly stated in Authorization C ('first inaccuracy') and she immediately reported the first inaccuracy to her supervisor who was the officer-in-charge of the crime investigation. The officer-in-charge then scrutinised the application documents and found that the same inaccuracy also appeared in the affirmation made in support of the application for Authorization C. On the next day, the LEA submitted an REP-11 report to the panel judge to rectify the first inaccuracy contained in Authorization C and the affirmation. The panel judge noted the report and allowed Authorization C to continue.

6.76 The LEA did not submit a separate report on the first inaccuracy to me but provided a sanitised copy of the relevant REP-11 report in its submission of weekly report. I wrote to the LEA requesting it to provide me with a full investigation report concerning the inaccuracy reported in the REP-11 report in respect of Authorization C. The LEA was also required to review whether there was any change in the assessment of the impact of the Type 1 surveillance given the difference in the particulars of the specified premises.

6.77 About one month later, the LEA reported to me that a further mistake concerning the designation of the applicant who made the application for the prescribed authorization ('second inaccuracy') had been detected in the affirmation and the application form in respect of Authorization C.

6.78 Subsequently, the LEA submitted a consolidated investigation report to me. The LEA considered that the first inaccuracy was primarily attributable to the lack of vigilance of the officers



concerned at the stage of preparing the application documents. According to the LEA's investigation report, when setting out details of the specified premises in the draft application documents, the officer-in-charge had only paid special attention to certain identifying particulars but relied on his impression on another particular and it turned out that his impression was wrong. The LEA further explained that, given the tight timeframe and the circumstances surrounding the crime investigation, the officer-in-charge had not instructed other officers of his team to proof-read the application documents on that occasion. The LEA also considered that the first inaccuracy would unlikely affect the validity of Authorization C as other essential particulars of the specified premises had been properly included in the application documents.

6.79 With regard to the second inaccuracy, the LEA considered it a clerical mistake. In the investigation report, the officer-in-charge explained that he might have inadvertently selected a wrong designation in the computer system for making ICSO applications due to a momentary lapse of attention. The applicant of the application for Authorization C admitted that he had not noticed the second inaccuracy due to his inadvertent oversight.

6.80 The LEA considered that the officer-in-charge who drafted the application documents and the applicant who made the application for Authorization C should be held accountable for the first and second inaccuracies in this case. The LEA recommended that the two officers concerned be each given an advice (non-disciplinary) by a senior directorate officer on the need to be more prudent and vigilant in preparing and scrutinising ICSO application documents, dealing with ICSO-related documentation and/or handling ICSO-related matters. In respect of improvement measures, the LEA reminded its officers to be vigilant in handling ICSO application documents and to ensure that all

information required therein is accurate. The LEA also enhanced its computer system to facilitate the selection of the applicant's designation.

6.81 Having reviewed the case, I considered that by virtue of section 63(5) and/or section 64(1) of the ICSO, the two inaccuracies did not affect the validity of the prescribed authorization concerned. Notwithstanding, as the two officers concerned were the same officers involved in Case 6.10 referred to in paragraphs 6.68 to 6.73 above, I considered their performance neither satisfactory nor professional. The two officers, being the officer-in-charge of the crime investigation and the overall command of the investigating teams respectively, had the primary responsibility to ensure that the application documents contained all the necessary and accurate information. However, they made mistakes in the ICSO application documents repeatedly within a short period of time. The mistakes reflected the lack of vigilance of the officers in performing their duties. In particular, the failure of the officer-in-charge to check against the relevant documents when setting out each and every essential particular of the specified premises in the draft application documents reflected badly on his sense of responsibility and attitude towards the seriousness of the application document which was unacceptable. I indicated my disappointment to the LEA in this regard. I pointed out to the LEA that all the information provided in the affirmations, affidavits or statements supporting the application for authorization should be complete and accurate and LEA officers must never rely on their impression when providing such factual information.

6.82 I asked the LEA for a review as to whether the proposed advice (non-disciplinary) was too lenient for the two officers concerned. In reply, the LEA maintained its view that the proposed actions against the two officers were proportionate on the reasons that the inaccuracies had not affected the validity of the prescribed authorization concerned, the two inaccuracies were the only mistakes among a large number of ICSO application documents and operations that the officers had

processed and executed and the proposed advice would serve a deterring effect. The LEA informed me that it had taken my advice to remind the officers concerned not to rely on their impression when setting out the factual information in the application documents.

6.83 Having reviewed the case, I did not agree with the LEA's review result on the proposed actions for the two officers though the improvement measures taken were acceptable. Thus, I further tendered my views to the LEA on the appropriateness of its proposed actions with the support of two precedents of similar nature and circumstances involving the same LEA (i.e. Report 5 in Chapter 7 of Annual Report 2011 and Report 1 in Chapter 6 of Annual Report 2016). I considered that the approach and attitude of the officer-in-charge in performing ICSO-related duties not acceptable and the issue of an advice (non-disciplinary) to him for the inaccuracy he made arising from his misimpression too lenient. As regards the applicant, I could accept that the proposed action against him remained unchanged as he might be less culpable.

6.84 To address my comments on the appropriateness of its proposed actions, the LEA further studied the matter and agreed that a more serious action against the officer-in-charge should be taken to impress upon officers responsible for ICSO-related duties the importance of exercising due care and vigilance in performing their duties. The LEA proposed that a verbal warning (disciplinary) be given by a senior directorate officer to the officer-in-charge for his lack of sense of responsibility and lax attitude. I considered the revised disciplinary action against the officer-in-charge acceptable.

***Case 6.12 : Access to an interception product after the arrest of the subject***

6.85 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.86 At the grant of the prescribed authorization concerned, the interception operation was assessed to have a likelihood of obtaining LPP information. The interception operation was, therefore, subject to additional conditions imposed by the panel judge to guard against the risk of obtaining LPP information. As the interception progressed, the LEA encountered calls which indicated heightened likelihood of obtaining LPP information. Upon consideration of the REP-11 reports submitted by the LEA, the panel judge allowed the interception to continue.

6.87 One day, a decision was made in the evening to change the duty hours of the interception team concerned on the following day due to operational needs. Supervisors of the team were required to inform their subordinates of the change in duty hours. However, a supervisor ('Supervisor A') forgot to inform his subordinates. On the following day, a subordinate of Supervisor A ('Officer'), without knowing the change in duty hours, reported duty in accordance with the normal duty hours, which were several hours before the start time of the rescheduled duty hours. The Officer found that an alert message had popped up in the computer system indicating the arrest of the subject of the interception operation in question. After confirming the arrest of the subject, which was unrelated to the crime under investigation, the Officer acknowledged the notification of the arrest in the computer system. The acknowledgement caused the alert message to be deleted from the computer system automatically. Then, the Officer made an entry in a register ('Register') to record the notification of the arrest of the subject. As no supervisor was available in the office at the time, the Officer called her immediate supervisor, Supervisor A, to report on the arrest. In the call, Supervisor A, who was off that day, informed the Officer of the rescheduled duty hours and asked her to report the arrest to another supervisor ('Supervisor B') directly in person for follow-up actions when Supervisor B came on duty several hours later. The Officer then left the office and intended to return to the office shortly before the start time of the rescheduled duty hours.

6.88 On that day, Supervisor B went to the office about an hour earlier than the start time of the rescheduled duty hours. In accordance with the prevailing procedures, Supervisor B checked the computer system to see if there was any alert message on arrest of subjects of interception. As the alert message had already been deleted, Supervisor B did not notice the arrest of the subject. Supervisor B then started monitoring the interception operation concerned. Soon after Supervisor B listened to one call, the Officer came back. The Officer immediately reported to Supervisor B the arrest of the subject. Pending a decision to discontinue the interception operation, Supervisor B removed the access right to the interception products concerned. Subsequently, the LEA submitted a section 58 report to the panel judge to report the arrest of the subject and request continuation of the interception operation. In the section 58 report, the panel judge was also informed of the background and details regarding Supervisor B's listening to the call. Upon consideration of the section 58 report, the panel judge allowed the interception operation to continue.

