



Annual Report 2010 to the Chief Executive

by

The Commissioner on
Interception of Communications
and Surveillance

June 2011

截取通訊及監察事務專員辦公室

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30 June 2011

The Honourable Donald Tsang, GBM
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Government House
Hong Kong

CONFIDENTIAL

Dear Sir,

Annual Report for the Year 2010

I have the pleasure, pursuant to section 49(1) and (6) of the Interception of Communications and Surveillance Ordinance, in submitting to you the annual report for the year 2010, together with its Chinese translation.

Yours sincerely,



(K.H. Woo)

Commissioner on Interception of
Communications and Surveillance

Encl: Annual Report for 2010
and its Chinese translation

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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, Code of Practice	the Code of Practice issued by the Secretary for Security under section 63 of the Ordinance
Commissioner, C/ICS	Commissioner on Interception of Communications and Surveillance
COP 120	paragraph 120 of the Code of Practice
COP 120 report	report submitted pursuant to paragraph 120 of the Code of Practice
CSP	communications services provider
discontinuance report	report on discontinuance of interception or covert surveillance submitted pursuant to section 57 of the Ordinance
fresh application	application for a prescribed authorization which is not a renewal
ICAC	Independent Commission Against Corruption
ICSO	Interception of Communications and Surveillance Ordinance

interception	interception of communications
JM	journalistic material
LEA	a law enforcement agency under the Ordinance, namely, Customs and Excise Department, Immigration Department, ICAC or Police
LPP	legal professional privilege
LPP information	information protected by legal professional privilege
non-ICSO device register	device register of devices withdrawn based on loan requests for surveillance devices for purposes in respect of which no prescribed authorization is required and of such devices returned
Ordinance	Interception of Communications and Surveillance Ordinance
PA	prescribed authorization
panel judge	the panel judge appointed under section 6 of the Ordinance
PJO	panel judges' office
Police	Hong Kong Police Force
prohibited number	specified telephone number prohibited from listening
renewal application	application for renewal of a prescribed authorization

REP-11 report	report on material change of circumstances or initial material inaccuracies under a prescribed authorization made on form REP-11
Reported LPP Call	a call which might involve LPP information or likely LPP information and was reported to the panel judge by way of an REP-11 report on such
section	section of the Ordinance
Specified Rank	a certain rank specified in an additional condition of a prescribed authorization
statutory activity	interception of communications and/or covert surveillance activity described in the Ordinance
surveillance	covert surveillance
the report period	the period from 1 January to 31 December 2010
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 panel judges to provide information to the Commissioner once every week

CHAPTER 1

INTRODUCTION

Work in the past four years

1.1 It has been over four years since the commencement of the scheme under the Interception of Communications and Surveillance Ordinance, Cap 589 ('Ordinance' or 'ICSO') and this is my fourth full-year annual report.

1.2 I have always borne in mind the object and spirit of the Ordinance when carrying out my functions as the Commissioner. The Ordinance has enveloped the activities of the law enforcement agencies ('LEAs') under the Ordinance^{Note 1} in the interception of communications, through the post or through the use of telecommunications facilities, and in covert surveillance by the use of surveillance devices (collectively called 'statutory activities') in a statutory framework, so as to ensure that they cannot be lawfully and properly carried out unless the requirements stipulated in the Ordinance are satisfied. The requirements are based on the necessity and proportionality principles, and the well being of Hong Kong can be achieved by striking a fair balance between the need for the prevention and detection of serious crimes and the protection of public security on the one hand and safeguarding the privacy and other rights of persons in Hong Kong on the other. The starting point for any statutory activity to be lawfully and properly conducted by an officer of an LEA is

^{Note 1} There are four LEAs under the Ordinance, namely Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption: see section 2(1) of the Ordinance for the definition of 'department' and Schedule 1 to the Ordinance.

by his obtaining a prescribed authorization granted by a panel judge for interception or for Type 1 surveillance or one issued by an authorizing officer of the LEA regarding Type 2 surveillance. My task is the next step in the same direction, which is to supervise and review the actions of the LEAs and their officers regarding their compliance with the requirements of the Ordinance that include the strict adherence to the terms of the prescribed authorizations.

1.3 In performing my functions as the Commissioner in these four years, my aim has been to achieve the object and spirit of the Ordinance. I have designed various ways to give effect to and facilitate my work, which have been presented to the LEAs and the Security Bureau in the form of advice, suggestions or recommendations. Further, during my review of cases that have been reported to me by the LEAs on their own accord or in the course of my consideration of problems discovered by me when examining those and other cases and matters incidental thereto, I have also made suggestions or recommendations to them and the Security Bureau wherever appropriate. For instance, I exercise control regarding covert surveillance devices by keeping a watchful eye over the use of them that are made available by the LEAs to their officers. Pursuant to my suggestion, all surveillance devices kept by each LEA have to be recorded in inventory lists, and their movements have to be accounted for by way of registers showing their withdrawals and returns. This stringent recording system for the deployment of surveillance devices has undoubtedly ensured the proper use of such devices, although it is not and cannot be made absolutely foolproof. The use of the computerised recording system that was introduced about two years ago has, upon my advice, become more widely adopted, so that this control system is better managed for assisting

the performance of my review function and at the same time reducing clerical and careless mistakes that would inevitably result from the keeping of records manually.

Aspiration for a sound foundation

1.4 My suggestions and recommendations include improvements on procedures which would enhance the efficacy and efficiency in the discharge of my oversight and supervising functions as the Commissioner and for plugging possible loopholes in the provisions of the Ordinance and of their insufficiencies. I have also witnessed the favourable change of the attitude of the LEAs towards the exercise of my statutory duties over them. All these have whetted my aspiration that a sound foundation for the operation of the ICSO scheme in Hong Kong for the welfare of the community as a whole will be laid before my retirement from the post of Commissioner. The aspiration has, however, been dampened. The most important of my recommendations, which is for deterrence against malpractice of the LEAs in their operations of interception of telecommunications, namely, by me and my staff listening to the intercept products of our choice, has not yet been adopted, far less implemented, by the Administration. This listening power, if expressly allowed by having the Ordinance amended, would be the key tool to expose such malpractice, and would become the most powerful weapon to safeguard citizens' rights to privacy, and in particular, to privileged confidential legal advice that is transmitted through telecommunications. This important recommendation equally applies to the power to examine products from postal interception and covert surveillance, with identical impact.

Continuous improvements

1.5 While the initial glitches from the commencement of the ICSO scheme have diminished, other problems and difficulties have cropped up from time to time. The experience gathering exercise since the start of the tenure of my office as the Commissioner is still progressing, confronting the occurrence of hitherto unexpected situations and designing ways to resolve them. This process would operate in the best interest of all the LEAs and also for the benefit of the society in which we live because improvements could be continuously made to tackle problems and to anticipate them with the aim to cause the least invasion to the privacy and other rights of individuals.

1.6 I have continued to make recommendations and suggestions on various procedural matters in the course of discharging my duties in overseeing and supervising the performance of the LEAs over their compliance with the requirements of the Ordinance. Most of them, save that referred to in paragraph 1.4 above, have been accepted by the Security Bureau and the LEAs, or they have made practical arrangements to remedy the adverse effect of the defects or deficiencies intended to be addressed by such recommendations and suggestions.

Transparency

1.7 While I appreciate the importance to give the utmost transparency in this report regarding the handling of matters under the Ordinance, at least for apprising members of the public that their rights are not forsaken for the purpose of unearthing or interdicting the activities of perpetrators of serious crimes, nonetheless I remain extremely careful 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^{Note 2}. This is the reason why some matters in this report may not be described in as much detail as to the satisfaction of the reader. However, considering the significance of transparency, not only required by public demand but also essential for fairness to all concerned, I have attempted to include as much information as possible insofar its publication does not amount to contravention of this non-prejudice principle.

^{Note 2} See, for instance, sections 44(6), 46(4), 48(3), 48(4) and 49(5) of the Ordinance.

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CHAPTER 2

INTERCEPTION

Prescribed authorizations

2.1 Pursuant to 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.

2.2 What requires specific mention is the last category. That kind of authorization allows interception of a telecommunications facility (such as a telephone line) that the targeted subject is ‘reasonably expected to use’, although at the time when the prescribed authorization was sought, the identifying details of this facility (such as the telephone number) were not yet known. It gives the LEA concerned the power to intercept any communications facility that the targeted subject is later found to be using without the necessity of going back to the panel judge to obtain specific authorization regarding the facility, which was not made known to the panel judge in his granting of the prescribed authorization.

2.3 In the course of my inspection visits to the LEAs, I paid special attention to this type of authorizations and the additional communications facilities which were included by the LEAs under these authorizations to ensure that they were granted properly. It appears to me that the panel judges were very cautious and stringent in considering applications requesting the ‘reasonably expected to use’ clause. If there were insufficient grounds in support, the panel judges simply issued the authorizations for interception without granting the clause sought. As a result, if the LEA concerned intended to intercept any other communications facilities being used by the targeted subject apart from the one(s) specified in the prescribed authorization, they must go back to the panel judges to apply afresh for another prescribed authorization.

2.4 Throughout the report period, I have not found a case where the panel judge had granted any authorization with such clause improperly or a case where the LEA concerned had subsequently added a communications facility pursuant to the clause without justification.

Written applications

2.5 During the report period, there were a total of 1,385 written applications for interception made by the LEAs, of which 1,375 were granted and 10 were refused by the panel judges. Among the successful applications, 541 were for authorizations for the first time ('fresh applications') and 834 were for renewals of authorizations that had been granted earlier ('renewal applications').

Reasons for refusal

2.6 Of the 10 refused applications, nine were fresh applications and the remaining one was a renewal application. The refusals were mainly due to the following reasons:

- (a) the conditions of necessity and proportionality were not met;
- (b) inadequate/insufficient materials to support the allegations put forth;
- (c) information subject to legal professional privilege ('LPP') would highly likely be obtained; and
- (d) the previous authorization was still effective at the proposed effective date of the renewal and the effect was such that there would be an overlap of the authorization periods if the application was granted.

Emergency authorizations

2.7 If an officer of an LEA considers that there is immediate need for interception to be carried out due to an imminent risk of death or serious bodily harm, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances that it is not reasonably practicable to apply to a panel judge, he may apply to the head of his department for the issue of an emergency authorization for the interception [section 20(1)]. An emergency authorization shall not last for more than 48 hours and may not be renewed [sections 22(1)(b) and (2)]. Where any interception is carried out pursuant to the emergency authorization, the officer should apply to a panel judge for confirmation of the emergency authorization within 48 hours, beginning with the time when the emergency authorization is issued [section 23(1)].

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

Oral applications

2.9 All applications for the issue or renewal of a prescribed authorization, including applications for emergency authorization, should basically 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 (a panel judge for interception) may deliver his determination orally to issue the prescribed authorization or to refuse the application. The Code of Practice issued by the Secretary for Security under section 63 of

the Ordinance advises LEA officers 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 as a result of such an application are regarded as having the same effect as a written application and authorization. Similar to emergency authorizations, however, the officer concerned should apply in writing to the relevant authority for confirmation of the orally-granted prescribed authorization within 48 hours from the issue of the authorization. Failing to do so will cause that prescribed authorization to be regarded as revoked upon the expiration of the 48 hours. See sections 25 to 27 of the Ordinance.

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

Duration of authorizations

2.11 For the majority (over 86%) of the cases (fresh authorizations as well as renewals) granted by the panel judges during the report period, the duration of the prescribed authorizations was for a period of one month or less, short of the maximum of three months allowed by the Ordinance [sections 10 and 13]. The longest approved duration was about 50 days while the shortest one was for several days only. Overall, the average duration of all the authorizations was about 30 days. This reflects that the panel judges had adopted a cautious approach in determining the duration of the authorizations they granted.

Offences

2.12 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 is shown in Table 2(a) in Chapter 10.

Revocation of authorizations

2.13 Under section 57(1), an officer of an LEA, who conducts any regular review pursuant to the arrangements made under section 56 by his head of department, should cause an interception (and also covert surveillance) to be discontinued if he is of the opinion that a ground for discontinuance 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 [section 57(2)]. The officer concerned shall then report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned [section 57(3) and (4)].

2.14 The number of authorizations for interception revoked ‘fully’ under section 57 during the report period was 482. In addition, another 71 cases involved the cessation of interception in respect of some but not all of the telecommunications facilities approved under a prescribed authorization, so that interception of the remaining facilities continued to be in force.

2.15 The grounds for discontinuance were mainly that the subject had stopped using the telephone number concerned for his criminal activities, the interception operation was not or no longer productive, or the subject was arrested. This reflects that the LEAs acted in a responsible

manner and complied strictly with the requirements and spirit of the Ordinance, in that whenever it was not necessary or proportional to continue with the prescribed authorization, or part of it, discontinuance would be undertaken as soon as possible.

