



Annual Report 2022 to the Chief Executive

by
The Commissioner on
Interception of Communications
and Surveillance

June 2023

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 John KC Lee, GBM, SBS, PDSM, PMSM
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China

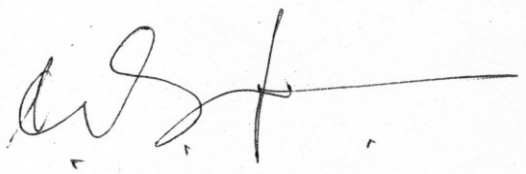
CONFIDENTIAL

Dear Sir,

Annual Report for the Year 2022

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 2022, together with its Chinese translation.

Yours sincerely,



(Yeung Chun Kuen)
Commissioner on Interception of
Communications and Surveillance

Encl: Annual Report for 2022

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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
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
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, the Customs and Excise Department, the Hong Kong Police Force, the Immigration Department or the Independent Commission Against Corruption
LPP	legal professional privilege
LPP case	a case that is likely to involve information protected by LPP
LPP information	information protected by LPP
non-ICSO purpose	purpose which is not related to ICSO
PJO	Panel Judges' Office
QR Code	Quick Response Code
renewal application	application for renewal of a prescribed authorization
RSM	removable storage media
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 panel judge	all or any of the panel judges appointed under section 6 of the Ordinance
the report period	the period from 1 January to 31 December 2022
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 from 1 January to 31 December 2022.

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, the Customs and Excise Department, the Hong Kong Police Force, the Immigration Department^{Note 1} and the Independent Commission Against Corruption. The statutory provisions ensure that the statutory activities can only be carried out when 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

^{Note 1} Immigration Department is not entitled to conduct interception of communications under the Ordinance.

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 on 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 the safeguarding of the freedom, privacy and other rights of Hong Kong residents 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 under 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 In 2022, I, together with the staff of the Secretariat, Commissioner on Interception of Communications and Surveillance ('Secretariat'), continued to check the compliance of the LEAs with the relevant requirements in various ways. During the periodical visits to the LEAs on the checking of files and documents and after the examination of protected products, I noticed that the LEAs were cautious in conducting covert operations and handling protected products in order to guard

against the obtainment of information subject to legal professional privilege ('LPP') and journalistic materials ('JM'). They had taken my recommendations and made more realistic assessments of the likelihood of obtaining LPP information during covert operations rather than just adopting a mechanical approach. In the report period, there was a significant drop in the number of new cases that were likely to involve LPP information as compared with 2021. Details are given in Chapter 4 of this report. In making applications for prescribed authorizations, the LEAs provided sound justifications for the proposed duration based on operational requirement. The average duration of the prescribed authorizations, though longer than before, was justified and better reflected the operational requirement for the proper investigation of serious crimes.

1.7 In 2022, I continued to have meetings with the panel judge whenever necessary to exchange views on issues regarding the granting of authorizations under the Ordinance and the compliance by the LEAs.

1.8 In this annual report, I have continued the practice of providing the utmost transparency of the work of the Commissioner and at the same time, taking great care not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security, as expressly required by various provisions of the Ordinance. With that in mind, I hope I have included as much information as possible insofar as its publication does not amount to contravention of this 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 1,119 written applications for interception made by the LEAs. All of them were granted by the panel judge. Of the 1,119 applications, 581 were for authorizations for the first time ('fresh applications') and 538 were for renewals of authorizations that had been granted earlier ('renewal applications').

Emergency authorizations

2.3 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 an 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.

2.4 During the report period, no application for emergency authorization for interception was made by any of the LEAs.

Oral applications

2.5 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 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 thereon 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.

2.6 During the report period, no oral application for interception was made by any of the LEAs.

Duration of authorizations

2.7 The maximum duration of a prescribed authorization allowed by the Ordinance is three months. During the report period, the longest approved duration of authorization was 87 days and the shortest was several days. Overall, the average duration of all the authorizations was about 49 days.

Offences

2.8 Table 2(a) in Chapter 8 sets out 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

2.9 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 the responsibility to discontinue an interception or a part of an interception (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.

2.10 The number of authorizations for interception revoked fully under section 57 during the report period was 531. Another 55 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.

2.11 The grounds for discontinuance were that the interception operation was not or no longer productive, the subject had been arrested, the subject had stopped using the telecommunications facility concerned for his criminal activities, or the value to continue the interception

operation was considered not proportional to the risk of obtaining LPP information, etc.

2.12 Revocation of authorizations is also expressly provided for in section 58 of the Ordinance. When 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, nevertheless, the officer of the LEA in charge of the interception who has become aware of the arrest is obliged by section 58 to submit 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 123 arrests but only 48 section 58 reports were made to the panel judge. Of those 48 section 58 reports, the panel judge allowed the interception operations of 16 of them to continue subject to additional conditions to guard against the risk of obtaining LPP information. For the remaining 32 reports, the panel judge allowed the interception operation to continue without additional conditions imposed because the subject was released unconditionally before submission of the relevant section 58 report to the panel judge, the offence for which the subject was arrested was minor in nature or there was no indication that the subject had sought or would seek professional legal advice. As regards the other arrest cases, decisions were made by the LEAs concerned to discontinue the interception operations pursuant to section 57.

2.13 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

2.14 There were 15 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 to be in order during periodical visits to the LEAs.