6.89 The investigation by the LEA concluded that there was no foul play or ulterior motive involved in the incident. The call listened to by Supervisor B was intercepted before the arrest of the subject, which did not contain any information subject to LPP or information indicating heightened LPP likelihood. As regards accountability, the LEA considered that Supervisor A's failure to inform his subordinates of the change in duty hours was the main reason leading to the incident. Having been informed by the Officer of the arrest, he should have either reported the matter to Supervisor B by himself immediately or instructed the Officer to do so immediately. In this regard, the LEA proposed to give him a verbal advice (disciplinary). For the Officer, the LEA proposed that she be advised (non-disciplinary) to be more cautious in performing ICSO-related duties and to report the matter to the responsible officer more expeditiously in similar situations in future. Regarding Supervisor B, the LEA considered that had he been more

cautious and taken an initiative to check the Register before commencing monitoring the interception, he could have discovered the arrest of the subject and the incident could have been avoided. The LEA proposed that he be advised (non-disciplinary) to be more vigilant in performing ICSO-related duties as a supervisor. To prevent recurrence of similar incidents, the LEA implemented an enhancement measure in the computer system involved and revised the procedures concerning the checking of the alert messages on arrest of subjects of interception.

6.90 In reviewing the case, I listened to the call in question, which confirmed that it did not contain any information subject to LPP or information indicating heightened LPP likelihood. I agreed that there was no foul play or ulterior motive involved in this case. The LEA's proposed actions against the officers concerned as well as other actions mentioned above were considered appropriate.

***Case 6.13 : Access to interception products by an officer below the rank specified in the additional conditions of a prescribed authorization***

6.91 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.92 At the grant of the prescribed authorization concerned ('the PA'), the interception operation was assessed to have a likelihood of obtaining LPP information and the panel judge imposed additional conditions on the PA. One of the additional conditions was that monitoring of the interception operation authorized under the PA should be undertaken by officers not below a certain rank ('the specified rank'). The purpose of this additional condition was to guard against the risk of obtaining LPP information since officers at a more senior rank should have a better understanding than their junior colleagues of what might constitute LPP information and more readily appreciate the risk of obtaining LPP information.

6.93 In the course of my review of the LPP case, I found that two calls intercepted under the PA had been listened to by an officer below the specified rank. It was a breach of the additional condition mentioned above. I requested the LEA concerned to conduct an investigation into the matter and inform me of the outcome.

6.94 The LEA submitted an investigation report to me, setting out the investigation results and proposing actions against the officers involved. The investigation by the LEA found that five officers were involved in the incident, hereinafter referred to as Officer A, Senior Officer B, Officer C, Senior Officer D and Senior Officer E. For the investigation of the same crime, the LEA obtained a number of prescribed authorizations, including the PA, for interception on the respective suspects. Of which, only the interception operation authorized under the PA was assessed to have a likelihood of obtaining LPP information and subject to the additional condition. Originally, Officer A, who was below the specified rank, was not involved in these interception operations. About half a month after the interception operation authorized under the PA commenced, Officer A was appointed to act in a post in the temporary absence of another officer whose duties were related to the monitoring of the interception operations. In this regard, Senior Officer B assigned the access rights in respect of the interception operations to Officer A in one go by completing an assignment form. However, Senior Officer B did not recall that one of the interception operations (i.e. the one authorized under the PA) was subject to the additional condition and wrongly assigned to Officer A the access rights for all the interception operations related to the crime, including the interception operation authorized under the PA. Based on the information stated in the assignment form, Officer C input data into a computer system to execute the grant of the access rights to Officer A.

6.95 Two days later, the wrong assignment of the access right to Officer A in respect of the PA was discovered by Senior Officer D in the

evening. At that time, Senior Officer D believed that the wrong assignment was caused by inadvertence of Officer C in inputting data into the computer system and, therefore, did not further probe into the cause of the error. As it did not occur to him that the wrong assignment of the access right might lead to non-compliance with the additional condition, Senior Officer D did not check the ATRs concerned to see whether Officer A had accessed any interception products obtained under the PA. On the following working day (which was the first working day after a long holiday), Senior Officer D sought Senior Officer E's approval for removing Officer A's access right to the interception products obtained under the PA. When seeking Senior Officer E's approval for removing Officer A's access right, Senior Officer D did not mention to Senior Officer E that the interception operation authorized under the PA was an LPP case and subject to the additional condition. Based on the simple report by Senior Officer D, Senior Officer E approved the removal of the access right without verification of the cause of the error. At that time, Senior Officer E was not aware that the interception operation under the PA was subject to the additional condition, so she was not alert to the possibility of non-compliance with the additional condition.

6.96 Officer A was not aware that one of the interception operations conducted for the investigation of the crime in question was subject to the additional condition and the access right in respect of the PA should not have been assigned to him. Before his access right was removed, Officer A had accessed two interception products obtained under the PA, which were the two calls discovered by me during review of the LPP case.

6.97 One of the duties of Senior Officer E was to conduct regular checks on the ATRs in respect of all the interception operations involving likelihood of obtaining LPP information or JM. However, Senior Officer E did not discover Officer A's listening to the two calls when the ATR concerned was checked. In this regard, Senior Officer E



admitted her oversight and claimed that it was partly due to the voluminous ATRs accumulated over the long holiday which required her checking.

6.98 The LEA considered that the non-compliance with the additional condition was caused mainly by Senior Officer B's wrong assignment of the access right to Officer A and recommended that she be given a verbal warning (disciplinary) for her oversight and lack of sufficient vigilance to ensure that access rights were assigned accurately when completing the assignment form. Officer C should not be held responsible for the wrong assignment of the access right because he was only required to input data into the computer system in accordance with the information stated in the assignment form. For Officer A, although his listening to the two calls could not be constructed as his fault, the LEA considered that he could have been more self-motivated to take proactive steps to familiarise himself with the facilities of which the access rights were assigned to him. The LEA proposed that he be given a verbal advice (non-disciplinary) to remind him to be more vigilant in performing ICSO duties. As regards the failure of Senior Officer D and Senior Officer E to discover the non-compliance with the additional condition, the LEA proposed that they be each given a verbal warning (disciplinary). To prevent recurrence of similar mistakes in future, in addition to the revision in the administrative arrangement for assignment of access rights, the LEA was making enhancement to the computer system concerned.

6.99 I have reviewed the case. The listening to the two calls by Officer A was a non-compliance with the additional condition imposed on the PA. It was mainly the consequence of the careless mistake made by Senior Officer B in assigning the access right to Officer A. The proposed verbal warning (disciplinary) to be given to Senior Officer B was considered appropriate. I noted that before Officer A's listening to the two calls, a senior officer at a rank higher than the specified rank had

already listened to them. The senior officer did not detect any LPP information or any indication of heightened LPP likelihood in the two calls. In view of this, I considered that the listening to the two calls by Officer A, though being a non-compliance with the additional condition, did not undermine the intended purpose of the additional condition as set out in paragraph 6.92 above. For Officer C, I agreed with the LEA's findings that he should not be held liable for the non-compliance. The proposed verbal advice (non-disciplinary) to be given to Officer A was also considered appropriate.

6.100 The failure of Senior Officer D and Senior Officer E to discover the non-compliance with the additional condition was unsatisfactory. They failed to perform their responsibilities as expected of their post and rank. I considered the proposed verbal warning (disciplinary) to be given to them appropriate.

***Case 6.14 : Mistakes in preservation of interception products of an LPP case***

6.101 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.102 At the grant of the prescribed authorization concerned, the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception progressed, one day, an officer listened to part of a call and found that the call contained information which indicated heightened LPP likelihood. As the value to continue the interception operation was considered not proportional to the risk of obtaining LPP information, the LEA concerned made a decision on the following working day to discontinue the operation. As required by the preservation requirement for LPP cases, the LEA should preserve, amongst others, the relevant interception products available at the time of discovery of the relevant LPP call for the Commissioner's examination. In accordance with the existing arrangement, the LEA duly asked a

dedicated team ('the Team') that operated independently of the investigative arms to execute the necessary preservation of the interception products.

6.103 Subsequently, in the course of making available the interception products concerned for my checking, the Team discovered that the interception products obtained on the day when the relevant LPP call was discovered and thereafter, which should have been preserved, were not retained. The Team informed me of the incident immediately, followed by a detailed investigation report. The investigation by the Team found that the mistake was due to a human error made by a technical officer of the Team on the instructions kept in a computer file to effect the preservation required. No malicious act was found. Checking of the ATRs concerned showed that there was no access by any LEA officers to any interception products obtained under the prescribed authorization for the days for which preservation was missed.