2.16 Revocation of authorizations is also expressly provided for in section 58 of the Ordinance. Where 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 information which may be subject to LPP 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, but all the same the officer of the LEA in charge of the interception who has become aware of the arrest is obliged by section 58 to make 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, there were a total of five section 58 reports made to the panel judge, although the LEAs concerned were aware of a total of 107 arrests. The panel judge allowed the LEAs of the five reported cases to continue with the interception after imposing additional conditions on four of the prescribed authorizations concerned to safeguard LPP information, whereas no additional condition was imposed on the remaining prescribed authorization because the particular subject had been released unconditionally after his arrest. In respect of the other arrest cases, decisions were made by an officer of the LEAs concerned to discontinue the interception operation pursuant to

section 57 instead of resorting to the section 58 procedure. This reflects that the LEAs were appreciative of the risk of obtaining LPP information after an arrest when reaching a decision of their own accord to discontinue the interception operation as soon as reasonably practicable under section 57.

2.17 As pointed out in my previous annual reports, where the relevant authority to whom a section 58 arrest report is made decides to exercise its discretion to revoke the prescribed authorization, there would be an interim period during which the interception (or covert surveillance) would remain in operation after the prescribed authorization (which is sought to be continued) is revoked but before the revocation (with immediate effect) is conveyed to officers carrying out the operation. The interception (or covert surveillance) carried out during the interim period would in the circumstances become in theory an unauthorized activity.

2.18 To address the issue, the LEAs have put in place enhanced arrangements for handling these cases so that the operations in question were discontinued within a short period of time after the revocation of prescribed authorizations by the relevant authority, thus reducing the length of the unauthorized activity to the minimum. Nonetheless, I remain of the view that a solution would be to amend the relevant provisions of the Ordinance to allow the relevant authority flexibility to defer the time of revocation of prescribed authorizations to some time that is justified as the relevant authority will state in the revocation. The issue is covered in the comprehensive review of the Ordinance being conducted by the Security Bureau.

Authorizations with five or more previous renewals

2.19 There were 53 authorizations for interception with five or more previous renewals within the report period. As the cases had lasted for quite a long period of time, I paid particular attention to see whether the renewals were granted properly and whether useful information had been obtained through the interception operations. All the cases with six renewals and some of their further renewals were checked and found in order during my inspection visits to the LEAs.

Legal professional privilege

2.20 During the report period, there was one case in which information subject to LPP had been obtained in consequence of interception carried out pursuant to a prescribed authorization. Details of the case can be found in Chapter 5 under LPP Case 1.

2.21 Besides, a number of applications for interception were assessed to have the likelihood of LPP information being obtained. My staff and I have examined the relevant files of these cases during my inspection visits at the LEAs' offices. It was found that the panel judges had handled the cases carefully and had fairly assessed the likelihood of LPP information being obtained, amongst other factors concerned, in reaching the decision that the authorization applied for should or should not be granted. If an authorization which was assessed to have the likelihood of LPP information being obtained was issued or renewed, additional conditions would be imposed by the panel judges to restrict the powers of the LEA and to protect the right of the subject in the event of LPP information likely to be involved.

Journalistic material

2.22 During the report period, there was no report from LEAs of any case where journalistic material ('JM') had been obtained in consequence of interception carried out pursuant to a prescribed authorization.

2.23 There were a few cases where the LEA concerned had assessed to likely involve JM. For those cases which were also assessed by the panel judge to have JM implications, additional conditions were imposed to better protect the freedom of the media.

Effectiveness of interception

2.24 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 crimes and the protection of public security. Information gathered from interception can very often lead to a fruitful and successful conclusion of an investigation. During the report period, a total of 103 persons, who were subjects of the prescribed authorizations, were arrested as a result of or further to interception operations. In addition, 237 non-subjects were also arrested consequent upon the interception operations. The relevant arrest figures are shown in Table 3(a) in Chapter 10.

Cases of irregularities

2.25 During this report period, there were three reports of non-compliance with the requirements of the Ordinance submitted under section 54 in respect of interception operations. In addition, one report of

incident was made to me not under section 54 because it was not treated as non-compliance with the requirements of the Ordinance by the LEA concerned. Details of these cases can be found in Chapter 7, namely,

The three reports submitted under section 54:

- (a) Report 3 in Chapter 7, ‘listening to intercept product by an officer below the rank specified in the prescribed authorization’, discussed in paragraphs 7.99 to 7.135 thereof.
- (b) Report 6 in Chapter 7, ‘listening to a call made to a prohibited telephone number’, mentioned in paragraph 7.234 thereof.
- (c) Report 7 in Chapter 7, ‘listening to two prohibited calls’, referred to in paragraph 7.235 thereof.

The report not submitted under section 54:

- (d) Report 5 in Chapter 7, ‘old ATR setting used’, discussed in paragraphs 7.228 to 7.233 thereof.

Procedure of oversight for interception

2.26 There were three different ways in which compliance with the requirements of the Ordinance in respect of interception by the LEAs was reviewed:

- (a) checking of the weekly reports submitted by the LEAs and the panel judges’ office (‘PJO’);
- (b) periodical examination of the contents of the LEA files and documents during inspection visits to the LEAs; and
- (c) counter-checking the facilities intercepted with non-LEA

parties such as communications services providers ('CSPs') and through other means.

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

Checking of weekly reports

2.27 The LEAs were required to submit weekly reports to me on their respective applications, successful or otherwise, and other relevant reports made to the panel judges/departmental authorizing officers by way of filling in forms designed for the purpose ('weekly report forms'). Such weekly reports deal with all statutory activities, ie interception and covert surveillance. At the same time, the PJO was also requested to submit weekly report forms to me on the applications made to the panel judges by 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 my Secretariat.

2.28 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, whether the 'reasonably expected to use' clause (referred to in paragraph 2.2 above) has been granted, the assessment on the likelihood of obtaining LPP information and JM from the proposed operation, etc. Sensitive information such as the case details, progress of the investigation, identity and particulars of the subject and others, etc is not required and therefore obliterated or sanitized, so that such information will always be kept confidential with minimal risk of leakage.

2.29 Upon receipt of the weekly report forms from the LEAs, my 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, clarifications and explanations were sought from the LEAs and/or the PJO as and when necessary. Should I perceive a need, I would also seek clarification and explanation in my periodical inspection visits to the offices of the LEAs. The case file and all related documents and records, with all information, secret or otherwise, would be made available for my inspection upon request. Such inspection visits were carried out so that secret or sensitive information contained in documents or copies that would otherwise be required to be sent to my Secretariat for checking would always remain in the safety of the LEAs' offices to avoid any possible leakage.

Checking of cases during inspection visits

2.30 As explained in preceding paragraphs, the LEAs and the PJO only provide general case information in their weekly reports. If I consider a need to further examine any case for the purpose of clarifying any doubts, periodical inspection visits were arranged for me to check the original of the applications and other relevant documents, such as reports on discontinuance, reports on material change of circumstances, reports on initial material inaccuracies, case files and internal review documents, etc, at the LEAs' offices. In these inspection visits, I would also select, on a random basis, some other cases for examination apart from those requiring clarification.

2.31 If my questions or doubts still could not be resolved after the examination of such documents, I would request the LEAs to answer my

queries or to explain the cases in greater detail. Whenever necessary, relevant case officers would be interviewed or required to provide a statement to answer my questions.

2.32 In addition to matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 521 applications for interception, including granted authorizations and refused applications, and 129 related documents/matters had been checked during my periodical inspection visits to the LEAs in the report period.

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

2.33 Apart from examining the weekly returns from LEAs against those from the PJO, and conducting periodical checks of the relevant files and documents at the LEAs' offices, I have also adopted measures for further checking the interceptions conducted by the LEAs.

2.34 Wherever necessary, counter-checks were conducted with non-LEA parties such as CSPs 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. Apart from requiring the CSPs to furnish me with a four-weekly return to ensure that the facilities intercepted tally with those as reported by the respective LEAs and to notify me at once upon discovery of any unauthorized interception, I have asked the Team to archive the status of all interceptions in a confidential electronic record whenever any interception is effected, cancelled or discontinued. After making necessary arrangements, these records can be used for checking the status of

interceptions at various points of time so as to ensure that no unauthorized interception has taken place.

2.35 To further help expose any unauthorized interception should it occur, arrangements had also been made for the archiving of the status of all interceptions being conducted at particular moments as designated by me from time to time. Only the designated staff of my office and myself can access the confidentially archived information for the purpose of checking the intercepted facilities as at any reference point of time, ensuring that no unauthorized interception had taken place.

Results of the various forms of checking

2.36 Apart from the cases of irregularities and incidents referred to in Chapters 5 and 7, there was no other case of wrong or unauthorized interception revealed by the various forms of checking described in this chapter.

2.37 The checking of the archived material referred to in paragraphs 2.34 and 2.35 above was useful, as not only the numbers of the facilities subject to duly authorized interception but also the numbers of the facilities that remained intercepted after the related authorizations had been revoked as described in paragraphs 5.28 to 5.56 of Chapter 5 were found to have been recorded.

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CHAPTER 3

TYPE 1 SURVEILLANCE

Covert surveillance

3.1 The respective scopes of the two types of covert surveillance under the ICSO: Type 1 surveillance and Type 2 surveillance and their common and distinguishing features can be found dealt with in my previous annual reports. Since Type 1 surveillance is more privacy intrusive than Type 2 surveillance, it requires a panel judge's authorization whereas Type 2 surveillance can be permitted by an executive authorization issued by an authorizing officer of the department to which the applicant belongs.

Written applications

3.2 During this report period, there were a total of 75 written applications for Type 1 surveillance made by the LEAs, including seven cases in which Type 2 surveillance was elevated as Type 1 surveillance pursuant to section 2(4) of the Ordinance. All these applications were granted, including 31 fresh applications and 44 renewal applications. No application for Type 1 surveillance was refused.

Emergency authorizations

3.3 An officer of an LEA may apply to the head of the department for the issue of an emergency authorization for any Type 1 surveillance, if he considers that there is immediate need for the Type 1 surveillance to be carried out by reason of an imminent risk of death or serious bodily harm,

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 [section 20(1)]. An emergency authorization shall not last longer than 48 hours and may not be renewed [sections 22(1)(b) and (2)]. Within the period of 48 hours from the issue of the emergency authorization, the officer is required to apply to a panel judge for its confirmation where any Type 1 surveillance is carried out pursuant to the emergency authorization [section 23(1)].

3.4 During the report period, no application for emergency authorization for Type 1 surveillance was ever made by the LEAs.

Oral applications

3.5 All applications for Type 1 surveillance, including applications for emergency authorization, should basically 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 [section 25]. The relevant authority (a panel judge for Type 1 surveillance) may deliver his determination orally to issue the prescribed authorization or to refuse the application.

3.6 The Code of Practice issued by the Secretary for Security 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. Similar to emergency authorizations, officers should apply in writing to the relevant authority for

confirmation of the orally-granted prescribed authorization within 48 hours from the issue of the authorization [section 26(1)]. Failing to do so will cause that prescribed authorization to be regarded as revoked upon the expiration of the 48 hours.

3.7 There was no oral application for Type 1 surveillance made during the report period.

Duration of authorizations

3.8 While the maximum duration authorized for Type 1 surveillance allowed under the Ordinance is three months [sections 10(b) and 13(b)], the longest approved duration of Type 1 surveillance granted in this report period was about 30 days whereas the shortest one was about a day. Overall, the average duration for such authorizations was about 16 days.

Authorizations with five or more previous renewals

3.9 During the report period, there were five authorizations for Type 1 surveillance with five or more previous renewals. As the cases had lasted for quite a long period of time, I paid special attention to see whether the renewals were granted properly and whether useful information had been obtained through the surveillance operations. Four out of these five cases were checked and found in order during my inspection visits to the LEAs concerned. The remaining case involved a sixth renewal. Its first to fourth renewals had been checked with no anomaly found. Its sixth renewal was revoked upon discontinuance on the ground that the operation was not productive.

Offences

3.10 Table 2(b) in Chapter 10 sets out the major categories of offences for the investigation of which prescribed authorizations were issued or renewed for both types of covert surveillance during the report period.

Revocation of authorizations

3.11 During the report period, a total of 39 Type 1 surveillance operations were discontinued under section 57 before the natural expiration of the prescribed authorizations for them. The grounds for discontinuance were mainly that the surveillance had been carried out, the expected meeting/activity to be monitored was postponed or cancelled, the operation was not productive, or the subject was arrested. Section 57(3) requires the LEA, as soon as reasonably practicable after the discontinuance, to report the discontinuance and the ground for discontinuance to the relevant authority (a panel judge for Type 1 surveillance), who shall under section 57(4) revoke the prescribed authorization concerned upon receipt of the report on discontinuance. Of the 39 discontinuance cases reported in relation to Type 1 surveillance, 21 prescribed authorizations concerned were subsequently revoked 'fully' by the relevant authority and one prescribed authorization was revoked 'partially' due to abandonment of some of the observation posts at which surveillance was conducted. The full revocation applied to cases where the entire covert surveillance operation had been discontinued whereas the partial revocation was required because it had become unnecessary to maintain some of the observation posts where surveillance devices were originally authorized to be employed. For the other 17 discontinuance cases, the prescribed

authorizations concerned had already expired by the time the relevant authority received the discontinuance reports submitted by the LEAs. In the circumstances, the relevant authority could only note the discontinuance reported by the LEAs instead of revoking the prescribed authorization.

