

**Commissioner on Interception of Communications and Surveillance
Annual Report 2009**

Summary

1. The Interception of Communications and Surveillance Ordinance, Cap 589 ('the Ordinance' or 'ICSO') came into force on 9 August 2006. Mr Justice WOO Kwok-hing, Commissioner on Interception of Communications and Surveillance ('the Commissioner'), submitted his fourth annual report, ie Annual Report 2009, to the Chief Executive on 30 June 2010. The report covers the period from 1 January 2009 to 31 December 2009. The following is a summary of the report.

2. The Commissioner's main function is to oversee the compliance by four law enforcement agencies ('LEAs'), as specified in the Ordinance, with the statutory requirements in relation to interception of communications and covert surveillance, and to conduct reviews to ensure full compliance by these LEAs and their officers with the requirements of the Ordinance, the Code of Practice issued by the Secretary for Security and the conditions prescribed in the authorizations. The four LEAs are Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption.

3. During the report period, a total of 1,989 prescribed authorizations (including fresh and renewed authorizations) were issued.

Among them, 1,781 were judge's authorizations for interception, 130 were judge's authorizations for Type 1 surveillance (including one case in which Type 2 surveillance was elevated as Type 1 surveillance), and 78 were executive authorizations for Type 2 surveillance (three of which consequent on oral application) issued by designated authorizing officers of the LEAs. These authorizations included 50 that had been renewed more than five times.

4. During the report period, a total of 19 applications were refused (including 15 applications for interception and four applications for Type 2 surveillance). For reasons for refusal, please see paragraph 2.6 of Chapter 2 and paragraph 4.3 of Chapter 4 of the report.

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

6. A total of 366 persons were arrested in 2009 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. The Ordinance makes specific reference to legal professional privilege ('LPP') and journalistic material ('JM') for particular caution when interception and covert surveillance are to be authorized and carried out. During the report period, the Commissioner received five reports (involving seven prescribed authorizations) relating to the inadvertent

obtaining of information which might be subject to LPP or heightened likelihood of obtaining LPP information. Among them, only one case involved the actual obtaining of LPP information. During the report period, the Commissioner also received two reports (involving three prescribed authorizations) on inadvertent obtaining of information which contained JM. All were interception cases. Please refer to paragraphs 5.7 to 5.73 of Chapter 5 of the report for details of the Commissioner's reviews of these LPP and JM cases.

8. Owing to the doubts cast on the Commissioner's power to listen to intercept products and to avoid any perception or criticism of his willfully acting above the law, pending resolution by the Legislature, the Commissioner did not listen to any of the audio recordings of the intercepted calls of the LPP/JM cases mentioned above although the LEAs concerned had at the request of the Commissioner preserved such recordings for his review. Without listening to the audio recordings, the Commissioner could not verify the contents of the calls as reported in the REP-11 reports to see if there was any misrepresentation or verify whether there were other LPP/JM calls preceding the reported calls that should have been reported to the panel judge. Please see paragraphs 5.76 to 5.79 of Chapter 5 of the report for details.

9. The Commissioner observed that the panel judges continued to adopt a very stringent approach in dealing with cases which might involve LPP. Likewise, the panel judges took a careful if not stringent approach in

dealing with JM.

10. During the report period, a total of 23 applications for examination were received, among which five were subsequently not pursued by the applicants and one was not within the ambit of the Commissioner's functions. Of the remaining 17 applications, 10 related to alleged interception and seven claimed a combination of interception and covert surveillance. After carrying out examination, the Commissioner found 12 cases not in the applicants' favour and notified each of them in writing accordingly. Under the Ordinance, the Commissioner was not allowed to provide reasons for his determination. The remaining five cases are covered by section 45(2) and the processing of them were pending at the time of the writing of the report. During the report period, the Commissioner did not issue any notice to relevant person pursuant to section 48 of the Ordinance.

11. From the initial applications or letters of complaint made to the Commissioner in the past three and a half years, he found that a large number of applicants and complainants did not quite understand the basis of an application for examination under the Ordinance. Such lack of understanding would inevitably generate delay in the process of the application and suspicion on the part of the applicant that the Commissioner might not be dealing with the application or complaint in good faith. To address the issue, the Commissioner intends to include explanations of the proper basis of an application in the website of the

Commission so that applicants or prospective applicants can make reference to them for properly lodging an application for examination. This has now been done.

12. During the report period, the Commissioner and his office received 12 reports of non-compliance or irregularities from the LEAs. They related to six interception, two Type 1 surveillance and four Type 2 surveillance cases. While five of these reports were made under section 54 of the Ordinance on non-compliance with the relevant requirements, the remaining seven reports were submitted not under section 54 of the Ordinance as the heads of the LEAs concerned did not consider that the irregularities were due to or constituted a non-compliance by the LEAs or any of their officers. In addition, there were two outstanding cases brought forward from the Annual Report 2008. Please see Chapter 7 of the report for details.

13. To better carry out the objects of the Ordinance, the Commissioner made a number of recommendations to the Secretary for Security and the heads of LEAs under sections 51 and 52 of the Ordinance during the report period. Please see Chapter 8 of the report for details.

14. Noting that the ICSO will shortly be under comprehensive review, the Commissioner has set out in Chapter 9 of the report matters which he has not raised before but require clarification in or revision of the Ordinance.

15. Despite the non-compliance and irregularities described in Chapter 7, the Commissioner is satisfied with the overall performance of the LEAs and their officers in their compliance with the requirements of the ICSO. He has not made any finding that any non-compliance or irregularity was due to deliberate flouting or disregard of the statutory provisions or the law, nor could he find any of the officers committing the mistakes being actuated by ulterior motive. Indeed, from the analysis of the cases referred to in Chapter 7, it is obvious that apart from the defects caused by technical problems, the incidents, be they irregularities or more serious non-compliance, were consequences of inadvertent or careless mistakes or unfamiliarity with the rules and procedures of the ICSO scheme.

16. The report or revelation of cases of non-compliance or irregularity was done by the LEAs on a voluntary basis, albeit for complying with the statutory provision or Code of Practice or established practice. Without such voluntary assistance from the LEAs, it would be difficult, if not impossible, for the Commissioner and his staff to discover or unearth any contravention by the LEAs. The new initiative proposed by the Commissioner to check the audio intercept products of cases of special interest or chosen at random, which was detailed under the second heading in Chapter 9 of the Annual Report 2008, may be a step in the right direction in providing the necessary deterrence against any contravention or abuse of the Ordinance or the statutory activities authorized by it or its

concealment.

17. The Commissioner expresses his gratitude to the panel judges, the Security Bureau, the LEAs, the communications services providers and other parties concerned for their co-operation and assistance in the performance of his functions as the Commissioner. He also expresses his thanks to everyone involved in the public discussions after the publication of his 2008 Annual Report. The Commissioner is confident that the improvement measures proposed by him to enhance the review procedure will work in producing better compliance and reducing irregularities, stepping closer towards accomplishing the protection of the rights to privacy and communication of people in Hong Kong.

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