

Commissioner on Interception of Communications and Surveillance

Annual Report 2021

Executive 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, the Commissioner on Interception of Communications and Surveillance ('Commissioner') is required to submit annual reports to the Chief Executive. Mr Yeung Chun Kuen, GBS, was appointed as the Commissioner on 17 August 2021 for a term of three years and he submitted his first annual report, i.e. Annual Report 2021, to the Chief Executive on 23 June 2022. The report covers the period from 1 January to 31 December 2021 which partly overlaps the term of office of Mr A. R. Suffiad, SBS, the third Commissioner whose term expired on 16 August 2021. 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 relevant 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 (Immigration Department is not entitled to conduct interception of communications under the Ordinance) and Independent Commission Against Corruption.

3. During the report period, a total of 1,290 prescribed authorizations (including fresh and renewed authorizations) were issued pursuant to written applications. Among them, 1,257 were panel judge's authorizations for interception, 28 were panel judge's authorizations for Type 1 surveillance and five were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs concerned. These authorizations included 27 cases that had been renewed more than five times. Besides, there was one authorization for Type 2 surveillance that was granted pursuant to an oral application and confirmed in writing within 48 hours from the issue of the authorization. No oral application for interception or Type 1 surveillance was made by the LEAs.

4. While all applications for Type 1 and Type 2 surveillance were approved, two applications for interception were refused because the panel judge considered that the materials provided to support the applications were insufficient.

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

6. During the report period, one device retrieval warrant was issued by the panel judge to an LEA for retrieving a device authorized to be used under a prescribed authorization for Type 1 surveillance.

7. A total of 102 persons were arrested in 2021 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 Ordinance also stipulates that no interception of telecommunication service of a lawyer used to provide legal advice to clients and no covert surveillance at an office or residence of a lawyer may be authorized unless the lawyer or the premises concerned is involved in a serious crime or a threat to public security. The COP provides that the LEAs should notify the Commissioner of covert operations that are likely to involve LPP information or JM as well as other cases where LPP information or 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 it subsequently transpires that there is anything 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 an LEA becomes aware that the subject of interception or covert surveillance has been arrested and the LEA considers that the operation should continue, the LEA should submit to the relevant authority a section 58 report assessing the effect of the arrest on the likelihood that any LPP information would 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 in order to apprise the Commissioner promptly with updated information on this important matter.

10. For cases with assessment that there was likelihood of involving LPP information, the panel judge would normally 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 information protected by LPP ('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 audit trail reports, etc. were checked and the protected products were examined.

12. Ten cases of heightened/assessed LPP likelihood reported in 2020 were on-going beyond 2020 and the authorized operations concerned were discontinued in 2021. The Commissioner had completed the review of these ten cases in the report period. Other than one case which involved an incident referred to in Case 6.6 of Chapter 6 of the Annual Report 2020, nothing untoward was revealed by various forms of checking of the other nine LPP cases.

13. In the report period, LEAs submitted notifications, in accordance with the COP, on 147 new LPP cases. Amongst these 147 new LPP cases, 22 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 125 cases, 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 125 cases included two cases of obtaining LPP information, one case of obtaining information suspected to be subject to LPP and 122 cases of heightened likelihood of obtaining LPP information. In one of these 122 cases of heightened LPP likelihood, the panel judge allowed continuation of the prescribed authorization but no additional condition was imposed as the case was further assessed to be without LPP likelihood. 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 judge had imposed additional conditions in the authorizations concerned. During the report period, the Commissioner did not receive any notifications on cases with heightened/assessed likelihood of obtaining JM.

14. Of the 147 new LPP cases, the authorized operations for 128 cases were discontinued by end of the report period and the Commissioner had completed the review of these 128 cases. There were two cases on actual obtainment of information subject to LPP. The Commissioner considered that the LPP information was obtained by the LEAs concerned inadvertently and no other irregularity was found. Details of the Commissioner's reviews of these cases are given in Chapters 4 and 6 of the report.

15. 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 said basis of selection, interception products of 364 selected authorizations and surveillance products of six selected authorizations were examined.