3.12 There was no report made to the relevant authority under section 58 of the Ordinance for Type 1 surveillance. Even when an arrest had been made to which resort could be made to section 58, the LEAs had already discontinued the covert surveillance operation and submitted a report under section 57 whereby the prescribed authorization was, as being mandatory, revoked by the panel judge. Similar to the situation for interception as mentioned in paragraph 2.16 above, this reflects that the LEAs were appreciative of the risk of obtaining LPP information after an arrest when reaching a decision of their own accord to discontinue the covert surveillance operation as soon as reasonably practicable under section 57.

3.13 There was, however, a case in which a prescribed authorization for Type 1 surveillance was revoked by the panel judge who considered that an application for Type 2 surveillance, instead of Type 1 surveillance, should be made to an authorizing officer of the LEA concerned for the case. Details of the case can be found in paragraphs 9.4 to 9.6 of Chapter 9.

Legal professional privilege and journalistic material

3.14 There was no report from the LEAs of any case where LPP information or JM was obtained in consequence of Type 1 surveillance carried out pursuant to a prescribed authorization during the report period.

Application for device retrieval warrant

3.15 During the report period, there was no application for any device retrieval warrant for retrieving the devices used for Type 1 surveillance, the reported reason being that the devices were removed upon the completion of the surveillance operation, successful or otherwise.

Effectiveness of surveillance

3.16 As a result of or further to surveillance operations, be it Type 1 or Type 2, a total of 43 persons who were subjects of the prescribed authorizations were arrested. In addition, 73 non-subjects were also arrested in consequence of such operations. The relevant arrest figures can be found in Table 3(b) in Chapter 10.

Procedure of oversight

3.17 The compliance with the requirements of the Ordinance in respect of Type 1 surveillance by the LEAs was reviewed in three different ways:

- (a) checking of the weekly reports submitted by the LEAs and the PJO;
- (b) periodical examination of the contents of the LEA files and documents during inspection visits to the LEAs; and

- (c) checking of the records kept by the surveillance device recording system of the LEAs.

Details of the reviews are set out below.

Checking of weekly reports

3.18 Weekly reports submitted to me by the LEAs and PJO cover all statutory activities, including Type 1 surveillance. This way of checking that has been described in paragraphs 2.27 to 2.29 of Chapter 2 for interception equally applies to surveillance and is not repeated here.

Checking of cases during inspection visits

3.19 The mechanism of checking cases during inspection visits to the LEAs is described in paragraphs 2.30 and 2.31 of Chapter 2.

3.20 In addition to matters relating to minor discrepancies in the weekly reports having been clarified, a total of 81 applications^{Note 3} for Type 1 surveillance, all resulting in granted authorizations, and 19 related documents/matters had been checked during my periodical inspection visits to the LEAs in this report period. Some examples are given below to show how the examination was conducted.

3.21 In the course of examination of the weekly reports, it was noted that there were some cases where surveillance devices were withdrawn under a prescribed authorization but no surveillance operation

^{Note 3} Some of the cases occurring in 2009 were checked in early 2010 and similarly some of the cases occurring in 2010 were only checked in early 2011. Of the 81 applications for Type 1 surveillance checked, 25 cases occurred in 2009 and 56 cases occurred in 2010. Another seven cases occurring in 2010 were checked in 2011 up to the writing of this report.

was carried out. In these cases, I considered the following matters required my enquiry:

- (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.

All such cases were included for examination in my inspection visits, at which I checked the relevant case documents and requested the LEA concerned to answer my queries. The explanations given by the LEA for all these cases were satisfactory and there was no sign of abuse of surveillance devices for any unauthorized purposes.

3.22 Section 57 requires that when the ground for discontinuance of a prescribed authorization exists officers shall as soon as reasonably practicable cause the operation concerned to be discontinued. Since it is necessary for surveillance devices to be used for the purpose of investigation to constitute covert surveillance, the return of all surveillance devices could mean that the ground for discontinuance exists. There were, however, some cases in which all surveillance devices drawn were found to have been returned well before the expiration of the authorizations

concerned but no discontinuance was effected. This called into question whether the LEA or any of its officers concerned had complied with the requirement of section 57.

3.23 The LEA explained that, in those cases, regardless of whether the surveillance operations that had already been conducted were successful or not, it possessed intelligence that the targets and/or their associates might meet with each other for discussion of their criminal activities within the authorized period pending expiration of the prescribed authorizations. In the circumstances, the officers allowed the authorizations to follow their natural courses to cater for further surveillance operations, if necessary. In view of the possibility that the anticipated meeting(s) might be postponed or did not materialize, officers were required to return the relevant surveillance devices to the device registries in the interim to minimize the chance of possible abuse of the devices by frontline officers for unauthorized purposes. Officers would only be allowed to keep the surveillance devices in hand in justified circumstances. For the cases referred to in the preceding paragraph, the anticipated meeting(s) among the targets and/or their associates failed to materialize before the expiration of the authorizations. Consequently, such prescribed authorizations expired naturally without any further surveillance operation being carried out. After examining the relevant case documents and hearing the LEA's explanations, I considered that the decisions not to discontinue the operations before expiration of the prescribed authorizations concerned were justified and there was no non-compliance with the requirement of section 57.

3.24 In examining the documents related to a prescribed authorization, I found that one of the subjects had temporarily gone to the restroom for a short period of time in the course of the covert surveillance. I considered that the continued covert surveillance on the other subject and an associate, in the absence of the former subject, during the said period might have been conducted beyond the ambit of the authorization and might constitute an unauthorized covert surveillance. The LEA concerned was advised to submit a report to notify the panel judge on the possible non-compliance and to invite the panel judge's comments, if any. Details of the case can be found in paragraphs 7.157 to 7.159 and 7.226 to 7.227 of Chapter 7.

3.25 During an inspection visit to an LEA, I reviewed an application for Type 1 surveillance and found that the applicant declared that to the best of his knowledge, within the preceding two years, there had been no application for the issue or renewal of a prescribed authorization to which one of the subjects had been subject. His declaration was contrary to my understanding as I recalled that that subject had been a subject of a number of prescribed authorizations within the two years before the application for Type 1 surveillance in question. I therefore requested the LEA to conduct an investigation into the matter and submit a report to me. Details of the case can be found in paragraphs 7.57 to 7.69 of Chapter 7.

Checking of surveillance devices

3.26 Based on the fact that covert surveillance, including Type 1 and Type 2 surveillance, as defined by the Ordinance, is surveillance carried out with the use of one or more surveillance devices, I had required the LEAs to develop a comprehensive recording system of surveillance

devices, including maintaining a device register of devices withdrawn based on loan requests with a prescribed authorization in support and a separate device register of devices withdrawn for administrative or other purposes based on loan requests for surveillance devices in respect of which no prescribed authorization is required. Both types of register will also record the return of the devices so withdrawn. An inventory list of surveillance devices for each device registry is also maintained with a unique serial number assigned to each single surveillance device item for identification as well as for my checking purposes.

3.27 The LEAs were also required to establish a control mechanism for issuing and collecting surveillance devices. All records of issue and return of surveillance devices should be properly documented in the device register. Copies of both the inventory list and device registers, as updated from time to time, were submitted to me on a regular periodical basis for my checking. Where necessary, the LEAs were also required to provide me with copies of the request forms for withdrawal of surveillance device for my examination. In case of discrepancies or doubts identified as a result of checking the contents of these copies and comparing with the information provided in the weekly report forms and other relevant documents, the LEA concerned would be asked to provide clarification and explanation.

3.28 The following are some of my major observations after checking the inventory lists, device registers and request forms for withdrawal of surveillance devices:

- (a) I had previously recommended to the Secretary for Security and the LEAs that the inventory lists provided to me by the

LEAs should include all devices (excluding fixtures) capable of performing covert surveillance even though they might not be used for covert surveillance. However, during my inspection visit to an LEA, I found that the inventory lists provided to me contained surveillance devices which were employed or would be employed for covert surveillance under the ICSO, but did not contain all devices which were capable of performing covert surveillance but were employed for purposes other than covert surveillance. As such inventory lists, together with the device registers, would be essential for my detection of any irregularity, I reminded the LEA that it should follow my requirements in the provision of inventory lists and device registers. The LEA has been reviewing the matter.

- (b) I noted from the device register of an LEA that no ICSO number for the revocation of a prescribed authorization was recorded in the column 'Date and Time of Revocation'. I advised the LEA to add the ICSO number of the revocation in the said column for easy reference and checking and to furnish me with a copy of the page of the register with the added entry.
- (c) Under the existing arrangement of an LEA, sometimes the same officer acted as both the applicant for a prescribed authorization for covert surveillance and the device issuing officer. I was concerned about the possible conflict of roles in the arrangement because before the devices were issued, the device issuing officer would check the request forms for withdrawal of surveillance devices against the relevant

prescribed authorizations. If any discrepancy was detected, the device issuing officer would refuse to issue the devices concerned. I thus requested the LEA to explore if the existing arrangement could be improved.

- (d) Some amendments were made on the device register and request forms for withdrawal of surveillance devices of an LEA with a signature against the amendments but without further details. I advised the LEA that the officer who had made the amendments should state the reason, date and his identity on the device register so as to give a complete record and account for the amendments. The LEA was also requested to provide me with the reasons for some of the amendments and discrepancies identified in a device register and some request forms.
- (e) The request forms for withdrawal of surveillance devices for several non-ICSO operations of an LEA bore duplicated reference numbers. As each request form should have its unique reference number, I requested the LEA to clarify in detail the reason for the duplicated reference numbers in the forms concerned and to inform me of the detailed procedures for the issuance and documentation of the request forms.
- (f) I observed from a non-ICSO device register of an LEA that a surveillance device was used for observation on illegal activities. The device was returned about half a month after issue and a remark 'for repairing' was entered in the device register concerned. The arrangement was inappropriate as the

device should be returned to the device registry immediately after the surveillance operation and a separate entry should be made for the purpose of repair and maintenance of the device. The LEA was requested to look into the matter.

- (g) It was noticed from a non-ICSO device register of an LEA that a surveillance device was used for conducting general observation at public place in an area which is on the east of Hong Kong. However, in response to our enquiry on the use of the device, the LEA stated that the device was used for observing suspected illegal activities in another area which is on the west of Hong Kong. As it is difficult to understand how the LEA could use the device to observe the suspected illegal activities in such a long distance, the LEA was requested to provide an explanation on the matter.

3.29 To better control the issue and return of surveillance devices, the majority of the LEAs have adopted a computerized device recording system in their device stores. I found the system very useful in reducing the chance of wrong data entry and keeping track of movement of the devices. To further enhance the system, I recommended to the LEAs concerned that a function should be added to enable the system to automatically generate a return slip after each withdrawal of surveillance device(s). This return slip would serve the purpose of notifying the approving officer what surveillance device(s) had actually been issued. I also recommended that the system should have the ability to spot any duplicated use of a request memo reference number so as to alert the device issuing officer to take necessary follow-up action. In addition, I also

recommended that the system should be refined to capture the time when any post-entry record was made.

3.30 Apart from the checking of inventory lists and device registers of surveillance devices managed by the LEAs, I arranged inspection visits to the device stores of the LEAs for the following purposes, namely,

- (a) to check the entries in the original register(s) against the entries in the copy of register(s) submitted to me, with the aim 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 on the copy inventory entries provided to me 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 evidenced by the copy registers to be in the stores;
- (g) for the above purposes, to compare the unique number on each item as shown on the copy registers against the number assigned to the item as marked on it or attached to it; and

- (h) to see the items that were outside my knowledge or the knowledge of my staff and seek explanation as to how they might be used for conducting covert surveillance operations.

3.31 During the report period, a total of four such visits were made to the LEAs. The results of the checking were satisfactory.

CHAPTER 4

TYPE 2 SURVEILLANCE

Executive authorizations

4.1 Since Type 2 surveillance is less privacy intrusive than Type 1 surveillance, an application for the issue of a fresh or renewed prescribed authorization to carry out Type 2 surveillance may be made to an authorizing officer of the department concerned. The authorizing officer is an officer not below the rank equivalent to that of Senior Superintendent of Police designated by the head of department [section 7]. Such an authorization when granted is called an ‘executive authorization’ [sections 2 and 14].

Written applications

4.2 During this report period, there were a total of 41 written applications for Type 2 surveillance made by the LEAs, of which 40 were granted and one was refused by the authorizing officer. Among the successful applications, 24 were fresh applications and 16 were renewal applications.

4.3 The refused application was a fresh application. It was refused by the authorizing officer mainly because it failed to provide sufficient information to justify the issue of an authorization and the applicant had not properly assessed the immediacy of the particular serious crime as alleged.

Oral applications

4.4 An application for the issue or renewal of a prescribed authorization for Type 2 surveillance may be made orally to the authorizing officer if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written application [section 25]. The authorizing officer may deliver his determination orally to issue the executive authorization or to refuse the application. The applicant shall apply in writing to the authorizing officer for confirmation of such an executive authorization within 48 hours from its issue, failing which it is to be regarded as revoked upon the expiration of the 48 hours [section 26]. In the report period, no oral application for Type 2 surveillance was made.