Arrests attributable to interception

2.15 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 as 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 as 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 91 persons, who were subjects of prescribed authorizations, were arrested as a result of or further to interception operations. In addition, 116 non-subjects were also arrested consequent upon the interception operations.

Procedure of oversight for interception

2.16 The LEAs' compliance with the requirements of the Ordinance in respect of the interception cases reported in 2022 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 and through other means.

The following paragraphs further explain how the above reviews were carried out.

Checking of weekly reports

2.17 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 judge/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.

2.18 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 are therefore obliterated or sanitised so that such information will always be kept confidential with minimal risk of leakage.

2.19 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

2.20 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 in the offices of the LEAs so that secret or sensitive information contained in the 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.

2.21 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.

2.22 In addition to matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 622 applications for interception and 310 related documents/matters had been checked during the Commissioner's periodical visits to the LEAs in the report period.

Examination of interception products

2.23 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.

2.24 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.

2.25 During the report period, with the basis of selection as mentioned in paragraph 2.24 above, the interception products of 616 selected authorizations were examined.

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

2.26 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.

2.27 Wherever necessary, counter-checks were conducted with non-LEA parties 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. As required by the Commissioner, the Team has 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. Moreover, the Secretariat counter-checked the LEAs' returns with communications services providers' four-weekly returns to verify the intercepted facilities reported by the LEAs.

Results of various forms of checking

2.28 Various forms of checking, including examination of interception products in respect of the specific cases (such as LPP cases) and 616 selected authorizations, 622 applications and 310 related documents/matters, were conducted in the report period as mentioned in paragraphs 2.17 to 2.27. No unauthorized interception was found but three cases of irregularity/incident were revealed as detailed in Chapter 6.

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:
- (a) 29 written applications for Type 1 surveillance including 20 fresh and nine renewal applications; and
 - (b) five written applications for Type 2 surveillance including three fresh and two renewal applications.
- 3.4 All applications for Type 1 and Type 2 surveillance were approved.

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 an 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, three authorizations for Type 2 surveillance were granted pursuant to oral applications and confirmed in writing within 48 hours from the issue of the authorizations. No oral application for Type 1 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. In the report period, the longest approved duration of Type 1 surveillance granted was about 92 days whereas the shortest one was about four days. Overall, the average duration for such authorizations was about 60 days. The longest approved duration of Type 2 surveillance granted in the report period was about 13 days while the shortest one was about five days. The overall average duration of Type 2 surveillance executive authorizations was about eight 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, 18 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 that the subject had been arrested, the anticipated activities did not materialise or the LEA concerned needed to modify the scope of the surveillance authorized. 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, 17 prescribed authorizations 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 As regards Type 2 surveillance, during the report period, six Type 2 surveillance operations were discontinued under section 57 before their natural expiration. The grounds for discontinuance were mainly that the surveillance had been carried out or the subject had been arrested. All the prescribed authorizations concerned were subsequently revoked by the authorizing officers.

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 and two Type 2 surveillance operations involving LEAs being aware of the arrest of subjects. The LEAs were aware that a total of 27 subjects of the Type 1 surveillance operations had been arrested but only one report was made to the panel judge under section 58 seeking continuation of the prescribed authorization. In that case, it was assessed at the time of application that the surveillance operation would likely obtain information subject to LPP and the panel judge imposed additional conditions in the prescribed authorization to guard against the risk of obtaining such information. As the LEA concerned assessed that the likelihood of obtaining LPP information through continued covert surveillance had not been heightened, the panel judge allowed the operation to continue subject to the additional conditions then in force. As regards Type 2 surveillance, the LEA concerned was aware that two subjects had been arrested but the LEA did not seek continuation of the executive authorizations by way of section 58 report to the relevant authority and the Type 2 surveillance operations concerned were

discontinued pursuant to section 57.

Authorizations with five or more previous renewals

3.15 During the report period, no authorization for Type 1 or Type 2 surveillance was renewed for more than five times.

Application for device retrieval warrant

3.16 During the report period, there was no application for any device retrieval warrant for the devices used in Type 1 and Type 2 surveillance as the devices were removed at the time of the completion of the surveillance operation, successful or otherwise.

Arrests attributable to covert surveillance

3.17 As a result of or further to surveillance operations, a total of 35 persons who were subjects of the prescribed authorizations were arrested and 26 non-subjects were also arrested.

Procedure of oversight for covert surveillance

3.18 The LEAs' compliance with the requirements of the Ordinance in respect of covert surveillance cases reported in 2022 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

3.19 Weekly reports submitted by the LEAs and the PJO cover all statutory activities, including both types of covert surveillance. The way of checking, described in Chapter 2 for interception, equally applies to covert surveillance.

Examination of documents and information during periodical visits

3.20 The mechanism of checking cases during periodical visits to the LEAs is described in Chapter 2.

3.21 During the year, 32 applications for Type 1 surveillance and 48 related documents/matters were checked.

3.22 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, nine applications for Type 2 surveillance and ten related documents/matters were checked.

3.23 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.

Examination of surveillance products

3.24 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.

3.25 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.

3.26 During the report period, with the basis of selection as mentioned in paragraph 3.25 above, the surveillance products of 13 selected authorizations were examined.

Checking of surveillance devices

3.27 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. All the LEAs have adopted computerised device management system ('DMS') in their device stores to keep track of surveillance devices used either for ICSO purposes or non-ICSO purposes. An inventory list of surveillance devices for each device registry is maintained with a unique serial number assigned to each single surveillance device item for identification as well as for checking purposes.

