

Commissioner on Interception of Communications and Surveillance
Annual Report 2020

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 sixth annual report, i.e. Annual Report 2020, to the Chief Executive on 29 June 2021. The report covers the period 1 January 2020 to 31 December 2020. 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 1,156 prescribed authorizations (including fresh and renewed authorizations) were issued. Among them, 1,150 were judge's authorizations for interception, five were judge's authorizations for Type 1 surveillance and one was executive authorization for Type 2 surveillance issued by a designated authorizing officer of the LEA concerned. These authorizations included 14 cases that had been renewed more than five times. No oral application was made by the LEAs. No application for interception, Type 1 surveillance or Type 2 surveillance was refused.

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

5. A total of 141 persons were arrested in 2020 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

6. 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 or JM as well as other cases where LPP information or JM has been obtained.

7. 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.

8. 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.

9. In the Commissioner's review of the cases that involved/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.

10. Fifteen cases of heightened/assessed LPP likelihood reported in 2019 were on-going beyond 2019 and the authorized operations concerned were discontinued in 2020. The Commissioner had completed the review of these 15 cases in the report period. Other than one case which involved two incidents mentioned in Chapter 6 of the report, nothing untoward was revealed by various forms of checking of the other 14 LPP cases.

11. In the report period, LEAs submitted notifications, in accordance with the COP, on 139 new LPP cases. Amongst these 139 new LPP cases, 29 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 110 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 110 cases included one case of obtaining information suspected to be subject to LPP and 109 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 cases with heightened likelihood of obtaining JM were received.

12. Of the 139 new LPP cases, the authorized operations for 129 cases were discontinued by end of the report period and the Commissioner had completed the review of these 129 cases. The review of the four JM cases was also completed. Details of the Commissioner's reviews of these cases are given in Chapters 4 and 6 of the report.

13. 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 352 authorizations and surveillance products of six authorizations were examined.

14. Various forms of checking, including examination of interception/surveillance products in respect of the specific cases (such as LPP and JM cases) or selected authorizations and examination of all the relevant documents and records, were conducted in the report period. While no unauthorized interception was found, two cases of

unauthorized surveillance were revealed as detailed in Chapter 6 of the report.

15. In 2020, there were ten cases of non-compliance/irregularity/incident while three of them involved reports submitted under section 54 of the Ordinance. The review of these cases was completed. Moreover, there were two outstanding cases brought forward from the Annual Report 2019. One of the outstanding cases was first reported in 2014 and the review result was not hitherto reported pending conclusion of the relevant court proceedings. The court proceedings were concluded during the report period. Another outstanding case was briefly reported in the Annual Report 2019. A full investigation report was received from the LEA concerned in 2020 and the review of the case was also completed. Details of the review of all these 12 cases are set out in Chapter 6 of the report. There was one case relating to devices capable of being used for covert surveillance which is set out in Chapter 3 of the report.

16. During the report period, four 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 2019. Table 12 in Chapter 8 of the report sets out the details.

17. To better carry out the objects of the Ordinance, in the report period, the Commissioner made a recommendation to the

Secretary for Security under section 51 of the Ordinance to revise a provision of the COP. Moreover, two recommendations were made to the LEAs under section 52 of the Ordinance. Details of the recommendations are given in Chapter 7 of the report.

18. In the report period, the Commissioner had meetings with the panel judges to exchange views on a number of issues, including recommendations to the LEAs in preparing applications for covert surveillance with a view to avoiding similar non-compliance relating to the operation of surveillance devices, and measures to be adopted by the panel judges in granting the authorizations to facilitate compliance by the LEAs. The LEAs welcomed the recommendations and measures.

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, 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 discontinued in 2020. There was one case on actual obtainment of information subject to LPP as detailed in Chapter 4 of the report. The Commissioner had listened to the call which contained information suspected to be subject to LPP and he considered that the information concerned was LPP information which was obtained by the LEA inadvertently. The Commissioner has reviewed the case and did not find any irregularity. As for the JM cases reported in 2020, except one case involving an incident referred to in Chapter 6 of the report, others were found in order.

20. In the handling of LPP and JM cases, the LEAs continued to adopt a very cautious approach though there were several occasions reflecting the misjudgement and lack of vigilance of some officers as revealed in the cases reported in Chapter 6 of the report. The continued efforts of the LEAs in reminding their officers to be vigilant when they encounter situations indicating heightened LPP likelihood in the course of performing interception monitoring duties and in tightening up measures to minimise the risk of inadvertently obtaining LPP information were appreciated.

21. For all the 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, as reflected in Outstanding case (ii) in Chapter 6 of the report, the oversight of an officer could lead to a series of mistakes subsequently committed by various officers in performing ICSO-related duties.

22. Besides, Cases 6.1 to 6.9 in Chapter 6 of the report reflected that some of the officers were still not vigilant and cautious enough in discharging ICSO duties. The supervisory roles of senior officers in monitoring the discharge of ICSO duties and communications amongst some of the LEA officers should be strengthened. The heads of LEAs should endeavour to review the workflow and operation guidelines regularly to prevent occurrence of irregularities and to provide their officers with sufficient advice and training to facilitate them to better perform the ICSO duties. Furthermore, officers of the LEAs should always stay alert and exercise care in different stages of the operations conducted under the ICSO.

23. The Commissioner is pleased to see that in the report period, LEAs continued to be positive to his recommendations and in reviewing and tightening up procedures and guidelines 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.

24. During the report period, five applications for examination were received. All these applications alleged a combination of interception and covert surveillance. After making all necessary enquiries, the Commissioner found all the five 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.

25. 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.

26. In the report, the Commissioner expressed his sincere thanks to the panel judges, the Security Bureau, the LEAs and the communications services providers that had continued to render great assistance to him in performing the oversight and reviewing functions under the ICSO during the report period. Their continued cooperation and support enabled the Commissioner to carry out his tasks 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.

27. 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.