6.104 In the examination of interception products, only those products to which LEA officers had accessed previously would be examined by the Commissioner. In this incident, as all the interception products that should have been retained were not accessed by any LEA officers, no interception products that might be examined by me were lost. Therefore, my examination of the interception products concerned was not affected. After the incident, the technical officer and all other officers involved in retention processes of interception products were advised or reminded to stay meticulous when handling retention tasks. To prevent recurrence of similar incidents, an enhancement measure was implemented in the computer system involved.

6.105 I have reviewed the case. Checking of the relevant ATRs confirmed that there was no access by any LEA officers to the missing interception products. Hence, the incident did not jeopardise my examination of the interception products concerned and my review of the

LPP case in question. I considered the action taken against the technical officer as well as the enhancement measure in the computer system appropriate.

***Case 6.15 : Conducting surveillance operation not in compliance with the prescribed authorization***

6.106 A prescribed authorization was issued for the conduct of Type 1 surveillance on a subject when he was in the specified premises. During a visit to the LEA concerned to examine the protected products obtained from the surveillance operation, I found that there might be occasions where surveillance was conducted when the subject was not present in the specified premises, which might not comply with the terms of the prescribed authorization. I requested the LEA to conduct an investigation and inform me of the outcome. In February 2019, the LEA submitted a full investigation report to me. At the time of writing this report, a review on the case is still on-going. Details about my review will be reported in the next annual report.

***Case 6.16 : Discrepancies concerning the contents reported in the REP-11 report***

6.107 Checking of protected products of a case selected from the weekly report involving interception revealed that some information provided in an REP-11 report to the panel judge was not presented accurately.

6.108 In response to my request for clarifications on the discrepancies identified, the LEA concerned replied that amongst the three discrepancies identified, two were actually relating to the different methodology adopted by the officer concerned and the Secretariat in interpreting the information obtained while one discrepancy was a mistake made by the officer due to her oversight. The LEA proposed

that the officer be verbally advised (disciplinary) to be more cautious in ensuring the accuracy of REP-11 reports.

6.109 I have reviewed the case. I found the explanations provided by the LEA and the proposed action against the officer acceptable. I also considered that the discrepancies identified did not constitute a factor affecting the validity of the prescribed authorization for interception in the case.

***Case 6.17 : Non-reporting of an alias of the subject surfaced during interception***

6.110 Checking of protected products of a case selected from the weekly report involving interception and an unidentified subject revealed that an alias of the subject was not reported to the panel judge.

6.111 As stipulated under paragraph 116 of the COP, if the identity of the subject of interception/surveillance or any alias that he uses which is relevant to the investigation is made known to the LEA after the authorization has been granted and the authorization or its renewal is still valid, the identity or alias of the subject should be reported to the relevant authority as a material change in circumstances under section 58A of the Ordinance as soon as practicable.

6.112 In response to my request for explanation for not reporting the alias, the LEA concerned conducted an investigation with the relevant officers and gave me a detailed reply. According to the LEA's reply, due to the circumstances of the call concerned, the officer could not pick up the alias of the subject from the call when listening to it. The LEA found that there was no foul play or ulterior motive involved. The LEA proposed that the officer be verbally advised to be more attentive and cautious on the possible mentioning of alias of subjects when performing interception monitoring duties.

6.113 I have reviewed the case. Although I was prepared to accept that no foul play or ulterior motive was involved in not reporting the alias in the case, I was of the view that paragraph 116 of the COP had not been complied with. Nevertheless, by virtue of sections 63(5) and 64(1) of the ICSO, the non-reporting of the alias did not affect the validity of the prescribed authorization for interception in the case. The LEA's proposed action against the officer was considered appropriate. I emphasised to the LEA the importance of observing the relevant COP provision in performing the interception duties.

***Case 6.18 : Deficiency in making record for a call with possible heightened LPP likelihood***

6.114 A prescribed authorization was selected on a random basis for checking its protected products. At the grant of the authorization, the interception operation concerned was not assessed to have a likelihood of obtaining LPP information.

6.115 Checking of the protected products of the authorization revealed that there was one intercepted call with information which might indicate heightened LPP likelihood but it was not reported to the panel judge. The LEA concerned was requested to provide explanation on the non-reporting of the call.

6.116 According to the LEA's explanations, the officer concerned, based on his judgement on the content and context of the call, considered that no LPP likelihood was involved. He then continued his monitoring of the interception operation without informing his supervisor or making any record of the call.

6.117 The LEA concluded that the assessment made by the officer that there was no heightened LPP likelihood arising from the call was not unreasonable. However, though there was no foul play or ulterior motive involved in the case, it was undesirable that the officer had not

made any record of the call which contained information that might indicate heightened LPP likelihood. The LEA proposed to give a verbal advice (disciplinary) to the officer.

6.118 After reviewing the case, I considered the reason provided by the officer for not reporting the call to the panel judge acceptable. I shared the LEA's view that there was no foul play or ulterior motive involved. The LEA's proposed disciplinary action of giving a verbal advice (disciplinary) to the officer was considered appropriate.

6.119 Despite this, it was unsatisfactory that the assessment on the LPP likelihood of a covert operation with possible indicator was merely done by an officer alone. Thus, the LEA had implemented a new guideline to standardise the decision making process for assessment of LPP likelihood in December 2018. I considered the new guideline necessary for making a thorough and more reliable assessment on the LPP likelihood of a covert operation.

6.120 Other than the matter mentioned above, no irregularity was revealed from the checking of the protected products of this case.

***Case 6.19 : Failure in the retention of interception products for examination by the Commissioner***

6.121 An LEA reported an incident where interception products had not been completely retained for my examination as required. The incident was related to six cases of heightened likelihood of obtaining LPP information referred to in Chapter 4 and an interception case that was selected for checking of the protected products.

6.122 For LPP cases involving interception, the LEAs should preserve all the interception products which are still available at the time of discovery of LPP likelihood, heightened LPP likelihood or LPP information. With regard to interception cases selected from the weekly

reports of the LEAs and the PJOs for checking of the protected products, the LEAs should arrange for preservation of the interception products that are available at the time of receipt of the notification of preservation requirement from the Secretariat. Under the existing arrangement, a dedicated team ('the Team') that operated independently of the investigative arms executed the necessary preservation of the interception products.

6.123 Concerning the seven cases of interception involved in this incident, the Team duly executed the necessary preservation of the relevant interception products by performing retention action on the interception systems on a regular routine.

6.124 Meanwhile, the Team implemented an upgrade exercise for enhancing the performance of an interception system ('the System'). A section head of the Team who was responsible for the upgrade exercise assigned an officer ('Officer A') to perform program deployment at two servers of the System ('Server A1' and 'Server A2') and another officer ('Officer B') to perform program deployment at another two corresponding servers ('Server B1' and 'Server B2'). However, as the instruction given by the section head was not clear, Officer A performed program deployment at Server A1 only and then reported to the section head that she had completed her tasks. Having misunderstood that Officer A had completed program deployment at both Servers A1 and A2, the section head asked Officer B to proceed with the program deployment at Servers B1 and B2. More than one month after the upgrade exercise, a supervisor of the Team noticed that the set of Servers A2 and B2 was not able to retain interception products properly from the day on which program deployment at Servers B1 and B2 was completed. The Team then took immediate action but was only able to retain part of the interception products that were subject to the preservation requirement. Interception products obtained through seven subject facilities for about 12 days had not been completely



retained for my examination.

6.125 The Team explained in its report that the retention failure was caused by the program running at Server A2 which was not of the up-to-date version. I requested the Team to provide further information on the incident including the reasons for not noticing the retention failure earlier, the line of management for the upgrade exercise, and the testing and quality control carried out after completion of the upgrading. As regards accountability of the retention failure, I asked the Team to consider whether any actions would be taken against the officers concerned.

6.126 In its reply, the Team claimed that there were thorough testing and quality control on the new programs at the testing platform to verify their functionalities and reliability and the programs had been tested and verified after completion of the upgrade exercise. However, the retention function could not be tested beforehand due to some technical constraints. Besides, though the System generated a retention report upon completion of each retention action, due to the design inadequacy of the report, the retention failure could not be discovered earlier.

6.127 The Team informed me that it had enhanced the retention program of the System to detect if any interception products were missing or could not be retained and to generate an error report to show the details of such missing products. To prevent recurrence of similar incidents in future, the Team had adopted a new approval mechanism for all upgrade tasks on interception systems. The Team also proposed to issue a verbal advice (administrative) to the section head to sternly advise him to be more vigilant in giving precise instructions to his team members, in particular on supporting interception systems.