3.28 The LEAs have also established a control mechanism for issuing and collecting surveillance devices. They maintain a register of devices withdrawn based on loan requests supported by a prescribed authorization. They also maintain a separate register of devices withdrawn for administrative or other non-surveillance purposes based on loan requests for surveillance devices in respect of which no prescribed authorization is required. Both types of register also record the return of the devices so withdrawn. 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 them with the information provided in the weekly report forms and other relevant documents, the LEA concerned will be asked to provide clarification and explanation.

Removable storage media

3.29 To better control the issue and return of removable storage media ('RSM') (e.g. memory cards, discs and tapes) along with surveillance devices, the LEAs have adopted the use of tamper-proof labels to seal the RSM 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. 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 are clearly documented in the device register.

Visits to device stores

3.30 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 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 in 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 against the copy registers;
- (g) to compare the unique number on each item as shown in 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 necessary, as to how they may be used for conducting covert surveillance operations.

3.31 During the report period, a total of four visits were made to the device stores of the LEAs.

Devices for non-ICSO purposes

3.32 Surveillance devices do not fall within the regulatory ambit of the Commissioner under the ICSO if they are not used for covert surveillance. Notwithstanding, surveillance devices that are allegedly used for non-ICSO purposes only should also be kept under close scrutiny and control because of the possibility that they might be used without authorization or unlawfully. As a matter of practice, an authorized covert surveillance should always be 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. Where necessary, the LEAs are required to provide copies of the device request memo for examination by the Commissioner.

3.33 During the year, no report relating to surveillance devices for non-ICSO purposes was received from the LEAs.

Results of various forms of checking

3.34 Various forms of checking, including examination of surveillance products in respect of the specific cases (such as LPP cases) and 13 selected authorizations, 41 applications and 58 related documents/matters, were conducted in the report period as mentioned in paragraphs 3.19 to 3.31. During the year, there was one incident reported by an LEA concerning the device issuing process and the details are set out in Chapter 6. Other than that, no unauthorized surveillance, non-compliance or irregularity was revealed during the checking.

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 statutory activities. Section 31 of the Ordinance stipulates that no interception of telecommunication service of a lawyer used to provide legal advice to clients or covert surveillance at an office or residence of a lawyer ('relevant premises') may be authorized unless the lawyer concerned or the relevant premises is involved in a serious crime or a threat to public security.

4.2 The COP also 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 it transpires that there is anything 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. Section 58 of the Ordinance requires that when an LEA becomes aware that the subject of interception or covert surveillance has been arrested, the LEA shall submit to the relevant authority a report assessing the effect of the arrest on the likelihood that any LPP information would be obtained by continuing the interception or covert surveillance. Section 58A further requires an LEA to report to the relevant authority any inaccurate information or change of circumstances. 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 updated 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 LPP information involvement, 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.

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. 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 also be notified of such occurrence. 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.

Outstanding LPP cases in 2021

4.7 It was reported in paragraph 4.23 of the Annual Report 2021 that there were 19 cases of heightened/assessed LPP likelihood which were still on-going beyond 2021. The authorized operations of these 19 cases were discontinued in 2022 and I had completed the review of these cases in the report period. Other than three cases which involved an incident referred to in Case 6.1 of Chapter 6, nothing untoward was revealed by various forms of checking of the other 16 LPP cases.

LPP reports received in 2022

4.8 In the report period, LEAs submitted notifications, in accordance with the COP, on 63 new cases that were likely to involve LPP information.

4.9 Amongst these 63 new LPP cases, 20 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 20 cases.

4.10 For the remaining 43 cases ^{Note 2}, the LEAs submitted REP-11 or section 58 reports to the panel judge on the subsequent change in

^{Note 2} 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.

circumstances relating to LPP involvement or likelihood. These 43 cases included:

- (a) two cases of obtaining LPP information;
- (b) four cases of obtaining information suspected to be subject to LPP; and
- (c) 37 cases of heightened likelihood of obtaining LPP information:
 - (i) in 35 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; and
 - (ii) in two cases the concerned LEA discontinued the operations of its own accord.

4.11 Of the 63 new LPP cases, the authorized operations for 36 cases were discontinued by the end of the report period. I had completed the review of these 36 cases. In the review of these LPP cases, all the relevant documents and records including the prescribed authorizations, the REP-11 reports, section 58 reports, the determinations by the panel judge, the notes, the summaries, the communication data, the ATRs, etc. were checked. 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, and 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.

4.12 The protected products of the 36 LPP cases were also examined with particular reference to 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 but had not been reported to the relevant authority.

One case of obtaining LPP information

4.13 The case where LPP information was obtained involved an interception operation. At the grant of the prescribed authorization, the interception operation was assessed as having no likelihood of obtaining LPP information.

4.14 As the interception progressed, one day, the LEA concerned encountered a call which contained suspected LPP information. The LEA submitted to the panel judge an REP-11 report on suspected obtainment of LPP information and sought approval to continue with the prescribed authorization. After considering the REP-11 report, the panel judge allowed the prescribed authorization to continue with additional conditions imposed. The interception operation was later discontinued by the LEA because it was not productive.

4.15 I had reviewed the case and did not find any irregularity. As regards the call which contained suspected LPP information, I had listened to the call and considered that LPP information was obtained by the LEA inadvertently.