16. Various forms of checking, including examination of interception/surveillance products in respect of the specific cases (such as LPP cases) and selected authorizations and examination of all the

relevant documents and records, were conducted in the report period. While no unauthorized interception was found, one case of unauthorized surveillance was reported by an LEA and two cases of irregularity concerning interception were revealed as detailed in Chapter 6 of the report. There was no sign of abuse of surveillance devices for any unauthorized purposes.

17. For the three 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, or any ulterior motive or ill will on the part of the officers involved. Officers of the LEAs were nevertheless reminded that they should always stay alert and exercise care at different stages of the operations conducted under the ICSO. The Commissioner pointed out that, despite the occasional but rare incidents of non-compliance as a result of inadvertence, the LEAs had performed their duties with enthusiasm and professionalism.

18. During the report period, 13 disciplinary actions in the form of verbal warning or written warning were taken for cases mentioned in Chapter 6 of the report and the Annual Report 2020. Table 12 in Chapter 8 of the report sets out the details.

19. The Commissioner has set out in Chapter 9 of the report an assessment of the overall performance of the LEAs and their officers in

their compliance with the relevant requirements of the ICSO in 2021. In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. The Commissioner observed that the LEAs tended to apply for a fixed duration of prescribed authorization which may not properly reflect the operational need. He advised the LEAs that they should apply for a reasonable duration of prescribed authorization based on the operational need of individual cases with full justifications provided.

20. The LEAs were also observed to have recognised the importance of protecting information which might be subject to LPP and they continued to adopt a very cautious approach in handling these cases. The continued and tireless efforts of the LEAs concerned in reminding their officers to be vigilant when they encounter situations indicating heightened LPP likelihood in the course of performing interception monitoring duties and tightening up measures to minimise the risk of inadvertently obtaining LPP information were appreciated. However, the Commissioner noticed that the assessment of LPP likelihood made by the LEAs has been rather mechanical. The Commissioner advised the LEAs that when making an assessment on the likelihood of obtaining LPP information, they should take into account the background of the cases and all the relevant circumstances instead of adopting a mechanical approach.

21. In July 2021, the then Commissioner, Mr A. R. Suffiad, SBS, delivered a talk to relevant officers of the four LEAs at a forum on interception of communications and covert surveillance organised by the Security Bureau. He reiterated the importance of the protection of LPP information and JM, highlighted some past cases of non-compliance/irregularities, provided advices and emphasised important points to note in the application and execution of covert operations. The forum provided a good opportunity in refreshing and enhancing the knowledge and understanding of the relevant officers of the LEAs in conducting interception and covert surveillance under the ICSO regime.

22. In September 2021, the Commissioner had meetings with the panel judge in following up the recommendations put forth to the Secretary for Security by his predecessor on the amendment of the COP. The COP was subsequently amended and promulgated in the gazette by the Secretary for Security in October 2021. The Commissioner and the panel judge also exchanged views on other issues including the understanding of the LEAs of the likelihood of obtaining LPP information and the current approach adopted by them in assessing such likelihood.

23. To better carry out the objects of the Ordinance, in the report period, the Commissioner made a number of recommendations to the LEAs under section 52 of the Ordinance. Details of the

recommendations are given in Chapter 7 of the report.

24. The Commissioner is pleased to see that in the report period, the LEAs were positive to his recommendations and in reviewing and tightening up procedures and guidelines aiming for better operation of the ICSO regime and they took initiative to implement system enhancements whenever necessary to prevent any technical mistakes or to avoid human errors.

25. During the report period, four applications for examination were received. Of these applications, one application was received 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 could not be entertained. The remaining three applications all alleged a combination of interception and covert surveillance. After making all necessary enquiries, the Commissioner found all the three 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. 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. There should not be any doubt that the Commissioner carries out his duties and functions under the Ordinance with utmost good faith and sincerity.

26. Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person when the Commissioner discovers any interception or covert surveillance 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.

27. Since his assumption of office in August 2021, the Commissioner has received great assistance and support from various parties including the panel judge, the Security Bureau, the LEAs and the communications services providers. In the report, the Commissioner expressed his sincere thanks to all of them. Their cooperation and support is vital and valuable to the Commissioner in performing the oversight and reviewing functions under the ICSO smoothly and efficiently. The Commissioner looks forward to the continuous support and cooperation of all the parties involved in facilitating his work under the ICSO.

28. 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.