

Commissioner on Interception of Communications and Surveillance
Annual Report 2019

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 fifth annual report, i.e. Annual Report 2019, to the Chief Executive on 29 June 2020. The report covers the period 1 January 2019 to 31 December 2019. 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. In January 2019, the Commissioner delivered two briefing sessions, one on telecommunications interception and another on covert surveillance, in a forum held by the Security Bureau on the interception of communications and surveillance for the relevant officers of the four LEAs under the ICSO. The forum provided a valuable opportunity in refreshing the knowledge and awareness of the LEAs in complying with the requirements of the ICSO and in enhancing their understanding, professional knowledge and sensitivity in conducting the interception and covert surveillance in a proper and lawful way.

4. During the report period, a total of 1,335 prescribed authorizations (including fresh and renewed authorizations) were issued. Among them, 1,310 were judge's authorizations for interception, 22 were judge's authorizations for Type 1 surveillance and three were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs. These authorizations included 12 cases that had been renewed more than five times. No oral application was made by the LEAs.

5. During the report period, four applications for interception were refused. The reason for refusal is stated in paragraph 2.3 of Chapter 2 of the report. No application for Type 1 or Type 2 surveillance was refused.

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

7. A total of 316 persons were arrested in 2019 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

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

9. When making an application for a prescribed authorization, the LEA applicant is obligated to state his assessment of the likelihood of obtaining LPP information. If subsequently there is anything that transpires which may affect the assessment, the officer concerned has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, to notify the authorizing officer by way of an REP-13 report. If the subject of the interception or covert surveillance has been arrested and the officer concerned considers that the operation should continue, the officer should submit a section 58 report to the relevant authority

assessing the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the interception or covert surveillance. The concerned LEA is required to give the Commissioner a similar notification of each of such occurrences.

10. For cases with assessment that there was likelihood of involving LPP information, the panel 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.

11. In the Commissioner's review of the cases that were likely to involve LPP information ('LPP cases') or JM ('JM 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 audit trail reports, etc. were checked and the protected products were examined.

12. Twenty-nine cases of heightened LPP likelihood reported in 2018 were on-going beyond 2018 and the authorized operations concerned were discontinued in 2019. The Commissioner had completed the review of these 29 cases in the report period. Other than one case which was related to an incident mentioned in Chapter 6 of the report and another case which involved technical problem of the computer systems mentioned in the Annual Report 2018, nothing

untoward was revealed by various forms of checking of these LPP cases.

13. In the report period, LEAs submitted notifications, in accordance with the COP, on 170 new LPP cases. Amongst these 170 new LPP cases, 18 cases were assessed at the time of application that the operations sought to be authorised 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 152 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 152 cases included one case of obtaining information suspected to be subject to LPP and 151 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 five new cases with heightened likelihood of obtaining JM were received.

14. Of the 170 new LPP cases, the authorized operations for 155 cases were discontinued in the report period and the Commissioner had completed the review of these 155 cases. The review of the five JM cases was also completed. Details of the Commissioner's

reviews of these cases are given in Chapters 4 and 6 of the report.

15. 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 427 authorizations and surveillance products of six authorizations were examined. Of the 427 authorizations for interception, no irregularity was found for 426 authorizations. As for the remaining authorization, it involved discrepancies made in submitting an REP-11 report to the panel judge as detailed in Chapter 6 of the report. With regard to the six authorizations for surveillance, notwithstanding that one of them involved inaccuracy in the recorded time of a surveillance product which was detailed in Chapter 6 of the report, nothing untoward was found during the examination.

16. In the report period, the protected products of six LPP cases that were reported before 2016 were also checked. The examination of protected products of these six cases 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.

17. During the report period, 17 applications for examination were received. Of these applications, one application could not be entertained as it was received by the Commissioner more than one year

after the day on which the interception or covert surveillance was alleged to have taken place which came within the ambit of the exception covered by section 45(1) of the Ordinance, and six applications were subsequently not pursued by the applicants. Of the remaining ten applications, four alleged interception and six claimed a combination of interception and covert surveillance. After making all necessary enquiries, the Commissioner found all the ten 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.

18. 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.