Two cases of obtaining information suspected to be subject to LPP

Case 1:

4.16 The case where suspected LPP information was obtained 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.

4.17 As the interception progressed, one day, the LEA concerned encountered a call which contained suspected LPP information. The LEA submitted to the panel judge an REP-11 report to report the obtainment of suspected LPP information. Having considered the REP-11 report, the panel judge allowed the prescribed authorization to continue subject to more additional conditions. The interception operation was later discontinued by the LEA because it was not productive.

4.18 I had reviewed the case and did not find any irregularity. As regards the call which contained suspected LPP information, I had listened to the call and considered that the information concerned was not LPP information.

Case 2:

4.19 The case where suspected LPP information was obtained

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.

4.20 As the interception progressed, one day, the LEA concerned encountered a call which contained suspected LPP information. The LEA discontinued the operation of its own accord and submitted an REP-11 report and a discontinuance report to the panel judge, who revoked the prescribed authorization accordingly.

4.21 I had reviewed the case and did not find any irregularity. As regards the call which contained suspected LPP information, I had listened to the call and considered that the information concerned was not LPP information.

18 cases of heightened LPP likelihood and 15 cases of assessed LPP likelihood

4.22 The review of the 33 heightened/assessed LPP likelihood cases had been conducted in accordance with the mechanism as stated in paragraphs 4.11 and 4.12 above. Of these 33 cases, one case was related to the incident referred to in Case 6.2 of Chapter 6. Nothing untoward was found in the remaining 32 cases.

27 on-going cases of obtaining LPP information, obtaining information suspected to be subject to LPP and heightened/assessed LPP likelihood

4.23 As the authorized operations for one case of obtaining LPP information, two cases of obtaining information suspected to be subject to LPP and 24 cases of heightened/assessed LPP likelihood reported in 2022

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

4.24 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 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 the same as those set out in paragraphs 4.5 and 4.6 above.

JM reports received in 2022

4.25 In 2022, I received a notification on one case with heightened likelihood of obtaining JM submitted in accordance with the COP, for which REP-11 report was submitted to the panel judge. As the authorized operation for this case is still on-going beyond the report period, details about my review of this case will be reported in the next annual report.

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 to 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, the Customs and Excise Department, the Hong Kong Police Force, the Immigration Department and the 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 2022

5.8 During the report period, there were three applications for examination. Of these applications, two applications were subsequently not pursued by the applicants. The remaining application alleged interception. Since it did not come 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 this case.

5.9 After making all necessary enquiries, I found this case not in the applicant's favour and accordingly notified him in writing of the findings, with such notice issued during the report period. 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 such 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 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, to prevent any advantage from being obtained by criminals

or possible criminals over the LEAs in the latter's efforts in fighting crimes and to protect 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, including incidents which are not covered by section 54 of the Ordinance for his consideration and scrutiny so that any possible non-compliance will be properly dealt with.

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, the LEAs would normally 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 was made.

Cases occurring in 2022

6.5 In 2022, there were four cases of irregularity/incident. The review of these four cases had been completed and details of the review are set out below.

Case 6.1 : Absence of proper measure to restrict access to interception products involving prohibited telephone numbers

6.6 The irregularity in this case was discovered in 2022 during a review of three LPP cases referred to in Chapter 4 of the Annual Report 2021.

6.7 Three interception operations were conducted by an LEA on three different subjects under the same crime investigation. At the grant of the prescribed authorizations concerned, the panel judge imposed additional conditions on the authorizations. One of the additional conditions was that officers of the LEA should refrain from accessing interception products involving certain specified telephone numbers ('the prohibited numbers'). In order to comply with this additional condition ('the Additional Condition'), the LEA input the prohibited numbers into the relevant computer system, which would screen out the interception products involving the prohibited numbers from being accessed by officers.

6.8 A few months later, the panel judge granted the renewal authorizations without imposing any additional conditions as the

three interception operations would no longer be likely to obtain LPP information ('Non-LPP Authorizations') on the day of the application for renewal ('Day 1'). Screening of the prohibited numbers could therefore be ceased when these Non-LPP Authorizations took effect two days later ('Day 3').

6.9 In the course of my review of these three LPP cases, I noticed that, when the Additional Condition was still in force on Day 1, screening of the prohibited numbers in the computer system had already been ceased and so the LEA officers could gain access to the interception products involving the prohibited numbers, if any. I requested the LEA to conduct an investigation into the matter and submit a detailed report to me.

6.10 After investigation, the LEA found that the irregularity was attributed to the miscommunication between the registry which handled the application documents and the dedicated team which maintained the computer system. On Day 1, an officer of the registry ('Officer A') informed the dedicated team by email that the Additional Condition had been waived by the panel judge and requested the dedicated team to 'cease screening' by providing a copy of the Non-LPP Authorizations to the dedicated team for reference but without stating the exact time when the screening should cease. Officer A assumed that the dedicated team would schedule the cessation of the screening on Day 3 when the Non-LPP Authorizations would take effect.

6.11 Upon receipt of Officer A's email on Day 1, an officer of the dedicated team ('Officer B') immediately ceased the relevant screening and informed Officer A by email indicating that 'Cessation of screening completed'.