Emergency authorizations

4.5 There is no provision in the Ordinance for application for emergency authorization for Type 2 surveillance.

Duration of authorizations

4.6 Same as judge's authorizations for interception or Type 1 surveillance, the maximum duration authorized by an executive authorization for Type 2 surveillance is three months [sections 16(b) and 19(b)]. In this report period, the longest approved duration of Type 2 surveillance granted was about 31 days while the shortest one was about a day. The overall average duration of all Type 2 surveillance executive authorizations was about 13 days.

Authorizations with five or more previous renewals

4.7 For the report period, there was one authorization for Type 2 surveillance with five or more previous renewals. The case was checked and found in order during one of my inspection visits to the LEA concerned.

Offences

4.8 Table 2(b) in Chapter 10 sets out the major categories of offences for the investigation of which prescribed authorizations were issued or renewed for surveillance (both Type 1 and Type 2) during the report period.

Revocation of authorizations

4.9 During this report period, a total of 26 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, the expected meeting/activity to be monitored was postponed or cancelled, the operation was not productive, or the subject was arrested. Of the 26 discontinuance cases reported to the authorizing officer in relation to Type 2 surveillance, 22 prescribed authorizations concerned were subsequently revoked by the authorizing officer under section 57(4). For the remaining four discontinuance cases, the prescribed authorizations concerned had already expired by the time the authorizing officers received the discontinuance reports. In the circumstances, the authorizing officers could only note the discontinuance reported instead of revoking the prescribed authorizations.

4.10 There was no report made to the authorizing officer under section 58 in respect of Type 2 surveillance during this report period. This reflects a correct attitude taken by the LEAs: see paragraphs 2.16 and 3.12 of this Report.

Legal professional privilege and journalistic material

4.11 During this report period, there was no report from the LEAs of any case where LPP information or JM was obtained in consequence of Type 2 surveillance carried out pursuant to prescribed authorizations.

Application for device retrieval warrant

4.12 There was no application for any device retrieval warrant for retrieving the devices used for Type 2 surveillance during this report period. This was because of the retrieval taking place on or before the discontinuance of the operation.

Effectiveness of surveillance

4.13 As a result of or further to surveillance operations, including both Type 1 and Type 2, a total of 43 persons who were subjects of the prescribed authorizations were arrested. In addition, 73 non-subjects were also arrested in consequence of such operations. The arrest figures can be found in Table 3(b) in Chapter 10.

Procedure of oversight

4.14 The procedure of oversight of compliance with the requirements of the Ordinance by the LEAs in respect of Type 1

surveillance that is set out in paragraph 3.17 of Chapter 3 equally applies to Type 2 surveillance.

Checking of weekly reports

4.15 Weekly reports submitted to me by the LEAs and PJO cover all statutory activities, including Type 2 surveillance. This way of checking has been described in paragraphs 2.27 to 2.29 of Chapter 2 and is not repeated here.

Checking of surveillance devices

4.16 Please refer to paragraphs 3.26 to 3.31 of Chapter 3 regarding the checking of surveillance devices.

Checking of cases during inspection visits

4.17 Please refer to paragraphs 2.30 and 2.31 of Chapter 2 for details of how my checking of cases was carried out during inspection visits to LEAs.

4.18 Under the Ordinance, an application for Type 2 surveillance is submitted to and determined by a designated authorizing officer of the department concerned. Since the entirety of the application procedure for Type 2 surveillance is completed internally within the department without the scrutiny of a panel judge, I have been paying particular attention 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 granted are fully justified.

Observations

4.19 Apart from matters relating to minor discrepancies in the weekly reports having been clarified, a total of 57 applications^{Note 4} for Type 2 surveillance, including the granted authorizations and the refused application, and 17 related documents/matters had been checked during my periodical inspection visits to the LEAs in this report period. On the whole, although there were some areas for improvement, most of the cases that I had checked were found to be in order. My major observations arising from the inspection visits are set out in the ensuing paragraphs.

Interpretation of 'person' under the 'if known' declaration

4.20 Part 1(b)(xi), Part 2(b)(xii) and Part 3(b)(xii) of Schedule 3 to the ICSO require the affidavit or statement supporting an application for the issue of an authorization for interception, Type 1 surveillance or Type 2 surveillance to set out, if known, whether during the preceding two years, there has been any application for the issue or renewal of a prescribed authorization in which any person set out in the affidavit or statement has also been identified as the subject of the interception or covert surveillance concerned.

4.21 There was a case in which an LEA officer responsible for an operation under a prescribed authorization discovered that the subject company had closed and moved to an adjacent unit to continue the illegal business. However, when a new authorization was sought to continue with the surveillance operation at the new location, the previous application was

Note 4 Some of the cases occurring in 2009 were checked in early 2010 and similarly some of the cases occurring in 2010 were only checked in early 2011. Of the 41 written applications for Type 2 surveillance (see paragraph 4.2 above), 38 were checked in 2010 and three were checked in 2011 up to the writing of this report.

not mentioned in the ‘if known’ declaration in the application for the new authorization. In response to my enquiry, the LEA explained that since the location of the subject company was different from the previous application and the suspect(s) was unknown, the officer concerned could not confirm whether the same suspect(s) was involved albeit the company name was the same. Thus, the previous application was not mentioned in the ‘if known’ declaration of the new application.

4.22 I considered the explanation of the LEA unconvincing as the meaning of ‘person’ under the ‘if known’ declaration should include ‘legal personality’ (eg a company). The LEA was advised to better educate the officers concerned on the matter.

Insufficient information in an application and its discontinuance report

4.23 During my inspection visit to an LEA, I examined the relevant documents of an executive authorization and its discontinuance report. I noted that the surveillance operation was proposed to end at 0500 hours on a day but no reason for it was given in the statement in writing. In reply to my enquiry, the LEA stated that it was planned to complete the operation at around midnight of the preceding day and the proposed duration had included the time for returning the surveillance devices to the device registry. I advised the LEA that the applicant should explain the situation in detail in the statement in writing to the authorizing officer.

4.24 On the other hand, I also noted from the discontinuance report concerned that the surveillance operation was only discontinued about one day after the target had departed Hong Kong. It appeared that the LEA officers were using the surveillance devices one day more than it was necessary for the surveillance operation. The LEA explained that as one of

the accomplices was identified during the operation to have taken a leading role, surveillance had to be mounted on that accomplice until the whole operation stood down, and the devices were returned to the device registry thereafter. While I was satisfied with the explanation, I told the LEA that the applicant should provide more detailed information and the sequence of occurrences in the discontinuance report.

Authorized period of an executive authorization

4.25 There was a case in which the authorized period of an executive authorization for conducting covert surveillance over a shop was about three days commencing at 0700 hours, but the surveillance operation only started at 1510 hours on the same day and discontinued about one hour later at 1620 hours after adequate information had been collected. I considered that it was too early for the authorized period to start at 0700 hours because the targeted shop was not yet open and the LEA officer concerned had not yet reported for duty. The fact that adequate information could be obtained within about one hour after the start of the covert surveillance also called into question the need for three days for the operation. I advised the LEA that the authorized period sought should be reasonably supported and limited to the shortest possible time. In the present case, the applicant should have critically assessed whether the authorized period applied for was reasonable and justified by the actual operational need.

4.26 It was also observed that the applicant omitted to fill in paragraph 3(i)(c) of the statement in writing in support of the application, ie the proposed starting date and time and finishing date and time of the Type 2 surveillance. I recommended that the authorizing officer should

check the content of the statement in writing and ensure that all the relevant information had been filled in before granting the authorization. The LEA undertook to remind the officers concerned accordingly.

4.27 In addition, there were two other executive authorizations granted for similar surveillance operations of the LEA. I noted that the authorized periods for these two authorizations were also too long. Moreover, it was unrealistic to have the authorized period ending at 2359 hours of a day because the targeted shops were closed by that hour and the surveillance officer concerned was already off duty. Similar to the case in paragraph 4.25 above, I recommended to the LEA that when considering the proposed duration of authorization, the applicant should not take too much time as a buffer for the sake of operational convenience. Instead, he should consider the duration strictly according to the actual need of the operation.

Legal requirement of an application

4.28 During my examination of the application file of an executive authorization in an LEA, I noticed that the LEA invoked the power of ICSO to investigate three offences, namely A, B and C whereas only offence A was within the ambit of the LEA. While I appreciated that the LEA was legally justified to investigate offences B and C which were connected with offence A, I was concerned whether the LEA should have invoked ICSO powers to investigate the case because offence A was the least serious offence among the three and by itself might not fully satisfy the stringent requirements for an application for Type 2 surveillance. The LEA agreed to take my view into account in dealing with similar cases in future.

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CHAPTER 5

LEGAL PROFESSIONAL PRIVILEGE **AND JOURNALISTIC MATERIAL**

LPP Cases

5.1 During this report period, there was a surge of the number of reports of cases that might involve information subject to legal professional privilege ('LPP').

5.2 Paragraph 120 of the Code of Practice ('COP 120') provides that the LEA concerned should notify me of operations that are likely to involve LPP information or where LPP information has been obtained inadvertently. Thus, not only cases where LPP information has been obtained, but also cases in which it may be obtained and those that are assessed to have the likelihood of obtaining it will have to be reported to me.

5.3 Regarding each of such cases, there are procedures required 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 LPP likelihood in his affidavit or statement in support of his application (as required by paragraph (b)(ix) of Part 1, paragraph (b)(x) of Part 2 and paragraph (b)(x) of Part 3 of Schedule 3 to the Ordinance). After such assessment, whenever there is anything that transpires which may affect the assessment, the LEA has to promptly notify the panel judge of the LPP involvement which is considered as a material change of circumstances, by way of an REP-11 report. In the REP-11

report, the LEA has to provide the details of all relevant circumstances, including how it came 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 its officers have taken or propose to take to prevent infringement of the right to communications that are protected by LPP. In order to apprise myself promptly with timely information on this important matter, I directed the LEAs to give me a similar notification of each of such occurrences as if under COP 120. This resulted in the increase of the number of LPP reports from them.

5.4 The panel judges continued to be very cautious in dealing with cases that might possibly involve LPP information being obtained by an LEA. When it was assessed that there was such likelihood, they would either refuse to grant the authorization sought or revoke the authorization already given, or if they granted the authorization or allowed it to continue, they would impose additional conditions. These additional conditions encumbered the LEA to report back when the likelihood was heightened or when there was any material change of circumstances so that the panel judge would reconsider the matter in the new light. While I will not disclose the details of these additional conditions for fear of prejudicing the prevention or detection of crime or the protection of public security, I can vouch that such additional conditions were stringent and effective in safeguarding this important right of individuals to confidential legal advice.

My requirements to the LEAs

5.5 In the course of my review of LPP cases, I found that some LEA officers were still not clear under what circumstances they had to

submit reports pursuant to COP 120 to me and under what circumstances they had to preserve the intercept products for my review. A typical case can be found in LPP Case 5 below. To enable the LEAs to know what they should do and what they should preserve to facilitate my review of such cases, in May 2010, I formally put forth the following reporting and preservation requirements to the LEAs when dealing with LPP matters. I illustrated my requirements with an example for better understanding by all concerned.

(1) Example

5.6 A prescribed authorization has been obtained to intercept two telephone numbers of the subject of an investigation, ie telephone numbers (i) and (ii).

5.7 Another prescribed authorization has also been obtained on the same subject intercepting telephone number (iii).

5.8 Through interception on the subject's telephone number (i), a call between the subject and a solicitor using telephone number (iv) is intercepted. Upon listening to this call, the listener considers that the call involves LPP information or likely LPP information or there is heightened likelihood of obtaining LPP information if listening continues. The listener reports this call to his superior officers.

(2) REP-11 report to the panel judge

5.9 An REP-11 report on material change of circumstances is to be submitted to the panel judge on the call reported by the listener

mentioned in the preceding paragraph. For ease of reference, I shall refer to this call hereunder as the 'Reported LPP Call' irrespective of whether LPP information has indeed been obtained.

5.10 I require that the reporting officer of the REP-11 report (who is usually the superior officer of the listener or an officer responsible for ICSO matters) to disclose in the REP-11 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.

5.11 In addition, the reporting officer should also report in the REP-11 report:

- (a) whether, other than the Reported LPP Call, there are any calls between the solicitor's telephone number (iv) and the subject's telephone number (i) or (ii), irrespective of whether such calls are intercepted before or after the Reported LPP Call;
- (b) whether, other than the Reported LPP Call, there are any calls between the solicitor's telephone number (iv) and the subject's telephone number (iii) authorized under another prescribed authorization, irrespective of whether such calls are intercepted before or after the Reported LPP Call; and
- (c) whether such other calls mentioned in (a) and (b) above have been listened to and if so, the identity of the listener(s).

5.12 For the purpose of paragraphs 5.10 and 5.11 above, the reporting officer should check the relevant audit trail report ('ATR') that records all accesses to the calls together with the corresponding call data when preparing the REP-11 report.

