

Commissioner on Interception of Communications and Surveillance

Annual Report 2022

Executive Summary

1. The Interception of Communications and Surveillance Ordinance (Cap. 589) ('the Ordinance' or 'ICSO') came into force on 9 August 2006 and was amended in June 2016. Pursuant to section 49 of the Ordinance, Mr Yeung Chun Kuen, GBS, the Commissioner on Interception of Communications and Surveillance ('Commissioner') submitted his second annual report, i.e. Annual Report 2022, to the Chief Executive on 26 June 2023. The report covers the period from 1 January to 31 December 2022. The following is a summary of the report.

2. The Commissioner's main functions are to oversee the compliance by the four law enforcement agencies ('LEAs') and their officers with the statutory requirements in relation to interception of communications and covert surveillance; and to conduct reviews to ensure full compliance by these LEAs with the relevant requirements of the Ordinance, the Code of Practice ('COP') issued by the Secretary for Security and the prescribed authorizations. The four LEAs are the Customs and Excise Department, the Hong Kong Police Force, the Immigration Department (Immigration Department is not entitled to conduct interception of communications under the Ordinance) and the

Independent Commission Against Corruption.

3. During the report period, a total of 1,153 prescribed authorizations (including fresh and renewed authorizations) were issued pursuant to written applications. Among them, 1,119 were panel judge's authorizations for interception, 29 were panel judge's authorizations for Type 1 surveillance and five were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs concerned. These authorizations included 15 cases that had been renewed more than five times. Besides, there were three authorizations for Type 2 surveillance that were granted pursuant to oral applications and confirmed in writing within 48 hours from the issue of the authorizations. No oral application for interception or Type 1 surveillance was made by the LEAs. No application for interception, Type 1 surveillance or Type 2 surveillance was refused.

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

5. A total of 234 persons were arrested in 2022 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

6. The Ordinance makes specific reference to legal professional privilege ('LPP') and journalistic material ('JM') for particular caution when interception or covert surveillance is to be authorized and carried out. The Ordinance stipulates that no interception of telecommunication service of a lawyer used to provide legal advice to clients and no covert surveillance at an office or residence of a lawyer may be authorized unless the lawyer or the premises concerned is involved in a serious crime or a threat to public security. The COP also provides that the LEAs should notify the Commissioner of covert operations that are likely to involve LPP information or JM as well as other cases where LPP information or JM has been obtained.

7. When making an application for a prescribed authorization, the LEA applicant is obligated to state his assessment of the likelihood of obtaining LPP information. If it subsequently transpires that there is anything which may affect the assessment, the officer concerned has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, to notify the authorizing officer by way of an REP-13 report. If an LEA becomes aware that the subject of interception or covert surveillance has been arrested and the LEA considers that the operation should continue, the LEA shall submit to the relevant authority a section 58 report assessing the effect of the arrest on the likelihood that any LPP information would be obtained by continuing the interception or covert surveillance. The concerned LEA is required to give the Commissioner

a similar notification of each of such occurrences in order to apprise the Commissioner promptly with updated information on this important matter.

8. For 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.

9. In the Commissioner's review of the cases that were likely to involve information protected by LPP ('LPP cases'), all the relevant documents and records including the prescribed authorizations, the REP-11 reports, section 58 reports, the determinations by the panel judge, the notes, the summaries, the communication data, the audit trail reports, etc. were checked and the protected products were examined.

10. 19 cases of heightened/assessed LPP likelihood reported in 2021 were on-going beyond 2021 and the authorized operations concerned were discontinued in 2022. The Commissioner had completed the review of these 19 cases in the report period. Other than three cases which involved an incident referred to in Case 6.1 of Chapter 6 of the report, nothing untoward was revealed by various forms of checking of the other 16 LPP cases.