6.12 The supervisor of the registry^{Note 3} noted the emails of Officer A and Officer B and made similar assumption as Officer A that the dedicated team would arrange for the screening be ceased at the time when the Non-LPP Authorizations took effect on Day 3. The supervisor also assumed that the dedicated team had completed scheduling the cessation accordingly. Eventually, the screening of the prohibited numbers was ceased almost 40 hours earlier than it should be. The supervisor did not notice such irregularity until she checked the actual time of cessation after receipt of enquiry from my Secretariat.

6.13 The LEA took the views that the early cessation of screening was not due to any bad faith or ulterior motive on the part of any of the officers concerned. The LEA proposed to remind Officer A and his supervisor that they should specify their requests clearly in their communication with the dedicated team in future. As regards Officer B, the LEA proposed to remind her on the need to be more vigilant in discharging ICSO-related duties. To prevent recurrence of similar incidents, the officers concerned will clearly specify the cessation time of the required screening.

6.14 In reviewing the case, I checked all the relevant records available, which confirmed that there was no interception product involving the prohibited numbers during the gap of some 40 hours between Day 1 and Day 3. I noted the LEA's findings and considered the proposed action against the three officers involved in the case appropriate.

6.15 In this case, the irregularity was mainly due to miscommunication among the officers concerned. Had there been any interception products related to the prohibited numbers accessed by the LEA officers after cessation of screening, it would have led to

^{Note 3} This supervisor was the same officer involved in Case 6.6 referred to in paragraphs 6.77 to 6.94 of the Annual Report 2020 in which she was identified as 'Supervisor B'.

non-compliance with the additional conditions of the prescribed authorizations concerned. I emphasised to the LEA that the officers must not rely on assumptions when performing any duties under the ICSO regime to avoid any miscommunication.

Case 6.2 : Mistake in the process of issuing a surveillance device

6.16 In September 2022, an LEA reported to me an incident that a mistake was made in the process of issuing a surveillance device. The incident related to two LPP cases (one case of obtaining information subject to LPP and the other with heightened LPP likelihood) referred to in Chapter 4.

6.17 A prescribed authorization was granted to the LEA for the conduct of a Type 1 surveillance ('Authorization A') in connection with a crime investigation.

6.18 Under the same crime investigation, a panel judge later granted another prescribed authorization to the LEA for conducting another Type 1 surveillance ('Authorization B').

6.19 One day, for the purpose of carrying out a surveillance operation pursuant to Authorization A, an investigator prepared a standard form requesting the issue of a surveillance device ('the Requesting Officer') and submitted the duly completed request form to the device store. According to the operational manual of the LEA, the Requesting Officer was required to present a copy of Authorization A to the device store when submitting the request form but she did not do so. Upon receipt of the request form, an Issuing Officer of the device store checked the information stated therein. The Device Store Manager ^{Note 4},

^{Note 4} This Device Store Manager was the same Device Store Manager involved in Outstanding case (ii) referred to in paragraphs 6.14 to 6.42 of the Annual Report 2020.

after checking the request form, considered that its contents were in line with the terms and conditions of Authorization A according to his recollection as the surveillance device ('the Device') was issued under Authorization A on frequent occasions and therefore confirmed the issue of the Device. With the Device Store Manager's confirmation, the Issuing Officer logged in the DMS to arrange for the issue of the Device. During the issuing process, the Issuing Officer had to scan the barcode of Authorization A. As the Requesting Officer did not bring along with her a copy of Authorization A, the Issuing Officer referred to a folder maintained by the device store which contained hard copies of prescribed authorizations in respect of all ongoing covert surveillance operations conducted by the LEA. However, the Issuing Officer retrieved Authorization B instead of Authorization A from the folder and scanned the barcode of Authorization B. The whole issuing process conducted by the Issuing Officer was witnessed by the Device Store Manager, who verified the information inputted into the DMS without inspecting the copy of the relevant authorization and granted approval through the system. Eventually, the Device, together with a record of issue which showed that the Device was issued under Authorization B, was handed over to the Requesting Officer. At this stage, neither the Requesting Officer, the Issuing Officer nor the Device Store Manager noticed the mistake.

6.20 When the deployment of the Device was being prepared, the Device Store Manager checked the record of issue which was automatically sent to his email account and discovered that the Issuing Officer had mistakenly issued the Device to the Requesting Officer under Authorization B. The Device Store Manager then asked the Issuing Officer for the immediate return of the Device. About twenty minutes after the issue of the Device, it was returned to the device store without being actually deployed. The Device Store Manager made a remark on the DMS accordingly.

6.21 The LEA took the views that the mistake was not due to any bad faith or ulterior motive on the part of any of the officers concerned. The LEA proposed to give an advice (non-disciplinary) to each of the Issuing Officer and the Device Store Manager for their lack of vigilance and inadequate performance in discharging their roles. As regards the Requesting Officer, the LEA proposed no sanction be imposed on her as the responsibility in ensuring accuracy in the device issuing process primarily rested with officers of the device store. To prevent recurrence of similar incidents, the investigators were reminded to present a copy of the authorization concerned to the device store when making request for issue of surveillance device.

6.22 To facilitate my review of this case, I paid a visit to the device store and required the LEA to demonstrate the device issuing process to me. Having reviewed the case, I agreed with the findings of the LEA that there was no ulterior motive involved in the incident. The proposed actions against the officers concerned and the improvement measure taken were considered appropriate.