(3) Preservation of records

5.13 When encountering cases in situations mentioned above (ie obtaining of LPP or likely LPP information or heightened likelihood of obtaining LPP information) and irrespective of whether the department has decided to discontinue the operation, the department should make sure that the following should be preserved for the performance of my review functions:

- (a) The intercept products of all intercepted calls on the facilities authorized by the prescribed authorizations from the time when such products or records are still available at the time of discovery of the Reported LPP Call up to 24 hours after the disconnection of the facilities.
- (b) The transcripts, summaries, notes, ATRs, and records in whatever form for the same period.

5.14 The preservation requirement further applies to any renewed applications in respect of the case.

5.15 The preserved records should not be destroyed without my prior consent.

(4) Reporting to me

5.16 The LEA should report the above cases to me pursuant to COP 120, which requires that a department should notify me of covert operations that are **likely** to involve LPP information as well as other cases where LPP information has been obtained. I require LEAs to use a separate letter for reporting such cases to me. They should not wait until the submission of the weekly report but should report such LPP cases or likely LPP cases (including heightened likelihood of obtaining LPP information) to me as soon as they have submitted an REP-11 report or a discontinuance report to the panel judge. This will ensure that such LPP cases will be immediately brought to my attention.

5.17 At the time of submitting a report to me pursuant to COP 120, the LEA should attach to the report a sanitized copy each of the application and supporting affirmation, prescribed authorization, REP-11 report, the panel judge's determination, discontinuance report (if applicable), ATR, etc.

(5) COP 120

5.18 The above paragraphs refer to the discovery of LPP information or likelihood in the middle of an interception operation. If at the time of the grant of the prescribed authorization, it is already assessed that there will be likelihood of obtaining information subject to LPP, this should be so reported to me under COP 120, using a separate letter (instead of just reporting it in the weekly report form). The LEA should preserve the records referred to in paragraph 5.13 above covering the period from the start of the prescribed authorization up to 24 hours after the disconnection of the facilities. The preserved records should not be

destroyed without my prior consent. Other requirements mentioned in the preceding paragraphs also apply where appropriate.

Journalistic material cases

5.19 There is no provision in the Ordinance or in the Code requiring an LEA to report to the panel judge or me the obtaining of information which may be the contents of any journalistic material ('JM') through interception or covert surveillance. The Ordinance only requires an 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 [Part 1(b)(ix), Part 2(b)(x) and Part 3(b)(x) of Schedule 3 to the Ordinance]. Save for these provisions, there is no reporting requirement at all on JM cases.

5.20 Although there is no provision in the Code requiring a department to report JM cases to me, I notify the LEAs that similar arrangements as in paragraphs 5.6 to 5.18 above should also be made in respect of cases where JM is involved or likely to be involved.

JM reports received in 2010

5.21 In 2010, I did not receive any report on obtaining of JM through interception or covert surveillance operations.

LPP reports received in 2010

5.22 The reports on LPP involvement were made to me generally under three sets of circumstances. Where at the time of the application it

was assessed that the operation sought to be authorized would likely obtain information which might be subject to LPP, a report pursuant to COP 120 ('a COP 120 report') would be made to me. Similarly, where the assessment of likely LPP involvement was made at the application for renewal of a prescribed authorization, a COP 120 report was called for. On the other hand, wherever there was a change of circumstances relating to LPP involvement, an REP-11 report would be made to the panel judge or a similar report would be made to the authorizing officer, which also called for a COP 120 report to be made to me. It can be seen that therefore on not infrequent occasions, even in a single case relating to one subject of an investigation, a number of COP 120 reports on LPP involvement might be made to me from time to time by the LEA carrying out the investigation. Since all the reports related to one single subject, it does not seem reasonable to assign a number to each of these COP 120 reports for counting them as that many LPP cases, because the figures might lead one into thinking that they concern more than one LPP case. I consider it logical and proper to use a subject as the basis for counting each LPP case. For the purpose of this annual report, therefore, the following counting system is adopted, namely, insofar as there is more than one COP 120 report relating to the same subject, all the reports are counted as only one LPP case. If, for instance, another subject, albeit under the same investigation, was involved, all the COP 120 reports relating to that other subject are counted as another distinct LPP case. Applying this counting system, in this report period, there were altogether 63 COP 120 reports made to me that referred to only 27 LPP cases.

5.23 Among those 27 LPP cases, there were 21 cases with the submission of REP-11 reports to the panel judges on change of LPP risk.

5.24 Those 21 cases included:

- (a) one case of obtaining information subject to LPP and the prescribed authorization was revoked by the panel judge;
- (b) three cases of heightened likelihood of obtaining LPP information and the prescribed authorizations were revoked by the panel judges; and
- (c) 17 cases of heightened likelihood of obtaining LPP information, among which 12 were allowed by the panel judges to continue with their prescribed authorizations subject to additional conditions imposed to guard against the risk of obtaining LPP information and five were discontinued by the LEAs of their own volition.

5.25 In my review of these cases, I checked all the relevant documents and records including the prescribed authorization, the REP-11 report, the determination by the panel judge, the listener's notes, the written summaries, the call data, the ATRs, etc. Apart from focussing on checking the veracity of what was reported in the REP-11 report about the Reported LPP Call, I also checked whether the LEA had complied with the additional conditions imposed by the panel judge, whether the LPP information or likely LPP information had been screened out from the written summaries passed on to investigators, whether there were calls between the same telephone numbers preceding the Reported LPP Call that should have been reported to the panel judge but were not reported, and whether there was any listening or re-listening to the intercept product after the discontinuance or revocation of the prescribed authorization.

5.26 In this connection, I wish to highlight that there is a serious limitation in the performance of my review function. As mentioned in paragraphs 5.20 to 5.25 of my Annual Report 2008, my power to listen to intercept products was doubted after the submission of my Annual Report 2007 to the Chief Executive in June 2008. The fact has been that there is no express provision in the Ordinance empowering me or my staff to listen to intercept products. In view of this and in order not to be perceived as acting above the law, since then and up to now, when I reviewed LPP cases, I did not listen to the recording of intercept product. I will maintain the same position pending a decision by the Administration on whether I should have such a power and if so, an amendment to the Ordinance to that effect.

5.27 Since I had not listened to the recording of the intercept product in my review of LPP cases in 2010, no finding could be made as to the veracity of the gist of the conversation in the Reported LPP Call as stated in the REP-11 report. Similarly, no finding could be made as to whether the calls preceding the Reported LPP Call (ie calls referred to in paragraph 5.11(a) and (b) above) also had LPP information or likely LPP information or increased LPP likelihood that ought to have been reported to the panel judge in the first instance, or whether there were any communications subject to LPP other than those reported.

Review of the four cases with prescribed authorizations revoked

5.28 Of the 21 LPP cases mentioned in paragraph 5.24 above, four were revoked by the panel judge after considering the REP-11 reports on change of circumstance regarding the LPP risk. The facilities were disconnected shortly after revocation, resulting in unauthorized interception

of a short period in these four cases, ranging from four to 22 minutes. Among these four cases, only one involved the actual obtaining of LPP information, that is, LPP Case 1. These four cases are discussed in paragraphs 5.29 to 5.56 below.

LPP Case 1

5.29 An LEA reported to me an incident where interception continued for nine minutes after a panel judge revoked a prescribed authorization upon considering an REP-11 report which reported on the inadvertent obtaining of information which might be subject to LPP and a further heightened likelihood of obtaining LPP information through the interception.

5.30 Briefly, at the time of the grant of the prescribed authorization, it was assessed that there was likelihood of obtaining LPP information through interception on the subject. Therefore the panel judge imposed additional conditions on the prescribed authorization when granting it.

5.31 One day, the listener listened to a call between the subject and a male known only by a first name. The two talked about their concerted efforts in the selling of certain shares and the legal action they could take if opposition was encountered. There was no disclosure of the name of the company and the full identity of the male in this call. The two discussed like business partners.

5.32 A few hours later, the listener listened to another call between the subject and the male, also on the same subject matter of the first call.

5.33 From what was disclosed in the second call and after conducting some checks, the listener came to realize that the male was probably a solicitor.

5.34 The LEA then caused an REP-11 report to be made to the panel judge on these two calls. After consideration of the REP-11 report, the panel judge revoked the authorization. The facility was disconnected nine minutes later.

5.35 Upon notification by the LEA, I conducted a review on this case including checking the ATR, the summaries and other preserved materials and records, except the contents of the intercept products. I made the following findings:

- (a) The department had acted swiftly in effecting the disconnection of the facility within nine minutes after the revocation of the prescribed authorization. The interception after the revocation of the prescribed authorization and before the disconnection of the facility was conducted without the authority of a prescribed authorization and hence unauthorized.
- (b) No call was intercepted during the nine minutes of unauthorized interception.
- (c) Although the LEA treated this case as information which might be (as opposed to was) subject to LPP had been obtained, based on the contents of the two calls as reported by the LEA in the REP-11 report and the identity of the male, I was of the opinion that it was more probable than not that

LPP information had been obtained by the listener, though inadvertently.

- (d) The summaries that were produced for my inspection did not contain any information subject to LPP. This verified that no LPP information had been passed to the investigators through the summaries, complying with the requirement of COP 120.

5.36 Pending revision of the Ordinance regarding the legitimacy or propriety of my examination of the intercept product, neither I nor my staff listened to the intercept products in this case. Hence, no finding could be made as to:

- (a) the veracity of the contents of the two calls as stated in the REP-11 report; and
- (b) whether there were any communications subject to LPP in the intercept products listened to by the LEA officers other than the two calls reported in the REP-11 report.

LPP Case 2

5.37 An LEA reported to me an incident where interception of four facilities continued for 10 to 22 minutes after the panel judge revoked a prescribed authorization upon considering an REP-11 report which notified the panel judge of a heightened likelihood of obtaining information subject to LPP.

5.38 At the time of the grant of the prescribed authorization ('Authorization 1'), it was not assessed that there would be LPP likelihood.

In the course of interception, it was revealed that the subject was involved in a dispute and detained and that he required the assistance of the related subjects and a solicitor. The LEA reported the matter to the panel judge through an REP-11 report and sought to continue the authorization. The panel judge revoked Authorization 1. The four facilities under the authorization were disconnected 10 to 22 minutes later.

5.39 I conducted a review on this case by examining the relevant documents and preserved materials and records, except the intercept product.

5.40 I found that for this investigation case, there were ongoing interceptions on seven other related subjects which were authorized respectively by seven prescribed authorizations. In the REP-11 report to the panel judge, the LEA included the following sentence:

‘Unless otherwise directed by the Panel Judge, the interception operations in respect of the said seven other related subjects will continue should the interception pursuant to Authorization 1 be allowed to continue.’

As Authorization 1 was revoked by the panel judge, the above quoted sentence in the REP-11 report clearly did not apply to the situation. I enquired if the interception operations in respect of the seven related subjects had continued despite the revocation of Authorization 1 and if so, the justification the LEA relied upon. I also enquired if the panel judge knew that those interception operations had continued.

5.41 The LEA replied that immediately after the revocation of Authorization 1, its officer had enquired with a staff of the Panel Judges’

Office ('PJO') about the status of the authorizations in respect of the related subjects. The staff of PJO informed the LEA that he had consulted the panel judge who indicated that only the authorization in respect of which the REP-11 report was submitted had been revoked (ie Authorization 1) and if there was material change in circumstances in respect of those related subjects, further REP-11 reports should be submitted to the panel judge. Given the determination of the panel judge that only Authorization 1 was revoked, the LEA considered that the interception operations in respect of the seven related subjects were allowed to continue despite the said sentence in the REP-11 report. Hence, the interception operations in respect of the seven related subjects continued.

5.42 In the light of my query on the matter, the LEA submitted a further report in respect of Authorization 1 ('a Further Report') to inform the panel judge of the full circumstances under which the interception operations in respect of the seven related subjects had continued despite the revocation of Authorization 1. In noting the Further Report, the panel judge commented that it was not possible for him to give directions in respect of the seven related prescribed authorizations since no REP-11 reports had been taken out in respect of these related prescribed authorizations. The LEA seemed to have fallen into the same error as it did initially when the report on material change pursuant to Authorization 1 was submitted.

5.43 In view of the panel judge's comments, the LEA submitted to the panel judge seven separate REP-11 reports in respect of the seven related subjects. After considering the seven reports, the panel judge was

satisfied that the conditions for the continuance of each of the authorizations in respect of the seven related subjects were still met and allowed those interception operations to continue.

5.44 Due to the comments by the panel judge, the LEA would ensure that in all future cases where there are related authorizations, separate REP-11 reports would be submitted under each authorization to report on the material change of circumstances relevant to that authorization and that an REP-11 report would only refer to facts and circumstances relevant to the authorization for which the report is submitted, but not those of other related authorizations.

5.45 Save for the observation in paragraph 5.40 above, I found nothing untoward. After conducting a review, I made the following findings:

- (a) The interception after the revocation of Authorization 1 and before the disconnection of the four facilities thereunder was conducted without the authority of a prescribed authorization. The periods of unauthorized interception ranged from 10 to 22 minutes.
- (b) Three calls were intercepted during the period of unauthorized interception in respect of one of the facilities but they were not listened to by the LEA.
- (c) No call was intercepted on the other three facilities during the unauthorized period.