6.128 In the examination of interception products, only those products to which LEA officers had accessed previously would be

examined by the Commissioner. Checking of the relevant ATRs confirmed that part of the interception products obtained through seven subject facilities for about 12 days that should have been retained were accessed by officers of the LEA. Hence, some interception products that might be examined by me were lost and the incident had jeopardised my examination of the interception products concerned and my review of the LPP cases in question.

6.129 I have reviewed the case. Although my examination of the interception products concerned was affected, there was no evidence to contradict the findings of the Team that there was no bad faith or ulterior motive in this incident. The proposed action against the section head concerned and the improvement measures taken were considered appropriate. Checking of the protected products in respect of the six LPP cases and one selected case of interception involved in this incident did not reveal any irregularity.

### ***Other reports***

6.130 For the other eight cases, they were reports on incidents of technical problems of the computer systems. These cases had been reviewed and nothing untoward was found. The LEAs concerned had also 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 visits to the LEAs, and the exchange of correspondence with them in the review of their compliance with the relevant requirements of the Ordinance, the following recommendations were made in the report period to the LEAs to better carry out the objects of the Ordinance:

*(a) Better control of the use of ancillary equipment in covert surveillance operations*

All the ancillary equipment intended to be used in covert surveillance operations should be recorded in the inventory lists for surveillance devices. The equipment should not be withdrawn from the device store before the effective time of the prescribed authorization concerned. The issue and return of the equipment should be recorded in the relevant device register.

*(b) Reporting of the communications between the subject and the lawyer or the law firm involved in the Reported LPP Call*

If the other party of a Reported LPP Call was a lawyer or related to a law firm, the LEA should state in the report

submitted to the Commissioner under the COP the communications between the subject's facility number and all the facility numbers known to be used by the lawyer or the law firm. This will facilitate examination of the protected products concerned by the Commissioner.

## **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)]**

		<b>Judge's Authorization</b>	<b>Emergency Authorization</b>
(i)	Number of authorizations issued	661	0
	Average duration	29 days	—
(ii)	Number of authorizations renewed	676	Not applicable
	Average duration of renewals	30 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	12	Not applicable
(vi)	Number of applications for the issue of authorizations refused	3	0
(vii)	Number of applications for the renewal of authorizations refused	3	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	Not applicable



**Table 1(b)**

**Surveillance – Number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]**

		<b>Judge's Authorization</b>	<b>Executive Authorization</b>	<b>Emergency Authorization</b>
(i)	Number of authorizations issued	17	0	0
	Average duration	18 days	—	—
(ii)	Number of authorizations renewed	24	0	Not applicable
	Average duration of renewals	26 days	—	—
(iii)	Number of authorizations issued as a result of an oral application	0	0	0
	Average duration	—	—	—
(iv)	Number of authorizations renewed as a result of an oral application	0	0	Not applicable
	Average duration of renewals	—	—	—
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	1	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)]**

<b>Offence</b>	<b>Chapter No. of Laws of Hong Kong</b>	<b>Ordinance and Section</b>
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
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Robbery	Cap. 210	Section 10, Theft Ordinance
Burglary	Cap. 210	Section 11, Theft Ordinance
Blackmail	Cap. 210	Section 23, 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

**Table 2(b)**

**Surveillance – Major categories of offences for the investigation of  
which prescribed authorizations have been issued or renewed  
[section 49(2)(b)(i)]**

<b>Offence</b>	<b>Chapter No. of Laws of Hong Kong</b>	<b>Ordinance and Section</b>
Trafficking in dangerous drug	Cap. 134	Section 4, Dangerous Drugs Ordinance
Manufacture of dangerous drug	Cap. 134	Section 6, Dangerous Drugs 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
Corrupt conduct to bribe electors and others at elections	Cap. 554	Section 11, Elections (Corrupt and Illegal Conduct) Ordinance
Corrupt conduct to provide others with refreshments and entertainment at election	Cap. 554	Section 12, Elections (Corrupt and Illegal Conduct) Ordinance

**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 <sup>Note 3</sup>		
	Subject	Non-subject	Total
Interception	87	141	228

**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 <sup>Note 4</sup>		
	Subject	Non-subject	Total
Surveillance	22	12	34

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Note 3 Of the 228 persons arrested, 27 were attributable to both interception and surveillance operations that had been carried out.

Note 4 Of the 34 persons arrested, 27 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 235.

**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	39	Interception & Surveillance	In addition to the checking of weekly reports, 39 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 859 applications and 705 related documents/matters had been checked.  (See paragraph 2.23 of Chapter 2 and paragraphs 3.22 and 3.23 of Chapter 3.)
(c) Examination of protected products at the LEAs' offices	48	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. In 2018, 48 visits had been made to LEAs for the examination of protected products. Specific cases such as LPP and JM cases reported by the LEAs, interception products of 421 authorizations and surveillance products of nine selected authorizations had been examined.</p> <p>(See paragraph 2.26 of Chapter 2 and paragraph 3.29 of Chapter 3.)</p>
(d) LPP cases reviewed by the Commissioner	154	Interception	<p><u>One case of obtaining information suspected to be subject to LPP</u></p> <p>At the grant of the prescribed authorization concerned, the interception operation was assessed to have a likelihood of obtaining LPP information. The panel judge imposed additional conditions on the prescribed authorization.</p> <p>One day, the LEA encountered a call which indicated heightened LPP likelihood. Having considered the REP-11 report submitted by the LEA, the panel judge allowed the prescribed authorization to continue subject to revised additional conditions. Subsequently, a message was intercepted and the information contained therein was suspected to be subject to LPP. The LEA submitted to the panel judge an REP-11 report and a discontinuance report with the contents of the suspected LPP information detailed separately in an annex to the REP-11 report. The panel judge revoked the prescribed authorization accordingly.</p> <p>The review did not reveal any irregularity. As regards the message</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>which contained information suspected to be subject to LPP, the Commissioner considered that the information concerned was not LPP information.</p> <p>(See paragraphs 4.12 to 4.14 of Chapter 4.)</p>
		Interception & Surveillance (153 reviews)	<p><u>142 cases of heightened LPP likelihood and 11 cases of assessed LPP likelihood</u></p> <p>All the relevant documents and records were checked and the protected products were examined. Except for the 17 LPP cases mentioned in Cases 6.1, 6.3, 6.4, 6.6, 6.7, 6.9, 6.10, 6.11, 6.12, 6.13, 6.14 and 6.19 of Chapter 6, and one non-compliance case detected by the Commissioner in early 2019, nothing untoward was found.</p> <p>(See paragraph 4.15 of Chapter 4.)</p>
(e) JM cases reviewed by the Commissioner	4	Interception & Surveillance	<p><u>Four cases of heightened JM likelihood</u></p> <p>The relevant documents, records and protected products of the four heightened JM likelihood cases were checked and no irregularity was found.</p> <p>(See paragraphs 4.20 and 4.21 of Chapter 4.)</p>
(f) Examination of protected products of past LPP cases that were reported before 2016	31	Interception	<p><u>One past case</u></p> <p>This case related to a case with heightened LPP likelihood in 2014. It was revealed from the checking of protected products that a call indicating heightened LPP likelihood was not reported to the panel judge.</p> <p>The LEA explained that the officer concerned did not consider the call as having heightened LPP likelihood according to the general</p>



Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>understanding of heightened LPP likelihood among the LEA officers. The Commissioner reviewed the case and he disagreed with the LEA's assessment.</p> <p>The LEA agreed to the Commissioner's assessment on the LPP likelihood and reported that it had implemented a new measure to enhance the reporting and assessment mechanism regarding communications with contents that might indicate heightened LPP likelihood. The LEA had also reminded all the officers involved to remain vigilant at all times when handling calls that might indicate a heightened likelihood of obtaining information subject to LPP.</p> <p>Having considered all relevant factors, the Commissioner accepted the LEA's explanation as he could not find any evidence of deliberate neglect or sinister motive of the officer concerned.</p> <p>(See paragraphs 4.23 to 4.25 of Chapter 4.)</p>
		Interception & Surveillance (30 reviews)	<p><u>Other past cases</u> The preserved protected products for 30 cases were checked and nothing untoward was found.</p> <p>(See paragraph 4.22 of Chapter 4.)</p>
(g) Non-compliance/irregularities/incidents reviewed by the Commissioner	27	Interception	<p><u>Case 6.1</u> The incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>An officer listened to part of a call in which the subject mentioned a matter which might indicate</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>heightened likelihood of obtaining LPP information. The officer reported the contents of the call to his supervisor for instruction. The supervisor conducted a relevant check, but the checking result did not support the matter. The supervisor did not consider that LPP likelihood was heightened and, therefore, did not further report the contents of the call to a senior officer.</p> <p>The senior officer, when performing supervisory check on intercepted calls, was aware of the contents of the call. The authenticity of the matter mentioned in the call was later confirmed, which indicated heightened LPP likelihood. The LEA submitted an REP-11 report to the panel judge who allowed the prescribed authorization to continue with additional conditions imposed.</p> <p>The LEA's investigation concluded that the supervisor had taken the necessary action to verify the matter mentioned in the call and made the judgement in good faith based on the checking result. The LEA reminded the supervisor of the need to take a more cautious and balanced approach in handling LPP situations in future and briefed officers involved in interception duties of the learning points from the incident.</p> <p>The Commissioner agreed with the findings of the LEA's investigation.</p> <p>(See paragraphs 6.8 to 6.12 of Chapter 6.)</p>
	Interception	<p><u>Case 6.2</u> An LEA reported to the Commissioner an incident of delay in preservation of interception products.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>The interception products obtained pursuant to three prescribed authorizations on one day, which should have been preserved, were not retained. The investigation of LEA concluded that the mistake was due to the oversight of the officer concerned. There was no foul play or ulterior motive involved. Considering an incident of similar nature in 2017, the LEA proposed to give a verbal warning (disciplinary) to the officer. The LEA proposed to give the direct supervisor of the officer a heavier punishment of a written admonishment (disciplinary) for her failure to properly supervise her subordinate despite she was verbally advised in another incident of similar nature in 2017. The LEA also proposed to remind the Division Head concerned, of her important and fundamental role in giving proper guidance, providing appropriate support to subordinates and ensuring that sufficient measures had been put in place to monitor the performance of ICSO-related duties.</p> <p>The Commissioner reviewed the case. The proposed actions against the officers concerned and remedial measures proposed were considered appropriate. Checking of the protected products of the three prescribed authorizations did not reveal any irregularity.</p> <p>(See paragraphs 6.13 to 6.17 of Chapter 6.)</p>
	Interception	<p><u>Case 6.3</u> This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>A supervisory officer, when performing supervisory duty, listened to part of a call and found that the call contained information which indicated heightened LPP likelihood. Checking of the relevant ATR discovered that the call had also been partially listened to by another officer. The officer explained that he perceived that the matter that gave rise to heightened LPP likelihood in the call was a lie told by the subject. Therefore, he did not report the call to his supervisor.</p> <p>The LEA concerned submitted an REP-11 report to the panel judge. The panel judge allowed the interception operation to continue with additional conditions imposed.</p> <p>The LEA considered that the officer's assessment that the subject was telling a lie was subjective. However, there was nothing that indicated any foul play or ulterior motive. Since the officer had committed a similar mistake previously, the LEA proposed to issue a verbal warning to the officer.</p> <p>The Commissioner agreed that there was no foul play or ulterior motive involved in this case. The LEA's proposed disciplinary action against the officer was considered appropriate.</p> <p>(See paragraphs 6.18 to 6.23 of Chapter 6.)</p>
	Interception	<p><u>Case 6.4</u></p> <p>An LEA reported an incident where the access right to the interception products in respect of an interception operation was not removed completely as required.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>The investigation by the LEA concluded that the failure to remove the access right completely was attributed to a momentary lapse of concentration of the officer. No foul play or ulterior motive was involved. The LEA proposed to give a verbal advice (disciplinary) to the officer. An enhancement measure to the relevant computer system was implemented.</p> <p>The Commissioner had checked the relevant ATRs which confirmed that there was no access to the interception products concerned during the period when the access right was not removed completely. He agreed with the LEA's findings. The proposed disciplinary action against the officer and the enhancement measure to the computer system were considered appropriate.</p> <p>(See paragraphs 6.24 to 6.28 of Chapter 6.)</p>
	Surveillance	<p><u>Case 6.5</u></p> <p>An LEA reported an incident where the legal representative of a defendant had failed to return one item of protected product and made unauthorized copy of another item of protected product. The missing protected product was retrieved about one week after the report of its loss.</p> <p>The Commissioner considered that the LEA had handled the disclosure of the protected product with due care and the LEA had taken all practicable steps to ensure that the provisions stipulated in the ICSO were complied with. The entire set of protected product that was</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>provided to the law firm concerned had finally been retrieved and all the copies of the protected product that were made by the law firm had been handed to the LEA.</p> <p>(See paragraphs 6.29 to 6.42 of Chapter 6.)</p>
	Interception	<p><u>Case 6.6</u> This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>A supervisory officer, when conducting routine checking, examined the transcripts prepared by an officer and found that the contents of a call stated in the transcripts indicated heightened LPP likelihood. The call had been listened to by the officer earlier on the same day. However, the officer did not report the call to her supervisor.</p> <p>The LEA submitted an REP-11 report and a discontinuance report to the panel judge. The panel judge noted the REP-11 report and duly revoked the prescribed authorization concerned.</p> <p>The LEA considered that the non-reporting of the call by the officer was a combined result of misjudgement of the officer and her lack of the required alertness. There was nothing that indicated any foul play or ulterior motive. The LEA proposed to issue a verbal advice (disciplinary) to the officer.</p> <p>The Commissioner accepted that there was no foul play or ulterior motive involved in this case. The LEA's proposed disciplinary action</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>against the officer was considered appropriate.</p> <p>(See paragraphs 6.43 to 6.47 of Chapter 6.)</p>
	Surveillance	<p><u>Case 6.7</u></p> <p>An LEA reported a case of possible irregularity relating to the conduct of Type 1 surveillance outside the ambit of a prescribed authorization. This case was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>The supervisor of the officer who operated the surveillance device concerned discovered from the system-generated file name of the recording that the finishing time of the recording was inconsistent with the time of cessation of recording as reported by the officer. The LEA submitted an REP-11 report to the panel judge reporting on the irregularity.</p> <p>The Commissioner examined the relevant surveillance product. The checking revealed that there was unauthorized surveillance and this was a case of non-compliance. The Commissioner requested the LEA to conduct inspection on the surveillance device to ascertain the proper functioning of the device.</p> <p>The LEA was of the view that the unauthorized surveillance was attributed to a human error when pressing the button to stop the recording. The LEA recommended that an advice (non-disciplinary) be given to the officer. Besides, the LEA had made enhancement to an accessory of the device.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>The Commissioner found no evidence showing that there was foul play, ulterior motive or deliberate act involved in the unauthorized surveillance. The recommended action against the officer as well as the improvement measure made were considered appropriate.</p> <p>(See paragraphs 6.48 to 6.59 of Chapter 6.)</p>
	Interception	<p><u>Case 6.8</u> An LEA reported an incident where an officer accessed an interception product after a decision to discontinue the related interception operation had been made.</p> <p>An officer, despite having been informed of the decision to discontinue the interception operation, mistakenly accessed an interception product obtained from the interception operation. The officer discovered the incident on the spot and reported it to her supervisor immediately.</p> <p>The investigation by the LEA concluded that the incident was due to the carelessness of the officer. There was nothing to indicate any foul play or ulterior motive. The LEA proposed to give a verbal advice (disciplinary) to the officer.</p> <p>The Commissioner examined the interception product concerned and confirmed that it did not contain any information which was subject to LPP or contents of JM. He agreed with the LEA's findings and considered the proposed disciplinary action against the officer appropriate.</p>



Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		(See paragraphs 6.60 to 6.63 of Chapter 6.)
	Interception	<p><u>Case 6.9</u> This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>The LEA concerned discovered that an officer had accessed an interception product when monitoring of the interception operation should have been put on hold pending submission of REP-11 report. The LEA considered that the officer might have pressed the relevant button of the computer system accidentally at the time but she was unaware of it. There was no foul play or ulterior motive involved. Upon consideration of the REP-11 report, the panel judge allowed the interception operation to continue subject to additional conditions imposed.</p> <p>The LEA proposed to give a verbal advice (disciplinary) to the officer. An enhancement measure was implemented in the computer system involved.</p> <p>The Commissioner examined the interception product concerned, which confirmed that it did not contain any information subject to LPP or information indicating heightened LPP likelihood. He agreed that there was no foul play or ulterior motive involved in this case. The LEA's proposed disciplinary action against the officer as well as the enhancement measure in the computer system were considered appropriate.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		(See paragraphs 6.64 to 6.67 of Chapter 6.)
	Surveillance	<p><u>Case 6.10</u> An LEA reported an incident concerning an inaccuracy in the affirmation in support of an application for the renewal of a prescribed authorization for Type 1 surveillance. This case was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>The LEA considered that the inaccuracy in the affirmation was a typographical error. The LEA recommended that the officer-in-charge who drafted the affirmation and his supervisor each be given an advice (non-disciplinary) by a directorate officer.</p> <p>The Commissioner opined that by virtue of section 64(1) of the ICSO, there was no material impact on the validity of the prescribed authorization. He agreed with the LEA that there was no evidence of improper conduct on the part of any officers in the incident.</p> <p>(See paragraphs 6.68 to 6.73 of Chapter 6.)</p>
	Surveillance	<p><u>Case 6.11</u> This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>A prescribed authorization was granted to an LEA for conducting Type 1 surveillance at the specified premises. One day, an LEA officer noticed that one of the particulars about the specified premises had</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>been incorrectly stated in the authorization ('first inaccuracy') and she immediately reported the first inaccuracy to the officer-in-charge of the crime investigation. The officer-in-charge then found that the same inaccuracy also appeared in the affirmation made in support of the application for the authorization. On the next day, the LEA submitted an REP-11 report to the panel judge to rectify the first inaccuracy. The panel judge noted the report and allowed the prescribed authorization to continue.</p> <p>The LEA reported to the Commissioner that a further mistake concerning the designation of the applicant who made the application for the prescribed authorization ('second inaccuracy') had been detected in the affirmation and the application form in respect of the authorization.</p> <p>In its investigation report, the LEA considered that the first inaccuracy was primarily attributable to the lack of vigilance of the officers concerned. With regard to the second inaccuracy, the LEA considered it a clerical mistake.</p> <p>The LEA considered that the officer-in-charge who drafted the application documents and the applicant who made the application for the prescribed authorization should be held accountable for the first and second inaccuracies. The LEA recommended that the two officers concerned be each given an advice (non-disciplinary) by a senior directorate officer.</p> <p>The Commissioner reviewed the case and considered that by virtue of</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>section 63(5) and/or section 64(1) of the ICSO, the two inaccuracies did not affect the validity of the prescribed authorization concerned.</p> <p>The two officers concerned were the same officers involved in Case 6.10. The mistakes reflected badly on the officer-in-charge's sense of responsibility and attitude towards the seriousness of the application document which was unacceptable.</p> <p>The LEA was asked to review whether the proposed advice (non-disciplinary) was too lenient. In reply, the LEA maintained its view that the proposed actions against the two officers were proportionate.</p> <p>The Commissioner did not agree with the LEA's review result on the proposed actions for the two officers with the support of two precedents of similar nature and circumstances involving the same LEA. The Commissioner considered the issue of an advice (non-disciplinary) to the officer-in-charge too lenient. As regards the applicant, the Commissioner could accept that the proposed action against him remained unchanged as he might be less culpable.</p> <p>To address the Commissioner's comments on the appropriateness of its proposed actions, the LEA agreed that a more serious action against the officer-in-charge should be taken. The LEA proposed that a verbal warning (disciplinary) be given by a senior directorate officer to the officer-in-charge. The Commissioner considered the revised disciplinary action against the officer-in-charge acceptable.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		(See paragraphs 6.74 to 6.84 of Chapter 6.)
	Interception	<p><u>Case 6.12</u>  This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>An LEA reported an incident that a supervisor had accessed an interception product when monitoring of the interception operation should have been put on hold after another officer learnt of the arrest of the subject of the interception concerned. The officer reported duty earlier than the rescheduled duty hours which she had not been informed of by her immediate supervisor, and was then aware of an alert message shown in the relevant computer system notifying the arrest of the subject. When the supervisor went to the office several hours later, he did not know the arrest of the subject as the alert message had been deleted. The supervisor, not knowing the arrest of the subject, monitored the interception operation concerned and accessed an interception product before he was informed by the officer of the arrest of the subject.</p> <p>The LEA's investigation concluded that no foul play or ulterior motive was involved. The LEA proposed to issue a verbal advice (disciplinary) to the officer's immediate supervisor who did not inform the officer of the rescheduled duty hours. The officer and the supervisor who accessed the interception product were advised (non-disciplinary) to be more cautious or vigilant in performing ICSO duties.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>The Commissioner agreed to the LEA's findings and considered the disciplinary action appropriate.</p> <p>(See paragraphs 6.85 to 6.90 of Chapter 6.)</p>
	Interception	<p><u>Case 6.13</u></p> <p>This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>At the grant of the prescribed authorization concerned ('the PA'), one of the additional conditions was that monitoring of the interception operation authorized under the PA should be undertaken by officers not below a certain rank ('the specified rank'). The Commissioner found that two calls intercepted under the PA had been listened to by an officer below the specified rank. The investigation by the LEA found that five officers were involved in the incident, hereinafter referred to as Officer A, Senior Officer B, Officer C, Senior Officer D and Senior Officer E.</p> <p>The LEA considered that the non-compliance with the additional condition was caused mainly by Senior Officer B's wrong assignment of the access right to Officer A and recommended that she be given a verbal warning (disciplinary). Officer C should not be held responsible for the wrong assignment of the access right because he was only required to input data into the computer system in accordance with the information stated in the assignment form. For Officer A, although his listening to the two calls could not be constructed as his fault, the LEA considered that he</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>could have been more self-motivated to familiarise himself with the facilities of which the access rights were assigned to him. The LEA proposed that he be given a verbal advice (non-disciplinary). As regards the failure of Senior Officer D and Senior Officer E to discover the non-compliance, the LEA proposed that they be each given a verbal warning (disciplinary). To prevent recurrence of similar mistakes in future, the LEA was making enhancement to the computer system concerned.</p> <p>The Commissioner reviewed the case. The listening to the two calls by Officer A was a non-compliance with the additional condition imposed on the PA. It was mainly the consequence of the careless mistake made by Senior Officer B in assigning the access right to Officer A. The proposed verbal warning (disciplinary) to be given to Senior Officer B was considered appropriate. The listening to the two calls by Officer A, though being a non-compliance, did not undermine the intended purpose of the additional condition. For Officer C, the LEA's findings that he should not be held liable for the non-compliance were agreed. The proposed verbal advice (non-disciplinary) to be given to Officer A was also considered appropriate. The failure of Senior Officer D and Senior Officer E to discover the non-compliance with the additional condition was unsatisfactory. The proposed verbal warning (disciplinary) to be given to them was considered appropriate.</p> <p>(See paragraphs 6.91 to 6.100 of Chapter 6.)</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p><u>Case 6.14</u></p> <p>This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>As required by the preservation requirement for LPP cases, the LEA should preserve, amongst others, the relevant interception products available at the time of discovery of the relevant LPP call for the Commissioner’s examination. The LEA duly asked a dedicated team (‘the Team’) that operated independently of the investigative arms to execute the necessary preservation of the interception products.</p> <p>The Team discovered that the interception products obtained on the day when the relevant LPP call was discovered and thereafter, which should have been preserved, were not retained. The investigation by the Team found that the mistake was due to a human error made by a technical officer of the Team. No malicious act was found. Checking of the ATRs concerned showed that there was no access by any LEA officers to any interception products for the days for which preservation was missed.</p> <p>The technical officer and all other officers involved in retention processes of interception products were advised or reminded to stay meticulous when handling retention tasks. An enhancement measure was implemented in the computer system involved.</p> <p>The incident did not jeopardise the Commissioner’s examination of the interception products concerned and</p>



Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>his review of the LPP case in question. He considered the action taken against the technical officer as well as the enhancement measure in the computer system appropriate.</p> <p>(See paragraphs 6.101 to 6.105 of Chapter 6.)</p>
	Surveillance	<p><u>Case 6.15</u></p> <p>A prescribed authorization was issued for the conduct of Type 1 surveillance on a subject when he was in the specified premises. The Commissioner found that there might be occasions where surveillance was conducted when the subject was not present in the specified premises, which might not comply with the terms of the prescribed authorization.</p> <p>At the time of writing this report, a review on the case is still on-going. Details about the Commissioner's review will be reported in the next annual report.</p> <p>(See paragraph 6.106 of Chapter 6.)</p>
	Interception	<p><u>Case 6.16</u></p> <p>Checking of protected products of a case selected from the weekly report revealed that some information provided in an REP-11 report to the panel judge was not presented accurately.</p> <p>The LEA replied that amongst the three discrepancies identified, two were actually relating to the different methodology adopted by the LEA officer concerned and the Secretariat in interpreting the information obtained while one discrepancy was a mistake made by the concerned officer due to her oversight. The</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>LEA proposed that the officer be verbally advised (disciplinary).</p> <p>The Commissioner found the explanations provided by the LEA and the proposed action against the officer acceptable. He also considered the discrepancies identified did not constitute a factor affecting the validity of the prescribed authorization for interception in the case.</p> <p>(See paragraphs 6.107 to 6.109 of Chapter 6.)</p>
	Interception	<p><u>Case 6.17</u></p> <p>Checking of protected products of a case selected from the weekly report involving an unidentified subject revealed that an alias of the subject was not reported to the panel judge.</p> <p>According to the LEA's reply, due to the circumstances of the call concerned, the officer could not pick up the alias of the subject from the call when listening to it. The LEA found that there was no foul play or ulterior motive involved. The LEA proposed that the officer be verbally advised.</p> <p>The Commissioner was of the view that paragraph 116 of the COP had not been complied with. Nevertheless, by virtue of sections 63(5) and 64(1) of the ICSO, the non-reporting of the alias did not affect the validity of the prescribed authorization for interception in the case. The LEA's proposed action against the officer was considered appropriate. The Commissioner emphasised to the LEA the importance of observing the relevant COP provision in performing the</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>interception duties.</p> <p>(See paragraphs 6.110 to 6.113 of Chapter 6.)</p>
	Interception	<p><u>Case 6.18</u></p> <p>A prescribed authorization was selected on a random basis for checking its protected products.</p> <p>There was one intercepted call with information which might indicate heightened LPP likelihood but it was not reported to the panel judge. The officer concerned, based on his judgement on the content and context of the call, considered that no LPP likelihood was involved. He then continued with his monitoring of the interception operation without informing his supervisor or making any record of the call.</p> <p>The LEA concluded that the assessment made by the officer was not unreasonable. Though there was no foul play or ulterior motive involved in the case, it was undesirable that the officer had not made any record of the matter. The LEA proposed to give a verbal advice (disciplinary) to the officer.</p> <p>The Commissioner shared the LEA's view that there was no foul play or ulterior motive involved. The LEA's proposed disciplinary action against the officer was considered appropriate.</p> <p>(See paragraphs 6.114 to 6.120 of Chapter 6.)</p>
	Interception	<p><u>Case 6.19</u></p> <p>An LEA reported an incident where interception products had not been completely retained for the</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>Commissioner's examination as required. The incident was related to six cases of heightened likelihood of obtaining LPP information referred to in Chapter 4 and an interception case that was selected for checking of the protected products.</p> <p>A dedicated team ('the Team') that operated independently of the investigative arms implemented an upgrade exercise for an interception system ('the System'). More than one month after the upgrade exercise, it was discovered that interception products obtained through seven subject facilities for about 12 days had not been completely retained for the Commissioner's examination.</p> <p>The Team explained that the retention failure was caused by the program running at one of the servers of the System which was not of the up-to-date version.</p> <p>To prevent recurrence of similar incidents in future, the Team had enhanced the retention program of the System to detect if any interception products were missing and to generate an error report to show the details of such missing products. The Team had adopted a new approval mechanism for all upgrade tasks on interception systems. The Team also proposed to issue a verbal advice (administrative) to the section head to sternly advise him to be more vigilant in giving precise instructions to his team members, in particular on supporting interception systems.</p> <p>Part of the interception products obtained through seven subject</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>facilities for about 12 days that should have been retained were accessed by officers of the LEA concerned. Hence, the incident had jeopardised the Commissioner's examination of the interception products concerned and his review of the LPP cases in question.</p> <p>The Commissioner reviewed the case. There was no evidence to contradict the findings of the Team that there was no bad faith or ulterior motive in this incident. The proposed action against the section head concerned and the improvement measures taken were considered appropriate. Checking of the protected products in respect of the six LPP cases and one selected case of interception involved in this incident did not reveal any irregularity.</p> <p>(See paragraphs 6.121 to 6.129 of Chapter 6.)</p>
	Interception & Surveillance (8 reviews)	<p><u>Other cases</u> They were incidents of technical problems of the computer systems. Nothing untoward was found. The LEAs concerned had taken appropriate actions to remedy the problems.</p> <p>(See paragraph 6.130 of Chapter 6.)</p>

**Section 41(2)**

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

<b>Number of reviews conducted under section 41(2)</b>		<b>Interception/ Surveillance</b>	<b>Summary of reviews</b>
(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	<u>Outstanding case</u> This case was first reported by an LEA in late 2014. The relevant court proceedings have not concluded at the time of writing this report. The reporting of this case can only be made when the relevant court proceedings have concluded.  (See Outstanding case at paragraph 6.6 of Chapter 6.)

**Table 6**

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

**Section 41(1)**

<b>Number of cases of irregularities or errors identified in the reviews under section 41(1)</b>		<b>Interception/ Surveillance</b>	<b>Broad nature of irregularities or errors identified</b>
(a) Reviews of LPP cases	12	Interception	<u>Case 6.1</u> A call which might indicate heightened LPP likelihood was not reported to the panel judge.
		Interception	<u>Case 6.3</u> An officer failed to report to his supervisor a call which indicated heightened LPP likelihood.
		Interception	<u>Case 6.4</u> The access right to the interception products in respect of an interception operation was not removed completely as required.
		Interception	<u>Case 6.6</u> An officer failed to report to her supervisor a call which indicated heightened LPP likelihood.
		Surveillance	<u>Case 6.7</u> Type 1 surveillance was conducted outside the ambit of the prescribed authorization concerned.
		Interception	<u>Case 6.9</u> An officer accessed an interception product accidentally during the period when monitoring of the interception operation should have been put on hold pending submission of REP-11 report to the panel judge.

Number of cases of irregularities or errors identified in the reviews under section 41(1)	Interception/ Surveillance	Broad nature of irregularities or errors identified
	Surveillance	<p><u>Case 6.10</u> An inaccuracy concerning an additional condition with regard to the requirement on the surveillance products to be screened was found in the affirmation in support of a prescribed authorization.</p>
	Surveillance	<p><u>Case 6.11</u> Incorrect information about the specified premises where Type 1 surveillance was to be conducted was provided in the prescribed authorization and the affirmation in support of the application. The designation of the applicant who made the application for the authorization as mentioned in the affirmation and the relevant application form was also wrong.</p>
	Interception	<p><u>Case 6.12</u> An officer accessed an interception product after the arrest of the subject.</p>
	Interception	<p><u>Case 6.13</u> An officer below the rank specified in the additional conditions of a prescribed authorization accessed the interception products of an interception operation with heightened LPP likelihood.</p>
	Interception	<p><u>Case 6.14</u> Mistakes in preservation of the interception products of an LPP case, resulting in interception products obtained on the day when an LPP call was discovered and thereafter being not preserved for the Commissioner.</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>Case 6.19</u> Interception products obtained through seven subject facilities for about 12 days had not been completely retained for the Commissioner's examination.</p> <p>The retention failure involved six LPP cases and one interception case that was selected for checking of the protected products.</p> <p>(For details, see item (g) under section 41(1) in Table 5 and Chapter 6.)</p>
(b) Examination of protected products of past LPP cases that were reported before 2016	1	Interception	<p><u>One past case</u> A call indicating heightened LPP likelihood was not reported to the panel judge.</p> <p>(For details, see item (f) under section 41(1) in Table 5 and Chapter 4.)</p>
(c) Other reviews	15	Interception	<p><u>Case 6.2</u> Interception products of three prescribed authorizations obtained on one day had not been preserved for examination by the Commissioner.</p>
		Surveillance	<p><u>Case 6.5</u> The legal representative of a defendant being the subject of a Type 2 surveillance failed to return one item of protected product and made unauthorized copy of another item of protected product.</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	<u>Case 6.8</u> An officer accessed an interception product after a decision to discontinue the related interception operation had been made.
	Surveillance	<u>Case 6.15</u> Surveillance might have been conducted when the subject was not in the specified premises, which might not comply with the terms of the prescribed authorization.
	Interception	<u>Case 6.16</u> Information provided in an REP-11 report to the panel judge was not presented accurately.
	Interception	<u>Case 6.17</u> An alias of the subject surfaced during interception was not reported to the panel judge.
	Interception	<u>Case 6.18</u> Deficiency in making record for a call with possible heightened LPP likelihood.
	Interception & Surveillance	<u>Eight other cases</u> These are cases involving technical problems of the computer systems.