Case 6.3 : No assessment made regarding a call with contents which may give rise to heightened LPP likelihood

6.23 In checking the protected products of a case, it was noticed that the contents of one call contained information which may give rise to heightened likelihood of obtaining LPP information. The LEA concerned was requested to advise whether any assessment of the likelihood of obtaining LPP information arising from the call was made, the assessment result and the reasons for not recording the assessment made. The LEA replied that due to circumstances of the call, the officer who monitored the interception operation was not aware that the content of the call contained information that may give rise to heightened LPP likelihood. The matter was thus not reported to his supervisor for further assessment.

Notwithstanding this, checking of the protected products of this case did not reveal that any LPP information was obtained. The LEA proposed to give a verbal advice (non-disciplinary) to the officer concerned reminding him to maintain a high level of vigilance when performing his duty.

6.24 While I accepted the LEA's explanation for missing out the assessment of the likelihood of obtaining LPP information arising from the concerned call, I emphasised to the LEA that all officers should handle all information gathered from interception operations with high degree of vigilance to guard against the risk of obtaining LPP information. The proposed action against the officer concerned was considered appropriate.

Case 6.4 : Re-granting of access right to interception products pending the panel judge's determination of continuance of the prescribed authorization concerned

6.25 An LEA reported to me an incident where the access right to the interception products obtained from an interception operation was re-granted to officers before the panel judge, upon consideration of a section 58 report to be submitted by the LEA reporting the arrest of the subject, allowed the continuance of the prescribed authorization.

6.26 In accordance with section 58 of the Ordinance, if the officer concerned becomes aware of the arrest of the subject of an interception operation and considers that the operation should continue, he should cause a report to be provided to the panel judge, with an assessment of the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the operation. In order to guard against the risk of obtaining LPP information pending determination of the panel judge, the LEA had issued some internal guidelines on suspending the monitoring of an interception operation under certain circumstances. The access right to the relevant interception products should be removed once a decision is

made to suspend the monitoring of the interception. If the panel judge, upon consideration of the section 58 report, allows the relevant prescribed authorization to continue, the access right will be re-granted to officers for resumption of the monitoring of the interception.

6.27 In this case, as the interception progressed, one day, an officer of the interception unit found an alert message in the computer system indicating the arrest of the subject of the interception. The officer reported the arrest to his supervisor, who then instructed the officer to remove the access right in respect of the interception concerned. Later on the same day, the interception unit confirmed with the relevant operation unit the arrest of the subject. At the same time, the operation unit also informed the interception unit that the subject had subsequently been released unconditionally. In the circumstances, the supervisor assessed that it would be unlikely to obtain any LPP information from the interception and directed resumption of monitoring of the interception. Access right was therefore re-granted to the officers concerned. About an hour later, the supervisor, after deliberation, considered that it was safer to suspend the monitoring of the interception before a section 58 report was submitted to the panel judge. Access right was therefore removed again. A section 58 report was submitted to the panel judge a few days later. In the report, the LEA also informed the panel judge of the resumption of monitoring of the interception. Upon consideration of the section 58 report, the panel judge allowed the prescribed authorization to continue without additional conditions imposed.

6.28 After investigation, the LEA considered that the situation where the subject had already been released unconditionally when the interception unit confirmed the arrest of the subject with the operation unit was a special circumstance, which was not explicitly covered by the relevant guidelines. With the release of the subject, the interception operation was unlikely to obtain LPP information and the decision by the

supervisor to re-grant the access right was not unreasonable. The incident did not involve any ulterior motive. Having said that, the LEA considered that as the special circumstance was not covered by the guidelines, the supervisor should have sought advice from his senior before making a decision to re-grant the access right. In this regard, the LEA proposed to issue a verbal advice (non-disciplinary) to the supervisor. The investigation by the LEA also found that no products obtained from the interception were accessed by any officers during the period when the access right was re-granted. The LEA indicated that the guidelines on the handling procedures upon arrest of subjects would be reviewed.

6.29 I have checked the ATRs, which confirmed that there was no access to the relevant interception products during the period concerned. I agreed with the LEA's findings that no ulterior motive was involved in the incident, and considered the proposed action against the supervisor appropriate.

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 During the report period, I made a recommendation relating to the timing of making an assessment of the likelihood of obtaining LPP information. I advised the LEAs that the assessment of LPP likelihood should be made at the time when a triggering event occurred and based on the then available information. LEAs should not defer the assessment pending availability of more information. Separate LPP assessments should be made on each and every occasion when updated or new information emerges and a triggering event occurs.

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)]

		Judge's Authorization	Emergency Authorization
(i)	Number of authorizations issued	581	0
	Average duration	42 days	—
(ii)	Number of authorizations renewed	538	Not applicable
	Average duration of renewals	57 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	15	Not applicable
(vi)	Number of applications for the issue of authorizations refused	0	0
(vii)	Number of applications for the renewal of authorizations refused	0	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)]

		Judge's Authorization	Executive Authorization	Emergency Authorization
(i)	Number of authorizations issued	20	3	0
	Average duration	55 days	9 days	—
(ii)	Number of authorizations renewed	9	2	Not applicable
	Average duration of renewals	73 days	7 days	—
(iii)	Number of authorizations issued as a result of an oral application	0	3	0
	Average duration	—	9 days	—
(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	0	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 ^{Note 5}
[section 49(2)(b)(i)]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
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
Bookmaking	Cap. 148	Section 7, Gambling Ordinance
Bribery	Cap. 201	Section 4, Prevention of Bribery Ordinance
Corrupt transactions with agents	Cap. 201	Section 9, Prevention of Bribery Ordinance
Robbery	Cap. 210	Section 10, Theft Ordinance
Burglary	Cap. 210	Section 11, Theft Ordinance
Handling stolen goods	Cap. 210	Section 24, Theft Ordinance
Shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm	Cap. 212	Section 17, Offences against the Person Ordinance
Conspiracy to defraud	—	Common Law

^{Note 5} The offences are arranged in the order of the respective chapter numbers of the related Ordinances.