- (d) Based on the gist of the conversations as stated in the REP-11 report, no LPP information had actually been obtained.

5.46 As I had not listened to the audio recordings archived in the LEA, no finding could be made as to:

- (a) the veracity of the gist of the conversations of the relevant calls as stated in the REP-11 report; and
- (b) whether there were any communications subject to LPP in the calls listened to by the LEA.

LPP Case 3

5.47 An LEA reported to me an incident of heightened likelihood of obtaining information subject to LPP and an incident of unauthorized interception in respect of the same prescribed authorization.

5.48 At the time of the issue of the prescribed authorization, it was not assessed that there would be likelihood of obtaining LPP information. Hence, no additional conditions were imposed by the panel judge.

5.49 One day, a listener listened to a call which was between the subject and an employee of a solicitors' firm. On the face of the conversation, it did not contain any LPP information, but acting on the side of caution, the listener reported the content of the call to a superior officer who considered that there might be likelihood of obtaining LPP information. The LEA then caused an REP-11 report to be submitted to the panel judge on the change in the assessment of LPP likelihood. The panel

judge allowed the authorization to continue with additional conditions imposed.

5.50 A few days later, the LEA intercepted another call between the subject and another person. The call revealed that the subject's organization was under investigation and he required a solicitor to accompany him during the investigation. The LEA considered that there was increased likelihood of obtaining LPP information and reported the change of circumstances to the panel judge. The panel judge revoked the prescribed authorization after considering the REP-11 report. The facility was disconnected 16 minutes after the revocation of the prescribed authorization.

5.51 After conducting a review, I made the following findings:

- (a) The interception after the revocation of the prescribed authorization and before the disconnection of the facility was conducted without the authority of a prescribed authorization. The unauthorized interception lasted 16 minutes.
- (b) No call was intercepted during the period of unauthorized interception.
- (c) Based on the gist of the conversations as stated in the REP-11 reports, no LPP information had been obtained.

5.52 As I had not listened to the audio recordings archived in the LEA, no finding could be made as to:

- (a) the veracity of the gist of the conversations of the relevant calls as stated in the two REP-11 reports; and
- (b) whether there were any communications subject to LPP in the calls listened to by the LEA.

LPP Case 4

5.53 An LEA reported to me an incident where interception continued for four minutes after the panel judge revoked the prescribed authorization upon considering an REP-11 report on heightened likelihood of obtaining information subject to LPP.

5.54 At the time of the issue of the prescribed authorization, it was not envisaged that the interception would involve LPP information. One day, a call from a person (later found to be a solicitor of a solicitors' firm) to the subject was intercepted. After listening to part of the call, the listener formed the view that there was heightened likelihood of obtaining LPP information. The LEA reported the same to the panel judge who revoked the prescribed authorization. The facility was disconnected four minutes after revocation of the prescribed authorization.

5.55 After carrying out a review, I made the following findings:

- (a) The interception after revocation of the prescribed authorization and before the disconnection of the facility was conducted without the authority of a prescribed authorization. The unauthorized interception lasted about four minutes.

- (b) No call was intercepted during the period of unauthorized interception.
- (c) Based on the gist of conversation as reported in the REP-11 report, no LPP information had actually been obtained.

5.56 As I had not listened to the audio recordings archived in the LEA, no finding could be made as to:

- (a) the veracity of the gist of the conversation of the call as stated in the REP-11 report; and
- (b) whether there were any communications subject to LPP in the calls listened to by the LEA.

Review of the other LPP cases

5.57 For those 17 cases where the panel judge allowed the prescribed authorizations to continue after considering the REP-11 reports on heightened likelihood of obtaining LPP information or where the interceptions were discontinued by the LEAs of their own volition, I had also conducted a review on them except LPP Case 7. These are described below.

LPP Case 5

5.58 In early 2010, during an inspection visit to an LEA, I was verbally informed by the LEA that the panel judge had allowed a prescribed authorization to continue subject to further conditions, after considering an REP-11 report on heightened likelihood of obtaining information subject to LPP. At the meeting, I requested the LEA to

preserve those records that were still available at the time when the suspected LPP calls were detected until disconnection for my review.

5.59 The following day, the LEA submitted a weekly report to me. In the covering letter, the LEA stated that sanitized copies of the REP-11 report, the panel judge's determination and the further conditions imposed on the prescribed authorization were enclosed for my perusal. The LEA also stated that the relevant intercept product since 12th of the month up to the time of disconnection had been and would be preserved for my examination.

5.60 Intercept product, if not preserved, will be automatically destroyed after a certain period. In view of the date of discovery of the (suspected) LPP calls, the intercept product that was still available as of that time should be from the 9th day of the month. I immediately enquired with the LEA why only the intercept product since the 12th day had been preserved but not since the 9th day.

5.61 In the following month, the LEA explained that the officers concerned in this case were aware of the preservation requirement concerning intercept product for:

- (a) cases where information which might be subject to LPP was inadvertently obtained and an REP-11 report had been submitted to the panel judge; and
- (b) cases of unauthorized interception in the period between revocation and disconnection (for example, arising from revocation of the prescribed authorization by the panel judge

upon considering an REP-11 report on heightened likelihood of obtaining information which might be subject to LPP).

In these cases, the intercept product that was still available at the time when the LPP call (or suspected LPP call) was detected, or when the unauthorized interception had occurred, up to the time of disconnection, would be preserved.

5.62 In the present case, the officers concerned were not certain if the preservation requirement mentioned above should also apply, since this was the first time that the panel judge had allowed a prescribed authorization to continue subject to further conditions after considering an REP-11 report on heightened likelihood of obtaining information which might be subject to LPP and there was no issue of unauthorized interception. After being notified on Friday of the panel judge's decision made at 1731 hours to allow the prescribed authorization to continue subject to further conditions, the officers deliberated between 1800 hours and 1856 hours on that Friday as to whether preservation of relevant records was required in this case. At 1856 hours, they decided to act on the side of caution by requiring all relevant records, including the intercept product, that were still available to be preserved. At about 1900 hours, they tried to inform the officer responsible for archiving intercept product but that officer had already gone off duty. Having considered that the two relevant calls giving rise to the change in LPP risk reported in the REP-11 report could still be preserved for my examination even if the archiving was to be conducted on the following Monday, the officers decided that the archiving of the intercept product be carried out on the following Monday. As a result, all intercept product that was still available as of the following

Monday, ie from the 12th day of the month, was preserved. Had the decision by the officers been made slightly earlier on Friday to preserve the intercept product, the product from the 9th day of the month could have been preserved.

5.63 At a subsequent inspection visit, I advised the LEA that the intercept product and relevant records that were still available at the time of discovery of LPP information / likely LPP information or when an assessment on heightened LPP likelihood was made should be preserved for my examination. It should notify me of the heightened likelihood of obtaining LPP information through a report submitted pursuant to paragraph 120 of the Code, instead of in the context of the weekly report.

5.64 A few days later, the LEA duly submitted a COP 120 report to me. According to the report, at the time of the grant of the prescribed authorization, it was not envisaged that LPP information would be involved. In the midst of interception, the listener listened to two calls, the contents of which were on the subject's relative who was involved in foreign legal proceedings. The LEA considered that there was heightened likelihood of obtaining LPP information and reported the two calls to the panel judge by way of an REP-11 report on change of circumstances. The panel judge allowed the prescribed authorization to continue subject to conditions imposed to minimize the chance of obtaining LPP information.

5.65 I had reviewed the case and subject to what is stated in paragraph 5.67 below, found no irregularity.

5.66 As I had not examined the contents of the intercept product archived in the LEA for the reason stated in paragraph 5.26 above, no finding could be made as to:

- (a) the veracity of the gist of the conversations of the two calls as stated in the REP-11 report; and
- (b) whether there were any communications subject to LPP in the intercept product listened to by the LEA officers.

5.67 I was, however, not satisfied with the fact that the intercept product in this case that was preserved for my examination only started from the 12th day of the month instead of from the 9th day. The explanations for the delay in the preservation were not acceptable. First, this was not the first case in this LEA in which a panel judge allowed a prescribed authorization to continue after receipt of an REP-11 report from the department on heightened likelihood. Secondly, the officers who were involved in making the decision that resulted in the late preservation seemed only to understand that the need for the preservation arose out of my wish to check whether or not there had been full and frank disclosure in the related REP-11 report concerning the two Reported LPP Calls. They did not seem to understand that another of the purposes of the pre-discovery preservation as stated in paragraphs 5.28 and 9.4(c) of my Annual Report 2008 published in December 2009 is to check if there had been any previous LPP calls which should have been but were not reported to the panel judge. They did not seem to appreciate the importance of preserving records as soon as possible in order to prevent their loss through automatic destruction.

LPP Case 6

5.68 In this case, at the issue of the prescribed authorization, it was not envisaged that the interception operation would likely involve LPP information. In the course of interception, the department considered that there would be such likelihood and submitted REP-11 reports to the panel judge on two occasions. On each occasion, the panel judge allowed the authorization to continue but with additional conditions imposed. One of such conditions was that the department should refrain from listening to calls made to or from certain specified telephone numbers ('the prohibited numbers'). There was also a third occasion when the department considered that there was further heightened likelihood of obtaining LPP information. Instead of seeking to continue the prescribed authorization, the department decided to discontinue the interception operation on the ground that the interception had not been productive since the commencement of the interception operation and that further heightened LPP likelihood was assessed. The prescribed authorization was duly revoked by the panel judge upon receipt of the REP-11 report and the discontinuance report. On each of the three occasions, the department reported the occurrences to me under COP 120.

5.69 When I reviewed the case during an inspection visit in December 2010, I found that the content of a call from the subject's facility to one of the prohibited numbers was listened to by a listener. The listening was non-compliant with the additional condition imposed by the panel judge. Upon my discovery, the department reported the matter to the panel judge. The department also formally reported the non-compliance to me under section 54 of the Ordinance. This is the case referred to in

Report 6 in Chapter 7. A full investigation report is awaited from the department. I shall review this non-compliance case upon receipt of the full investigation report.

LPP Case 7

5.70 In mid-December 2010, pursuant to COP 120, an LEA notified me of an incident where the panel judge allowed a prescribed authorization to continue after considering an REP-11 report on change of circumstances but with additional safeguards imposed. One of the safeguards was prohibition against listening to calls between the subject facility and a specified telephone number ('the prohibited number').

5.71 On 29 December 2010, the LEA further reported to me under section 54 of the Ordinance that a listener had inadvertently listened to a call made between the subject and the prohibited number. He listened to the call for the first time for 22 seconds and then re-listened to it for another 12 seconds to clarify the content of the call. He then suddenly realized that the call was on the prohibited number and reported the matter to his supervisory officer. When preparing an REP-11 report to the panel judge to report on this matter, the LEA discovered that a few days earlier, another listener had also listened to another call between the subject and the prohibited number. The LEA duly reported both incidents to the panel judge. It also discontinued the interception operation. The panel judge revoked the prescribed authorization upon receipt of the REP-11 report and the discontinuance report. Pending the submission of a full investigation report from the LEA, I have not yet carried out a review of this case. This is the case referred to in Report 7 in Chapter 7.

LPP Case 8

5.72 At the time of the issue of the prescribed authorization, it was assessed that the interception would not involve LPP information. Hence, no additional conditions were imposed by the panel judge. In the midst of interception, the department submitted on three occasions REP-11 reports to the panel judge to report on the change of circumstances relating to possible LPP involvement, as a result of which the panel judge imposed additional conditions in the prescribed authorization prohibiting the listening to calls made to or received from several telephone numbers ('the prohibited numbers'). When I reviewed this case in March 2011, I discovered that after the imposition of the additional conditions, between November and December 2010, there were five occasions on which a listener listened to calls made to or received from three of the prohibited numbers (three occasions on one prohibited number, one occasion on another prohibited number and one occasion on a third prohibited number). These were breaches of the additional conditions imposed by the panel judge. Upon my discovery, the department reported these incidents to the panel judge. In March 2011, the department submitted an initial report of non-compliance on these five incidents to me under section 54 of the Ordinance. A full investigation report from the department is awaited.

LPP Case 9

5.73 A prescribed authorization was imposed with additional conditions by the panel judge because of an assessment of LPP likelihood. On Day 1, a female listener listened to a call and found that there would be added likelihood of obtaining LPP information. She suspended monitoring and reported the matter to her supervisor. She was instructed to continue

with the suspension. On Day 3, an REP-11 report was submitted to the panel judge to report on the content of the call ('the Reported LPP Call'). After considering the REP-11 report, the panel judge allowed the prescribed authorization to continue but subject to further conditions.

5.74 In my review of this case in early 2011, I found from the ATR that the listener had on Day 2 accessed another call intercepted after the Reported LPP Call when monitoring was supposed to be put on hold pending submission of an REP-11 report to the panel judge on the Reported LPP Call and a determination by the panel judge. According to the ATR, the listener had accessed this other call for 15 seconds.