19. In 2019, there were 16 cases of non-compliance/irregularity/incident while none of them involved report submitted under section 54 of the Ordinance. The review of 15 cases was completed and details of the review are set out in Chapter 6 of the report. Moreover, there were two outstanding cases brought forward from the Annual Report 2018. One of the outstanding cases was first reported in 2014 and the reporting of which will be made after the relevant court proceedings have concluded. Another outstanding case was briefly reported in the Annual Report 2018 and the review of the case was completed in 2019. Details of which are also set out in Chapter 6 of the report. There was one case relating to surveillance devices for non-ICSO purposes which is set out in Chapter 3 of the report.

20. The protected products of five past cases of non-compliance, irregularity or incident that did not involve the obtainment of LPP information or JM or such likelihood, including two reported in 2009, two in 2010 and one in 2014, were selected for examination. In one of

these five cases, the then Commissioner had mentioned in the Annual Report 2010 that conclusion for that case could only be drawn by checking of the recordings. After checking of the protected products of this case, the Commissioner concluded that no non-compliance was involved. For another case, the LEA concerned was required to provide explanation and it subsequently submitted a report under section 54 of the Ordinance. Details of these two cases are set out in Chapter 6 of the report. For the remaining three cases, the Commissioner did not find anything that deviated from what had been reported to the relevant authority and/or the Commissioner.

21. During the report period, 17 disciplinary actions in the form of verbal advice or verbal warning were taken for cases mentioned in Chapter 6 of the report and the Annual Report 2018. Table 12 in Chapter 8 of the report sets out the details.

22. 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.

23. 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, the interception/covert surveillance operations were in general conducted pursuant to prescribed authorizations granted by the relevant authorities and the additional conditions imposed but there were still a few cases of non-compliance as reported in Chapter 6 of the report. There was no sign of abuse of surveillance devices for any unauthorized purposes. Through the examination of protected products, the Commissioner is 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. Apart from those specifically mentioned in Chapter 6 of the report, nothing untoward was found for the LPP cases reported and discontinued in 2019. There was one case on actual obtainment of information subject to LPP as detailed in Chapter 4 of the report. The Commissioner has checked and confirmed that the LEA had complied with the additional conditions imposed on the prescribed authorization concerned and the surveillance products passed on to the investigators did not contain any LPP information. As for the JM cases reported in 2019, they were all found in order.

24. In the handling of LPP and JM cases, the LEAs continued to adopt a very cautious approach, but there were still several cases reflecting the failure of some officers in exercising enough vigilance and care on certain occasions as revealed in the cases reported in Chapter 6

of the report. For an officer who persistently failed to perform interception monitoring duties vigilantly in guarding against the risk of obtaining information subject to LPP, the LEA concerned had removed the officer from carrying out such duties.

25. For all the completed cases of non-compliance/irregularity/incident mentioned in Chapter 6 of the report, the Commissioner did not find any deliberate disregard of the statutory provisions or the COP nor has he found any ulterior motive or ill will on the part of the officers involved. However, the Commissioner considered that the non-compliance case on Type 1 surveillance involving misinterpretation of a term of the prescribed authorization concerned was rather alarming. It reflected the lack of understanding and professional knowledge of the officer concerned in discharging ICSO duties. The mistakes were made by an officer of a rather senior level responsible for ICSO duties and were left unnoticed after a series of internal reviewing process of the LEA. Coupled with the track record of the officer concerned being involved in several other irregularities on ICSO duties in recent years, the Commissioner casted doubt on the reliability of the officer in discharging ICSO duties. The LEA had taken the Commissioner's advice of reconsidering the suitability of the officer in undertaking ICSO duties and posted out the officer subsequently.

26. Most of the cases mentioned under Cases 6.1 to 6.12 in Chapter 6 of the report 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.

27. The Commissioner is pleased to see that in the report period, LEAs continued to be positive to his recommendations in every aspect aiming 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.

28. 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 cooperation. In particular, the Commissioner is grateful that relevant parties continued to render great assistance to him in performing the oversight and reviewing functions under the ICSO without which he could not have performed his functions so smoothly and efficiently. The Commissioner looks

forward to the concerted efforts of each and every one of the officers involved in ICSO duties in observing the spirit and requirements of the Ordinance and also the continuous support and cooperation of all the parties involved in facilitating his oversight work.

29. 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.