Table 2(b)

Surveillance – Major categories of offences for the investigation of which prescribed authorizations have been issued or renewed ^{Note 6}
[section 49(2)(b)(i)]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drug	Cap. 134	Section 4, Dangerous Drugs Ordinance
Bribery	Cap. 201	Section 4, Prevention of Bribery Ordinance
Corrupt transactions with agents	Cap. 201	Section 9, Prevention of Bribery Ordinance
Forcible taking or detention of person, with intent to sell him	Cap. 212	Section 42, Offences against the Person Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance
Conspiracy to defraud	—	Common Law

^{Note 6} The offences are arranged in the order of the respective chapter numbers of the related Ordinances.

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 ^{Note 7}		
	Subject	Non-subject	Total
Interception	91	116	207

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 ^{Note 8}		
	Subject	Non-subject	Total
Surveillance	35	26	61

^{Note 7} Of the 207 persons arrested, 34 were attributable to both interception and surveillance operations that had been carried out.

^{Note 8} Of the 61 persons arrested, 34 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 234.

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)]

(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	26	Interception & Surveillance	During the report period, 26 visits were made to the LEAs 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 663 applications and 368 related documents/matters had been checked. (See paragraph 2.22 of Chapter 2 and paragraphs 3.21 and 3.22 of Chapter 3.)
(c) Examination of protected products at the LEAs' offices	34	Interception & Surveillance	In 2022, 34 visits were made to the LEAs for examination of protected products. Specific cases such as LPP cases reported by the LEAs, interception products of 616 selected

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>authorizations and surveillance products of 13 selected authorizations were examined.</p> <p>(See paragraph 2.25 of Chapter 2 and paragraph 3.26 of Chapter 3.)</p>
(d) LPP cases reviewed by the Commissioner	55	Interception & Surveillance (19 reviews)	<p><u>Outstanding LPP cases in 2021</u> 19 cases of heightened/assessed LPP likelihood were still on-going beyond 2021 and the authorized operations of these cases were discontinued in 2022.</p> <p>The review of these cases had been completed. Other than three cases which involved an incident referred to in Case 6.1 of Chapter 6, nothing untoward was revealed.</p> <p>(See paragraph 4.7 of Chapter 4.)</p>
		Interception	<p><u>One case of obtaining LPP information</u> An LEA encountered an intercepted call which contained suspected LPP information. The Commissioner considered that LPP information was obtained inadvertently. Details are set out in paragraphs 4.13 to 4.15 of Chapter 4.</p>
		Interception (2 reviews)	<p><u>Two cases of obtaining information suspected to be subject to LPP</u> An LEA encountered intercepted calls which contained suspected LPP information. The Commissioner considered that the information concerned was not LPP information. Details are set out in paragraphs 4.16 to 4.21 of Chapter 4.</p>
		Interception & Surveillance (33 reviews)	<p><u>18 cases of heightened LPP likelihood and 15 cases of assessed LPP likelihood</u> All the relevant documents and records were checked and the</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>protected products were examined. Except for the LPP case mentioned in Case 6.2 of Chapter 6, nothing untoward was found.</p> <p>(See paragraph 4.22 of Chapter 4.)</p>
(e) Non-compliance/irregularities/incidents reviewed by the Commissioner	4	Interception	<p><u>Case 6.1</u> Proper measure to restrict access to interception products involving prohibited telephone numbers of three interception operations was absent. Details are set out in paragraphs 6.6 to 6.15 of Chapter 6.</p>
		Surveillance	<p><u>Case 6.2</u> There was a mistake in the process of issuing a surveillance device under a prescribed authorization. Details are set out in paragraphs 6.16 to 6.22 of Chapter 6.</p>
		Interception	<p><u>Case 6.3</u> Assessment was not made regarding a call with contents which may give rise to heightened likelihood of obtaining LPP information. Details are set out in paragraphs 6.23 and 6.24 of Chapter 6.</p>
		Interception	<p><u>Case 6.4</u> Access right to interception products was re-granted upon the unconditional release of the subject of an interception operation before submission of section 58 report. Details are set out in paragraphs 6.25 to 6.29 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

Number of reviews conducted under section 41(2)		Interception/ Surveillance	Summary of reviews
(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	Nil	Not applicable	For the report period, there was no report submitted under this category.

Table 6

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

Section 41(1)

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
(a) Reviews of LPP cases	2	Interception	<u>Case 6.1</u> Absence of proper measure to restrict access to interception products involving prohibited telephone numbers.
		Surveillance	<u>Case 6.2</u> Mistake in the process of issuing a surveillance device under a prescribed authorization.
			(For details, see item (e) under section 41(1) in Table 5 and Chapter 6.)
(b) Other reviews	2	Interception	<u>Case 6.3</u> No assessment made regarding an intercepted call with contents which may give rise to heightened LPP likelihood.
		Interception	<u>Case 6.4</u> Re-granting of access right to interception products before submission of section 58 report.
			(For details, see item (e) under section 41(1) in Table 5 and Chapter 6.)

