

Commissioner on Interception of Communications and Surveillance Annual Report 2018

Summary

1. The Interception of Communications and Surveillance Ordinance (Cap. 589) ('the Ordinance' or 'ICSO') came into force on 9 August 2006 and was amended in June 2016. Pursuant to section 49 of the Ordinance, Mr. A. R. Suffiad, the Commissioner on Interception of Communications and Surveillance ('Commissioner'), submitted his fourth annual report, i.e. Annual Report 2018, to the Chief Executive on 26 June 2019. The report covers the period 1 January 2018 to 31 December 2018. The following is a summary of the report.

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

3. During the report period, a total of 1,378 prescribed authorizations (including fresh and renewed authorizations) were issued. Among them, 1,337 were judge's authorizations for interception and 41 were judge's authorizations for Type 1 surveillance. These

authorizations included 13 cases that had been renewed more than five times. No application for Type 2 surveillance and no oral application was made by the LEAs.

4. During the report period, six applications for interception were refused. The main reasons for refusal are stated in paragraph 2.3 of Chapter 2 of the report. No application for Type 1 surveillance was refused.

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

6. A total of 235 persons were arrested in 2018 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

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

8. When making an application for a prescribed authorization, the LEA applicant is obligated to state his assessment of the likelihood of obtaining LPP information. If subsequently there is anything that transpires which may affect the assessment, the officer concerned has to

promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, to notify the authorizing officer by way of an REP-13 report. If the subject of the interception or covert surveillance has been arrested and the officer concerned considers that the operation should continue, the officer should submit a section 58 report to the relevant authority assessing the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the interception or covert surveillance. The concerned LEA is required to give the Commissioner a similar notification of each of such occurrences.

9. For cases with assessment that there was likelihood of involving LPP information, the panel judges would impose additional conditions if they granted the authorization or allowed it to continue. These additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice.

10. 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'). 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 there was no subsequent change in circumstances one way or another relating to LPP likelihood for these cases. For the remaining 172 cases, the LEAs submitted REP-11 or section 58 reports to the panel judges on the subsequent change in circumstances relating to LPP involvement or likelihood. These 172 cases included one case of obtaining information suspected to be subject to LPP and 171 cases of

heightened likelihood of obtaining LPP information. For all the LPP cases where the operations were either assessed to have a likelihood of obtaining LPP information at the grant of the prescribed authorizations or allowed to continue after such likelihood was reported heightened, the panel judges had imposed additional conditions in the authorizations concerned. As regards JM, in the report period, reports on four new JM cases were received.

11. Of the 183 new LPP cases, the authorized operations for 154 cases were discontinued in the report period and the Commissioner completed the review of these 154 cases. The review of the four JM cases was also completed. In the review of these 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 and the protected products were examined. Details of the Commissioner's reviews of these cases are given in Chapters 4 and 6 of the report.

12. Besides, the Commissioner selected from the weekly reports, on the basis of the information provided therein or at random, interception and surveillance products of other cases for examination. During the report period, with the basis of selection as mentioned above, interception products of 419 authorizations and surveillance products of nine authorizations were examined. Interception products of two authorizations of 2011 were also examined. Of the 421 authorizations for interception, no irregularity was found for 417 authorizations. As for the four remaining authorizations, they

involved 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 respectively. Details are stated in Chapter 6 of the report. With regard to the nine authorizations for surveillance, nothing untoward was found for eight authorizations while the review for the remaining one authorization is still on-going when the report is being compiled.

13. The preserved protected products of 31 LPP cases that were reported before 2016 were also checked. The examination of protected products of these LPP cases, one of which required explanation from the relevant LEA, did not reveal anything to justify any deviation from the assessments given by the Commissioner or his predecessors on the handling of LPP cases reported in the past years.

14. During the report period, 11 applications for examination were received. Of these applications, 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. After making all necessary enquiries, the Commissioner found all the nine cases not in the applicants' favour and accordingly notified each of them in writing. Under the Ordinance, the Commissioner is not allowed to provide reasons for his determination. The Commissioner observed that there were occasions where the applicants expressed strong discontent at not being given the details of the reasons for his determinations. It is hoped that the public

will understand that the statutory prohibition is designed to forbid the disclosure of any information which might prejudice the prevention or detection of crime or the protection of public security. There should not be any doubt that the Commissioner carries out his duties and functions under the Ordinance with utmost good faith and sincerity.

15. Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person when the Commissioner discovers a case in which interception or covert surveillance has been carried out by an officer of any of the four LEAs covered by the Ordinance without a prescribed authorization. However, section 48(3) provides that the Commissioner shall only give a notice when he considers that doing so would not be prejudicial to the prevention or detection of crime or the protection of public security. Section 48(6) also exempts the Commissioner from his obligation if the relevant person cannot, after the use of reasonable efforts, be identified or traced, or where he considers that the intrusiveness of the interception or covert surveillance on the relevant person is negligible. During the report period, no notice pursuant to section 48 of the Ordinance was issued.

16. 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 was completed and details of the review are set out in Chapter 6 of the report. Moreover, there was one outstanding case brought forward from the Annual Report 2017. The outstanding case was first reported in 2014 and the reporting of which will be made after the relevant court proceedings have concluded. Two other cases relating to surveillance

devices for non-ICSO purposes are covered in Chapter 3 of the report.

17. During the report period, 14 disciplinary actions in the form of verbal advice, verbal warning or written admonishment were taken for cases mentioned in Chapter 6 of the report and the Annual Report 2017. Table 12 in Chapter 8 of the report sets out the details.

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

19. The Commissioner has set out in Chapter 9 of the report an assessment of the overall performance of the LEAs in their compliance with the relevant requirements of the ICSO during the report period. In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. 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 mentioned in Chapter 6 of the report. There was no sign of abuse of surveillance devices for any unauthorized purposes. With the implementation of examination of protected products since October 2016, the Commissioner is able to check the veracity of the gist of communications or information as stated in the REP-11/REP-13 reports and whether there were any communications or information subject to LPP or with JM that had been accessed by the LEA officers but not

reported to the relevant authority. Apart from those specifically mentioned in Chapter 6 of the report, nothing untoward was found for the LPP cases reported and discontinued in 2018. The Commissioner noted that although there was a marked increase in the number of reported new LPP cases in 2018, there was no actual obtainment of LPP information in any of the cases. The Commissioner considered this 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. As for the JM cases reported in 2018, they were all found in order. In the handling of LPP and JM cases, the LEAs continued to adopt a very cautious approach, save for some occasions where some of the LEA officers still failed to exercise enough vigilance and care as revealed in various cases reported in Chapter 6 of the report.

20. For all the cases of non-compliance/irregularity/incident mentioned in Chapter 6 of the report, the Commissioner did not find that there was deliberate disregard of the statutory provisions or the COP nor did the Commissioner find any ulterior motive or ill will on the part of the officers involved. Most of the cases 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. The Commissioner considered 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. Furthermore, officers of the LEAs should stay alert and exercise care in

different stages of the operations conducted under the ICSO.

21. The Commissioner is pleased to see that in the report period, LEAs continued to be positive to his 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.

22. In the report, the Commissioner expresses his gratitude to the panel judges, the Security Bureau, the LEAs and the communications services providers for their assistance and co-operation. In particular, the Commissioner is grateful that relevant parties continued with their prompt and effective support without which he could not have performed his functions smoothly and efficiently. The Commissioner looks forward to the continuous support and co-operation of all the parties involved for any new arrangement that will facilitate his oversight work.

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