11. In the report period, LEAs submitted notifications, in accordance with the COP, on 63 new LPP cases. Amongst these 63 new LPP cases, 20 cases were assessed at the time of application that the operations sought to be authorised would likely obtain information subject to LPP and there was no subsequent change in circumstances one way or another relating to LPP likelihood for these cases. For the remaining 43 cases, the LEAs submitted REP-11 or section 58 reports to the panel judge on the subsequent change in circumstances relating to LPP involvement or likelihood. These 43 cases included two cases of obtaining LPP information, four cases of obtaining information suspected to be subject to LPP and 37 cases of heightened likelihood of obtaining LPP information. For all the LPP cases where the operations were either assessed to have a likelihood of obtaining LPP information at the grant of the prescribed authorizations or allowed to continue after such likelihood was reported heightened, the panel judge had imposed additional conditions in the authorizations concerned.

12. Of the 63 new LPP cases, the authorized operations for 36 cases were discontinued by the end of the report period and the Commissioner had completed the review of these 36 cases. There was one case on actual obtainment of information subject to LPP. The Commissioner considered that the LPP information was obtained by the LEA concerned inadvertently and no irregularity was found. Details of the Commissioner's reviews of these 36 cases are given in Chapters 4

and 6 of the report.

13. As regards JM, in the report period, the Commissioner received a notification on one case with heightened likelihood of obtaining JM. The authorized operation for this case is still on-going beyond the report period.

14. The Commissioner selected from the weekly reports, on the basis of the information provided therein or at random, interception and surveillance products of other cases for examination. During the report period, with the said basis of selection, interception products of 616 selected authorizations and surveillance products of 13 selected authorizations were examined.

15. Various forms of checking, including examination of interception/ surveillance products in respect of the specific cases (such as LPP cases) and selected authorizations and examination of all the relevant documents and records, were conducted in the report period. While no unauthorized interception or surveillance was found, three cases of irregularity/incident concerning interception and one incident concerning the device issuing process were revealed as detailed in Chapter 6 of the report. There was no sign of abuse of surveillance devices for any unauthorized purposes.

16. For the four cases of irregularity/incident mentioned in Chapter 6 of the report, the Commissioner did not find any deliberate disregard of the statutory provisions or the COP, or any ulterior motive or ill will on the part of the officers involved. Officers of the LEAs were nevertheless reminded that they should always stay alert and exercise care at different stages of the operations conducted under the ICSO. The Commissioner pointed out that, despite the occasional but rare cases of irregularities as a result of inadvertence, the LEAs had performed their duties with enthusiasm and professionalism.

17. During the report period, no disciplinary action was taken for cases mentioned in Chapter 6 of the report.

18. The Commissioner has set out in Chapter 9 of the report an assessment of the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2022. 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 the Commissioner's recommendation and sought a suitable duration (subject to the statutory maximum of three months) 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.

19. The LEAs were also observed to have recognised the importance of protecting information which might be subject to LPP and they continued to adopt a very cautious approach in handling these cases. They had taken the Commissioner's recommendation and made more realistic assessments of the likelihood of obtaining LPP information during covert operations rather than just adopting a mechanical approach. The Commissioner 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. The Commissioner 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.

20. To better carry out the objects of the Ordinance, in the report period, the Commissioner made a recommendation to the LEAs under section 52 of the Ordinance. Details of the recommendation are

given in Chapter 7 of the report.

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

22. During the report period, three applications for examination were received. Of these applications, two applications were subsequently not pursued by the applicants. The remaining application alleged interception. After making all necessary enquiries, the Commissioner found this case not in the applicant's favour and accordingly notified the applicant of his findings in writing. Under the Ordinance, the Commissioner is not allowed to provide reasons for his determination. This statutory prohibition is designed to forbid the disclosure of any information which might prejudice the prevention or detection of crime or the protection of public security. There should not be any doubt that the Commissioner carries out his duties and functions under the Ordinance with utmost good faith and sincerity.

23. Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person when the Commissioner discovers any interception or covert surveillance carried out by an officer of any of the

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

24. In the report, the Commissioner expressed his sincere thanks to various parties including the panel judge, the Security Bureau, the LEAs and the communications services providers that had continued to provide valuable support to him in performing the oversight and reviewing functions under the ICSO during the report period. The Commissioner looks forward to the continuous support and cooperation of all the parties involved in facilitating his work under the ICSO.

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