5.75 When interviewed by me, the listener stated that she had not listened to any call after listening to the Reported LPP Call. She suspected that there was 'accidental access' when she was preparing a draft REP-11 report at her listening workstation on Day 2. However, I found that 'the accidental access' was not disclosed in the REP-11 report to the panel judge, which cast doubt on whether the reporting officer of the REP-11 report (the supervisor) had checked the ATR before submitting the REP-11 report to the panel judge on Day 3. If the reporting officer had checked the ATR before submitting the REP-11 report, such 'accidental access' would have been discovered and reflected in the REP-11 report. I requested the department to submit an investigation report and a statement from the listener on the matter. I have not yet received the investigation report and the listener's statement pending the completion of this annual report.

LPP Case 10

5.76 An LEA submitted a report under section 58 of the Ordinance to the panel judge reporting that the subject of a prescribed authorization was arrested for a minor offence which was unrelated to the offence for which the prescribed authorization was granted. The subject was released on bail. The LEA sought to continue the prescribed authorization. The panel judge allowed the authorization to continue with additional conditions imposed. On a later day, the listener listened to a call in which the subject discussed the unrelated offence with an unknown male. After listening for about two minutes, the listener suspected that the unknown male might possibly be a legal professional and that the content of the call might likely involve LPP information. The LEA reported the interception of the call ('the Reported LPP Call') to the panel judge who allowed the authorization to continue with further conditions imposed.

5.77 Other than the Reported LPP Call, the REP-11 report also reported that there was another call ('the Preceding Call') intercepted between the same two telephone numbers three minutes before the Reported LPP Call which was also listened to partially by the same listener for 23 seconds. The LEA claimed that the Preceding Call did not involve any LPP or likely LPP information.

5.78 When interviewed by me, the listener stated that she could not remember the content of the Preceding Call, but she was sure that it did not involve LPP information as she recalled that after realizing that the Preceding Call was also between the same two telephone numbers, she had told her supervisor that there was nothing special in the Preceding Call. Regarding the Reported LPP Call, the listener stated that the unknown male

did not identify himself as a lawyer, nor did the subject address the unknown male as a lawyer.

5.79 In my review of this case, since I did not listen to the calls, no finding could be made on the veracity of the gist of the conversations of the Reported LPP Call as stated in the REP-11 report and the claim stated in the REP-11 report that the Preceding Call did not involve any LPP or likely LPP information. Otherwise, nothing untoward was found.

LPP Case 11

5.80 In this case, at the time of the grant of the prescribed authorization, it was not envisaged that LPP information would be obtained through interception. One day, an incoming call from a solicitor to the subject was intercepted. After listening to part of the call for about one minute, the listener ('Listener A') considered that further listening might result in the obtaining of LPP information. After consideration, the department decided to discontinue the interception operation partly because of the heightened likelihood of obtaining of LPP information through continued interception and partly because the interception had not been productive since the last renewal. The department submitted to the panel judge an REP-11 report to report on the call ('the Reported LPP Call') and a discontinuance report to discontinue the prescribed authorization. The panel judge duly revoked the authorization.

5.81 In accordance with my requirement referred to in paragraph 5.11 above, the department also reported in the REP-11 report that checking of the call data showed that within about a week before the interception of the Reported LPP Call, there were three calls made from the

solicitor's telephone number to the subject. These three preceding calls were listened to by another listener ('Listener B') on the days of their interception. The ATR showed that Listener B listened to these calls partly for 14 seconds, 23 seconds and 22 seconds respectively. The REP-11 report stated that according to Listener B, these three calls were irrelevant to the investigation and did not involve LPP information or likelihood.

5.82 When I reviewed this case, apart from reviewing the Reported LPP Call, I also made enquiries to see if there was anything improper for Listener B not to report the preceding three calls to her supervisors when she listened to them a few days before Listener A listened to the Reported LPP Call, for example, whether she knew that these three preceding calls were from a solicitors' firm or from a solicitor. When questioned by me about the three preceding calls, Listener B stated that she could not remember the callers and contents of the three calls as she did not make any notes on them. What she could say was that they were irrelevant to the investigation; hence she only listened to them partially. She maintained that they did not contain any information subject to LPP or which might increase the likelihood of obtaining LPP information.

5.83 In the absence of express power to permit me to listen to the intercept product, no finding could be made as to (i) the veracity of the gist of the conversation of the call reported by Listener A as stated in the REP-11 report, and (ii) the veracity of the claim of Listener B that the three preceding calls intercepted a few days before did not involve LPP information or likelihood.

The remaining 10 LPP cases

5.84 I also completed the review of the remaining 10 LPP cases and found nothing untoward.

Improvement to the ATR system

5.85 The ATR is an important record to check the access of listeners to intercept products. Originally, the ATR was only able to show which listener had accessed the intercept product and the start time of access. At my request, the ATR was enhanced in November 2009 such that it was able to show the duration of the call, the start and end time of access by the listener and the length of listening. However, the ATR, as enhanced, still could not record which part of the intercept product that a listener had accessed.

5.86 In the review of LPP cases (or JM cases), it is of importance that the ATR should be able to record which part of an intercepted call the listener has listened to. This is crucial for knowing whether a listener has indeed accessed the part containing LPP information (or JM), whether the listener is at fault in not reporting the matter to his senior officers for onward report to the panel judge and me, and whether the listener has complied with the additional conditions imposed by the panel judge in the prescribed authorization.

5.87 In September 2009, I recommended that a new ATR system with improved capability should be developed so that it would be able to record which part of a call the listener has accessed, even noting the pauses and the re-access to the recorded product and eventually at which position

of the product did the access or re-access start. Such improvement is most advantageous for my checking and verification purposes.

5.88 In addition, in 2010, I also recommended improvement to the formatting or presentation of the ATR to put in the reference of the prescribed authorization and the reference of the facility number, the total number of pages with each page paginated (for example, 'page 1 of 5, page 2 of 5' and so on), the word 'End' after the last entry, the date and time of publishing the ATR record, and the name, post and signature of the publishing officer of the ATR printout.

5.89 In May 2011, I was informed that a new ATR system has been completed which is capable of recording the exact position accessed by a listener and has incorporated all my suggestions and recommendations in the preceding two paragraphs. The new ATR system has been implemented since mid May 2011.

Power to listen to product of interception and covert surveillance

5.90 My staff and I have been reviewing the LPP cases in order to ensure that there is no irregularity or breach of any of the terms and conditions imposed in the prescribed authorization which may amount to non-compliance with the Ordinance. While a number of records can be used to check the various details of the contents of the REP-11 report, we have desisted from listening to the intercept product, for the reason that we fear that we might be treated as or criticised for operating above the law since there is no express power to do so given to us by the Ordinance. Thus any representation in the REP-11 report regarding the content of the intercept product is not subject to our review and scrutiny with the

assistance of the root material. We are compelled to take the description of the intercept products in the REP-11 reports as true and correct. Our inability is known to the LEA officers with the consequence that they could, and I am not saying that they would, make any representations about the intercept product, be they true or false. This is most undesirable and I urge that my recommendation of empowering me and my staff to inspect and listen to intercept products be adopted and put into effect. The same power should similarly be given regarding the products of covert surveillance operations, the necessity of which is well demonstrated by the case cited in paragraphs 7.70 to 7.98 of Chapter 7 below. With this power, while I appreciate that the workload of mine and my staff would be greatly increased, I have no doubt that it will act as a deterrent against malpractice and breaches by the LEAs and will only inure to the benefit of all concerned.

5.91 My recommendation of empowering me and my staff to inspect and listen to intercept products (which should also apply to covert surveillance products) was set out in paragraphs 9.2 to 9.11 of Chapter 9 of the Annual Report 2008. In brief, my recommendation is to require LEAs to preserve the intercept product of each and every interception and related records to enable my staff and me to check (by listening to the audio recording of the intercept products) cases of special interest or chosen at random. All such records should be preserved at the premises of individual LEAs concerned and only I and such staff of mine as designated by me could have access to them. LEA officers and any other persons should not be allowed access to these materials.

5.92 I understand that some people are concerned that this recommendation or new initiative would add intrusion into the privacy of members of the public, infringe their right to confidential legal advice or increase the risk of unauthorized disclosure or unintended leakage of confidential information. In this regard, I wish to repeat the following points made in my speech in the public forum held on 29 November 2010 addressing these concerns:

- (a) The persons affected by this new initiative are subjects of prescribed authorizations and the panel judges have authorized to intercept their communications. They are suspected offenders of serious crimes. Under the Ordinance, if there is no reasonable suspicion of a person's involvement in a serious crime or threat to public security, the panel judge will not issue a prescribed authorization to intercept his communications. It follows that ordinary citizens will not be the subjects of prescribed authorizations. The new initiative will basically not affect the privacy of these ordinary citizens. On the contrary, if on the face of it an LEA applies to a panel judge to intercept the communications of Person A, but in actual fact it intercepts the communications of Person B, the new initiative may be able to expose such irregularity, thus better protecting the privacy of citizens.
- (b) For the subjects of the prescribed authorizations, their conversations might have been listened to by LEA officers for more than once and by more than one listener of the LEA. Their privacy has already been infringed upon by LEA officers.

The intrusion into privacy caused by my or my staff's listening to their conversations is doubtless an additional intrusion but this additional intrusion is very limited.

- (c) If LEAs intercept calls involving LPP information or JM but did not report these calls to the panel judges, the new initiative would be able to expose such non-compliance. If the new initiative is established as part of the oversight mechanism, it can deter this kind of non-compliance. Viewed from this perspective, the new initiative can better protect people's right to confidential legal advice and JM.
- (d) Section 61(4) of the Ordinance provides that if an LEA obtains from the intercept product any information which might be capable of undermining the case for the prosecution against the defence or of assisting the case for the defence in criminal proceedings, the department **shall** disclose the information to the prosecution, so that the prosecution will inform the trial judge. However, under the existing system, if the department did not so disclose to the prosecution, nobody would know. But if the new initiative is implemented, there would be a chance of exposing such non-compliance or it could act as deterrence.
- (e) As regards the worry of unauthorized disclosure or inadvertent leakage of confidential information, even without the new initiative, the risk already exists regarding LEA officers as they could similarly disclose the confidential information in an unauthorized manner or leak it inadvertently. I wish to point

out that I and my staff are subject to the Official Secrets Ordinance and our ranks are not below those of the LEA listeners. There is no reason for only casting doubt on me or my staff in unauthorized disclosure or inadvertent leakage of confidential information. There is also a suggestion that my staff are general grades officers who would be transferred to other government departments after working in my secretariat for a certain period and hence, this would increase the risk of leakage of confidential information. Similarly, the LEA listeners may also leave their existing posts through promotion, transfer, resignation or retirement.

- (f) At present, through inspection visits to LEAs' offices, my officers and I examine various confidential documents, such as affidavits setting out particulars of the suspects and details of their activities, with telephone numbers to be intercepted and other related documents in which information obtained through interception may be mentioned. I cannot see the logic that I and my officers could access such confidential information through inspecting documents but there is worry of our accessing such information through listening to the audio recording of the intercept products.

5.93 I put forth the new initiative to the Security Bureau in April 2009. A decision by the Administration is awaited on whether the new initiative should be implemented.

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CHAPTER 6

APPLICATION FOR EXAMINATION AND NOTIFICATION TO RELEVANT PERSON

The law

6.1 Under 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 that has been carried out by officers of the LEAs. Under section 44, the Commissioner shall, save where the circumstances set out in section 45 apply, carry out an examination upon receiving an application to determine:

- (a) whether or not the suspected or alleged 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.

After the examination, if the Commissioner finds the case in the applicant's favour, he shall notify the applicant concerned and initiate the procedure for awarding payment of compensation to him/her by the Government.

6.2 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) 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. Relevant criminal proceedings, as defined under section 45(3), are 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

6.3 The procedure adopted for an examination can be briefly described below. The Commissioner's office will make enquiries with the specified LEA who, as the applicant alleges, has carried out either interception or surveillance or a combination of interception and surveillance against him/her 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. Further enquiries with other parties will be pursued if that may help obtain evidence regarding the existence or otherwise of any such alleged statutory activity. The results obtained from the enquiries will be compared and counterchecked to ensure correctness. Other than the information given above, I consider it undesirable to disclose more details

about the methods used for the examination of applications or about the examinations undertaken, because that would probably divulge information relating to the prevention or detection of crime or to the protection of public security, which would put the LEAs in a disadvantageous position as against criminals or possible criminals.

The applications under section 43

6.4 During the report period, a total of 23 applications for examination were received, four of which could not be entertained because the applications had either not raised matters within the ambit of my function as the Commissioner or failed to follow proper application procedures. Another six of the 23 applications were subsequently not pursued by the applicants. Of the remaining 13 applications, four alleged interception, one suspected surveillance and eight claimed a combination of interception and surveillance. As the Commissioner, I did not consider that any of the 13 applications came within the ambit of the exceptions covered by section 45(1) and I had carried out an examination provided for in section 44 in respect of each case.

6.5 Regarding these 13 applications for examination, I have made all necessary enquiries and found all these cases not in the applicants' favour. I accordingly notified each of the applicants in writing of my finding relating to him/her, with eight of such notices issued during the report period and five thereafter. By virtue of section 46(4) of the Ordinance, I was not allowed to provide reasons for my determination or to inform the applicants whether or not the alleged or suspected interception or surveillance had indeed taken place.