**Section 41(2)**

<b>Number of cases of irregularities or errors identified in the reviews under section 41(2)</b>		<b>Interception/ Surveillance</b>	<b>Broad nature of irregularities or errors identified</b>
(a) Reviews on cases in default of application being made for confirmation of emergency authorization within 48 hours as reported by the head of department under section 23(3)(b)	Nil	Not applicable	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
11	2	1	6	2

**Table 8**

**Respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)]**

Number of notices to applicants given by the Commissioner		Nature of applications for examination		
		Interception	Surveillance	Both Interception and Surveillance
Number of cases that the Commissioner had found in the applicant's favour [section 44(2)]	0	—	—	—
Number of cases that the Commissioner had not found in the applicant's favour [section 44(5)] <sup>Note 5</sup>	9	2	1	6

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Note 5 Of the nine notices, six were issued during the report period and three thereafter.

**Table 9**

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

	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)]**

<b>Recommendations made by the Commissioner</b>		<b>Interception/ Surveillance</b>	<b>Broad nature of recommendations</b>
Reports to the Chief Executive on any matter relating to the performance of the Commissioner's functions [section 50]	Nil	Not applicable	Not applicable
Recommendations to the Secretary for Security on the COP [section 51]	Nil	Not applicable	Not applicable
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the COP [section 52]	2	Interception & Surveillance	<p>(a) Better control of the use of ancillary equipment in covert surveillance operations.</p> <p>(b) Reporting to the Commissioner the communications between the subject and the lawyer or the law firm involved in the Reported LPP Call.</p> <p>(See paragraph 7.2 of Chapter 7.)</p>

**Table 11**

**Number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]**

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







<b>Case number and nature of operation</b>	<b>Brief facts of case</b>	<b>Broad nature of the disciplinary action</b>
<p><u>Case 8</u> Interception</p>	<p>(i) An officer failed to preserve part of the interception products in accordance with the preservation requirement for a non-LPP/non-JM case selected for checking.</p> <p>(ii) The direct supervisor of the officer mentioned in (i) above failed to supervise the officer in performing ICSO-related duties.</p> <p>(See paragraphs 6.13 to 6.17 of Chapter 6.)</p>	<p>Verbal warning</p> <p>Written admonishment</p>
<p><u>Case 9</u> Interception</p>	<p>An officer accessed an interception product after a decision to discontinue the related interception operation had been made.</p> <p>(See paragraphs 6.60 to 6.63 of Chapter 6.)</p>	<p>Verbal advice</p>
<p><u>Case 10</u> Interception</p>	<p>An officer failed to report to his supervisor a call indicating heightened LPP likelihood.</p> <p>(See paragraphs 6.18 to 6.23 of Chapter 6.)</p>	<p>Verbal warning</p>

8.2 In accordance with section 49(2)(e) of the Ordinance, the Commissioner is required to give an assessment on the overall compliance with the relevant requirements during the report period. Such assessment and the reasons in support can be found in Chapter 9.

## **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 2018 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 six of the 1,343 applications for interception were refused and the reasons for refusal were insufficient materials to support the allegations put forth and lack of useful information obtained from interception operation conducted under previous authorizations. As regards covert surveillance, all the 41 applications were granted by the panel judges.

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 2.17 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 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, most of the interception/covert surveillance operations were conducted pursuant to prescribed authorizations granted by the relevant authorities and the additional conditions imposed except a few cases of non-compliance as reported in Chapter 6. There was no sign of abuse of surveillance devices for any unauthorized purposes.

### ***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, I am able to check the veracity of the gist of the communications or information 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 but not reported to the relevant authority.

9.9 A total of 187 new LPP and JM cases were reported in 2018. Except 29 LPP cases which were still on-going beyond the report period, review of 154 LPP and four JM cases had been completed. Of the 154 LPP cases, except for those specifically mentioned in Cases 6.1, 6.3, 6.4, 6.6, 6.7, 6.9, 6.10, 6.11, 6.12, 6.13, 6.14 and 6.19 of Chapter 6 and one non-compliance case detected by me in early 2019 (details of which will be provided in the next annual report), nothing untoward was found for these cases. As for the four JM cases, they were all found in order. I noted that although there was a marked increase in the number of reported new LPP cases, there was no actual obtainment of LPP information in any of the cases. This is a good indication of a high level of alertness maintained by LEA officers in performing their intercepting duties for guarding against the risk of obtaining information subject to LPP. While the LEAs were observed to have recognised the importance of protecting information which might be subject to LPP or JM and have

continued to adopt a very cautious approach in handling these cases, some of their officers still failed to exercise enough vigilance and care on some occasions as revealed in various cases reported in Chapter 6. The LEAs concerned had repeatedly reminded their officers to be vigilant when they encounter situations indicating heightened LPP likelihood in the course of performing interception duties.

9.10 During the report period, the protected products of 31 LPP cases reported before 2016 were also examined. While explanation was required for one case as detailed in paragraphs 4.23 to 4.25 of Chapter 4, the examination of the protected products of these 31 cases did not reveal anything to justify deviation from the assessments given by my predecessors or myself on the handling of LPP cases reported in the past years.

***Non-compliance, irregularities or incidents***

9.11 Under section 54 of the Ordinance, the head of an LEA is required to submit a report to the Commissioner if he considers that there may have been any case of failure 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. Furthermore, whenever necessary, the LEAs are required to provide a report, clarification or explanation for anything unusual detected in the course of examination of documents and protected products by the Commissioner. In 2018, there were 27 cases of non-compliance/irregularity/incident.

9.12 For all the cases reported in Chapter 6, I have not made any finding that there was deliberate disregard of the statutory provisions or

the COP nor have I found any ulterior motive or ill will on the part of the officers involved. Most of the cases mentioned under Cases 6.1 to 6.19 were consequences of inadvertence or carelessness of the officers concerned, reflecting that some of the officers were still not vigilant and cautious enough in discharging ICSO duties. Such kind of inadvertence or carelessness is still a great concern to me. I consider it of utmost importance that all LEAs and their officers should make every effort to ensure that similar mistakes would not be made again. The heads of LEAs should endeavour to provide their officers with sufficient advice and training to facilitate them to better perform the ICSO duties especially when officers are newly deployed to take up ICSO duties either on a long term basis or in short term acting capacity. Furthermore, 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 I am pleased to see that in the report period, LEAs continued to be positive to my recommendations in regard to new arrangements for better operation of the ICSO regime and took initiative to implement system enhancements to prevent recurrence of technical mistakes or to avoid human errors.

## **CHAPTER 10**

### **ACKNOWLEDGEMENT AND WAY FORWARD**

#### **Acknowledgement**

10.1 I would like to take this opportunity to express my heartfelt gratitude to those who have rendered me prompt and effective support in the report period including the panel judges, the Security Bureau, the LEAs and the CSPs. My tasks as the Commissioner could not be carried out so smoothly and efficiently without their continuous assistance and co-operation.

#### **Way forward**

10.2 The ICSO aims to strike a balance between the need for the prevention and detection of serious crime and the protection of public security on the one hand and the need for safeguarding the privacy and other rights of individuals on the other. Throughout the years since the enactment of the Ordinance in 2006 and its amendment in 2016, a number of suggestions and recommendations have been made on the procedural matters and control mechanism to remedy any deficiencies or irregularities. The recommendations have been well accepted and implemented by the LEAs to enhance compliance with the Ordinance and the COP. Despite the implementation of all the recommendations, problems or irregularities still cropped up from time to time. Most of the irregularities encountered and mistakes made by LEA officers were attributable to the inadvertence or negligence of individual officer and sometimes due to the lack of sufficient experience and knowledge on ICSO-related duties rather than deficiencies in the control systems.



10.3 I appreciate that the LEAs did recognise the importance of observing the spirit of the Ordinance and complying with the relevant requirements through provision of training and guidance to the officers involved in ICSO-related duties. They also strived for improvements and enhancements in the procedures and technologies to minimise the risk of human errors. In the years ahead, I hope that the concerted efforts and the drive for improvements of the LEAs will be sustained and the alertness of all related officers will be strengthened with a view to achieving full compliance with the ICSO requirements.

10.4 I look forward to the continuous support and cooperation of all the parties involved for any new arrangement that will facilitate the oversight work of the Commissioner.