Section 41(2)

Number of cases of irregularities or errors identified in the reviews under section 41(2)		Interception/ Surveillance	Broad nature of irregularities or errors identified
(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 no report submitted under this category.

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
3	1	0	0	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)]	1	1	0	0

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)]

Recommendations made by the Commissioner		Interception/ Surveillance	Broad nature of recommendations
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]	1	Interception & Surveillance	An assessment of the likelihood of obtaining LPP information should be made at the time when a triggering event occurs and based on the then available information. (See paragraph 7.2 of Chapter 7.)

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)]

	Number of cases
Interception	1
Surveillance	0

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)]

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
Not applicable	For the report period, no disciplinary action was taken in respect of any officer under this category.	Not applicable

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 2022 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 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, all 1,119 applications for interception and 37 applications for covert surveillance were granted by the relevant authorities.

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. Instead of applying for a fixed duration of the prescribed authorization which may not properly reflect the operational need as usually done in the past, the LEAs took heed of my recommendation and sought a suitable duration for each individual prescribed authorization based on the operational requirement with sound justifications. The average duration of the prescribed authorizations, though longer than before, was justified and better reflected the operational requirement for the proper investigation of serious crimes.

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 2.16 of Chapter 2 and paragraph 3.18 of Chapter 3. These included checking of the weekly reports submitted by the LEAs and the PJO, and 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 and through other means would be done. For covert surveillance operations, the records kept by the surveillance device recording system of the LEAs would also be checked.

9.6 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. No unauthorized interception or surveillance was detected. A few cases of irregularity/incident are 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 Through the examination of protected products, 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 In 2022, 63 new LPP and one JM cases were reported. Except 27 LPP and one JM cases which were still on-going beyond the report period, review of 36 LPP cases had been completed. Of the 36 LPP cases, except for the one specifically mentioned in Cases 6.2 of Chapter 6, nothing untoward was found. There was one case on actual obtainment of information subject to LPP as detailed in paragraphs 4.13 to 4.15 of Chapter 4. At the grant of the relevant prescribed authorization, the interception operation was assessed as having no likelihood of obtaining LPP information. When the LEA concerned encountered a call which contained information suspected to be subject to LPP, it submitted an

REP- 11 report to the panel judge and sought approval to continue with the prescribed authorization. The panel judge allowed the prescribed authorization to continue with additional conditions imposed. The interception operation was later discontinued. The review of this case was completed. I had listened to the call concerned and considered that the information contained therein was subject to LPP. I considered that the LPP information was obtained inadvertently and no irregularity was found.

9.10 With regard to the 19 on-going LPP cases reported in the Annual Report 2021, the authorized operations concerned were discontinued in 2022. Other than three cases which involved an incident referred to in Case 6.1 of Chapter 6, nothing untoward was revealed by various forms of checking of the other 16 LPP cases.

9.11 The LEAs were observed to have recognised the importance of protecting information which might be subject to LPP. They continued to adopt a very cautious approach in handling these cases. They had taken my recommendations and made more realistic assessments of the likelihood of obtaining LPP information during covert operations rather than just adopting a mechanical approach. I appreciated 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 information subject to LPP. I advised the LEAs that when making an assessment on the likelihood of obtaining LPP information, they should make the assessment at the time when a triggering event occurred and based on the then available information. Separate LPP assessments should be made on each and every occasion when updated or new information emerges and a triggering event occurs.

Non-compliance, irregularities or incidents

9.12 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 2022, there were four cases of irregularity/incident.

9.13 For all the cases reported in Chapter 6, I did not find any deliberate disregard of the statutory provisions or the COP nor have we found any ulterior motive or ill will on the part of the officers involved. The officers of the LEAs were nevertheless reminded that they should always stay alert and exercise care in different stages of the operations conducted under the ICSO.

Response from LEAs

9.14 I am pleased to note that in the report period, LEAs were positive to my recommendation and in reviewing and tightening up procedures and guidelines aiming for better operation of the ICSO regime. They also took initiative to implement system enhancements whenever necessary to prevent any technical mistakes or to avoid human errors.

CHAPTER 10

ACKNOWLEDGEMENT AND WAY FORWARD

Acknowledgement

10.1 During the report period, various parties including the panel judge, the Security Bureau, the LEAs and the communications services providers continued to provide valuable support to me in performing the oversight and reviewing functions under the ICSO. I would like to express my sincere thanks to all of them.

10.2 I would also point out that despite the occasional but rare cases of irregularities as a result of inadvertence, the LEAs have performed their duties with enthusiasm and professionalism.

Way forward

10.3 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. Various suggestions and recommendations on the procedural matters and control mechanism put forth in previous years were well implemented by the LEAs to enhance compliance with the Ordinance and the COP. In the course of discharging my duties in overseeing the performance of the LEAs over the compliance with the requirements of the Ordinance and in performing my reviewing functions as the Commissioner, I will continue to discuss with the relevant parties and put forth recommendations to address any new problems or issues that may be foreseen or arise in future to ensure that the highest standard of compliance by the LEAs will be observed.

10.4 I look forward to the continuous support and cooperation of all the parties involved in facilitating the work of the Commissioner under the ICSO.