Applications affected by section 45(2)

6.6 As mentioned in paragraph 6.6 of my Annual Report 2009, there were a total of seven applications for examination brought forward from 2008 and in 2009 which were covered by section 45(2) and were put in abeyance pending the final determination or final disposal of the relevant criminal proceedings.

6.7 During the report period, I initiated an examination in respect of three out of the seven applications after having been satisfied that their relevant criminal proceedings had been finally determined or finally disposed of. The examination of the three cases concerned was duly concluded and a notice was issued to the legal representatives of the applicants concerned. As regards the remaining four applications brought forward from 2009, they are still pending.

Notification to relevant person under section 48

6.8 Under section 48, I am obliged to give notice to the relevant person whenever, during the performance of my functions under the Ordinance, I discover 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 I shall only give the notice when I consider that doing so would not be prejudicial to the prevention or detection of crime or the protection of public security. Moreover, section 48(6) exempts me from my obligation if the relevant person cannot, after the use of reasonable efforts, be identified or traced, or where I consider that the intrusiveness of the interception or covert surveillance on the relevant person is negligible.

6.9 For instance, the interception of communications on the telephone through the use of a telephone number other than that permitted by a prescribed authorization issued by a panel judge, however that error is made, constitutes in my opinion an unauthorized interception. It gives rise to the necessity of considering whether I should, as obliged by section 48 of the Ordinance, give a notice to the relevant person of the wrong interception and invite him/her to make written submissions to me in relation to my assessment of reasonable compensation to be paid to him/her by the Government.

6.10 In considering and assessing the amount of compensation that the Government ought to pay to the relevant person, the following non-exhaustive factors have to be taken into account:

- (a) the duration of the interception and/or covert surveillance;
- (b) the number of the communications that had been intercepted or the extent of the conversations and activities that had been subject to covert surveillance;
- (c) the total duration of the communications, conversations or activities that had been intercepted or subject to covert surveillance;
- (d) the sensitivity of the communications, conversations or activities;
- (e) injury of feelings such as feelings of insult and embarrassment, mental distress, etc;

- (f) whether the unauthorized act was done deliberately, with ill will or ulterior motive, or done unintentionally and resulted from negligence, oversight or inadvertence; and
- (g) the degree of the intrusion into privacy in the context of the number of persons outside the communications, conversations or activities having knowledge of the contents, whether such persons would remember or likely remember their contents, and whether such persons know the relevant person and the other participants to the communications, conversations or activities.

6.11 Account has to be taken of the contents of the written submissions made by the relevant person, which may involve any or all of the above factors. It may be necessary to listen to or examine the materials intercepted or subject to covert surveillance, but extreme care must be exercised if that step is to be taken because anyone from my office or I listening to or examining the intercept or surveillance product would certainly increase the extent of the intrusion into the relevant person's privacy.

Notice issued under section 48 in the report period

6.12 During the report period, I gave a notice to a relevant person pursuant to section 48(1) of the Ordinance for covert surveillance conducted by an LEA without the authority of a prescribed authorization. I informed the relevant person of the right to apply for an examination in respect of the unauthorized covert surveillance. At the time of the writing of this report, I have not yet received any response from the relevant person.

Elaboration on the application requirements

6.13 From the initial applications or letters of complaint made to me in the past four and a half years, I have 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 I might not be dealing with the application or complaint in good faith. Further suspicion of my fides was caused by the fact that I am not allowed by the Ordinance to disclose reasons for my determination or to inform the applicants whether or not the alleged or suspected interception or surveillance had indeed taken place [section 46(4)].

6.14 It is only when the proper basis of an application is satisfied that I am entitled to institute the process of my examination of the case. The proper basis is to satisfy both of 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 Police, ICAC, Customs and Excise Department or Immigration Department.

6.15 Regarding requirement (a), one usual complaint was that the complainant was 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 were also complaints of the complainant being implanted in the brain or another part of the body a device that could read his/her mind or incessantly talked to him/her or urged him/her to do something or impersonated him/her to speak to other people. There were certain other cases which related to the complainants being tracked and hurt by some kind of rays or radio waves emitted by a device. All these again do not form a proper basis for an application for me 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.

6.16 Regarding requirement (b), some applicants or complainants described how an employer or a particular person, as opposed to an LEA officer, carried out the suspected interception or covert surveillance. This failed to satisfy this second requirement for me to entertain an application or to engage in an examination.

6.17 During the report period, the above information about the relevant provisions of the Ordinance, application requirement and procedure as well as the consent form on the use of personal data were uploaded onto the website of the Commission to provide ready reference to the applicants or prospective applicants to facilitate their properly lodging an application for examination with me under section 43 of the Ordinance.

Statutory prohibition against disclosure of reasons for determination

6.18 Section 46(4) expressly provides that in relation to an application for examination, I am not to provide reasons for my

determination, or give details of any interception or covert surveillance concerned, or in a case where I have not found in the applicant's favour, indicate whether or not the suspected interception or covert surveillance has taken place.

6.19 It is hoped that the public will understand that this statutory prohibition against me is designed to forbid the disclosure of any information which might prejudice the prevention or detection of crime or the protection of public security, preventing the provision of an advantage to criminals or possible criminals over the LEAs in the latter's efforts in fighting crimes and in protecting the safety of the community in Hong Kong. There should not be any doubt that I carry out my duties and functions under the Ordinance with the utmost good faith.

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CHAPTER 7

REPORTS OF NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS AND FINDINGS

Reporting of irregularities

7.1 Section 54 of the ICSO provides that where the head of any of the LEAs considers that there may have been any case of failure by the department or any of its officers to comply with any relevant requirement, he shall submit to the Commissioner a report with details of the case (including any disciplinary action taken in respect of any officer). Relevant requirement is defined in the Ordinance to mean any applicable requirement under any provision of: (i) the ICSO, (ii) the Code of Practice, or (iii) any prescribed authorization or device retrieval warrant concerned.

7.2 Where the head of an LEA considers that there is an irregularity but does not consider that the irregularity is due to or constitutes any such non-compliance by the department or any of its officers, it has become a practice that the department will submit an incident report to the Secretary to the Commission. Such reports are *not* made under section 54 of the Ordinance.

7.3 When reporting non-compliance or irregularity, normally the LEAs would adopt a two-step approach. They would first submit an initial report to notify me of the occurrence of the incident, to be followed by a full investigation report after they have conducted in-depth investigation into the case. The full investigation report is usually submitted several months after the initial report.

Cases brought forward from Annual Report 2009

7.4 There were five cases in the Annual Report 2009 my review of which had not yet completed at the time of submission of the report to the Chief Executive in June 2010, as follows:

- (i) Reactivation of discontinued interceptions [Paragraph 7.32 of Annual Report 2009], dealt with in paragraph 7.7 below;
- (ii) Duplicated distribution of audio products of telecommunications interception [Report 7 in paragraph 7.117 of Annual Report 2009], dealt with in paragraphs 7.8 to 7.12 below;
- (iii) Type 2 surveillance conducted on telephone conversation between a participating agent and a person unrelated to the investigation [Report 8 in paragraph 7.118 of Annual Report 2009], dealt with in paragraphs 7.13 to 7.39 below;
- (iv) Type 2 surveillance on seven phone calls conducted on the representative of the subject [Report 9 in paragraphs 7.119 to 7.122 of Annual Report 2009], dealt with in paragraphs 7.40 to 7.52 below; and
- (v) Wrong interception of a call [Report 12 in paragraph 7.131 of Annual Report 2009], dealt with in paragraphs 7.53 to 7.56 below.

The review of these cases has now been completed and they are described in the various paragraphs referred to above.

Cases occurring or discovered in 2010

7.5 In 2010, my office and I received seven reports of non-compliance or irregularities from the LEAs, in the following order:

- Report 1 : Failure to declare previous applications in the affidavit supporting an application for prescribed authorization for Type 1 surveillance, dealt with in paragraphs 7.57 to 7.69 below;
- Report 2 : Type 2 surveillance conducted on an incoming call whose caller was not the subject of the executive authorization, dealt with in paragraphs 7.70 to 7.98 below;
- Report 3 : Listening to intercept product by an officer below the rank specified in the prescribed authorization, dealt with in paragraphs 7.99 to 7.135 below;
- Report 4 : Type 1 surveillance carried out on persons in a meeting not allowed by the terms of the prescribed authorization, dealt with in paragraphs 7.136 to 7.227 below;
- Report 5 : Old ATR setting used, dealt with in paragraphs 7.228 to 7.233 below;
- Report 6 : Listening to a call made to a prohibited telephone number, dealt with in paragraph 7.234; and

Report 7 : Listening to two prohibited calls, dealt with in paragraph 7.235 below.

7.6 Reports 3, 4, 6 and 7 were submitted under section 54 of the Ordinance whereas Reports 1, 2 and 5 were submitted *not* under section 54 of the Ordinance.

OUTSTANDING CASES FROM 2009

Outstanding Case (i): Reactivation of discontinued interceptions [Paragraph 7.32 of Annual Report 2009]

7.7 In May 2009, the Team submitted an investigation report to me on the reactivation of four discontinued interceptions for about three hours due to technical problems, followed by a further report in August 2009. The CSP concerned also submitted a report to me on this incident. After considering the reports from the Team and the CSP, in December 2009, I sought comments from the Team on the CSP report and clarification on certain points. After conducting a review, I was satisfied that the reactivation of the four telecommunications services was not due to the fault of the Team or other officers of the LEAs concerned. Remedial measures have also been taken to avoid recurrence.

Outstanding Case (ii): Duplicated distribution of audio products of telecommunications interception [Report 7, paragraph 7.117 of Annual Report 2009]

7.8 In November 2009, a department submitted an initial report to me on an incident where audio products of telecommunications

interception were distributed to another section of the department by mistake. Briefly, Section A of the department had obtained 26 prescribed authorizations for telecommunications interception for investigating certain crimes. Section B of the department was not involved in the investigation of these crimes. Due to human error, audio products obtained from telecommunications interception authorized by these 26 prescribed authorizations which should be sent to Section A only, were also made available to Section B. It was not until an officer of Section B listened to some of the audio products from one intercepted telecommunications facility and found that the intended target was different that the mistake was discovered. The department had also reported the case to the panel judge as a material change of circumstances. In March 2010, the department submitted a full investigation report to me, not under section 54 of the Ordinance.

7.9 After conducting a review, I was satisfied that the mistake was caused by a cable misconnection by a technical staff during relocation of equipment. The mistake appeared to have been caused by a momentary lack of concentration and care by the technical staff and there was no evidence to suggest ulterior motive or ill intent on the part of this technical staff. He was given a **warning** for the need to exercise care and vigilance in future system maintenance work. His supervisor was also **warned** for not exercising proper supervision over him resulting in the erroneous distribution of intercept products.

7.10 The listener in Section B had listened to nine of the misdirected calls (belonging to Section A of the department) relating to one of the 26 prescribed authorizations for a total of five minutes before he

realized that there might have been a mistake and reported the matter to his senior officers. I agreed with the department that given the exceptional circumstances and unprecedented situation of this misconnection, the listening to these calls should not be construed as a fault of the listener. No other listener in Section B had listened to any of the misdirected calls because of the early discovery by the listener. The cable misconnection which occurred at 1630 hours was rectified at 1022 hours the following day.

7.11 The prescribed authorization for the interception concerned did not restrict its application to Section A officers only. I therefore considered that there was no non-compliance with the terms of the prescribed authorization although the intercept product was listened to by a Section B officer.

7.12 I considered that the measures taken by the department to prevent recurrence of the mistake were satisfactory.

Outstanding Case (iii): Type 2 surveillance conducted on telephone conversation between a participating agent and a person unrelated to the investigation [Report 8, paragraph 7.118 of Annual Report 2009]

7.13 An LEA obtained an authorization for conducting Type 2 surveillance on the telephone conversations between a Participating Agent and the Subject of the investigation. In the course of conducting covert surveillance, a call made to the Participating Agent from a person unrelated to the investigation was also recorded and partly listened to by an LEA officer. The recording of this call, lasting 19 seconds, was not covered by the terms of the executive authorization. In November 2009, the LEA

reported this case to me by an initial report. In April 2010, it submitted a full investigation report to me under section 54 of the Ordinance.

Facts of the case

7.14 At 1250 hours, the Participating Agent used his telephone to call the Subject's phone number ('**the First Call**'). As authorized by the executive authorization, covert surveillance was carried out by the LEA on the call. Before ending the call, the Subject indicated that he would return call shortly.

7.15 At 1256 hours, the Participating Agent's phone rang. The caller display showed a different phone number ('**the Second Call**'). The Participating Agent indicated to an LEA officer ('the Surveillance Officer') that he had no knowledge of the caller with this incoming phone number. The Surveillance Officer, however, asked the Participating Agent to answer the Second Call and instructed that covert surveillance be conducted on the call. After listening for a few seconds, the Surveillance Officer realized that the caller was not the Subject. He immediately ceased listening, instructed the Participating Agent to end the call, and stopped the recording of the call which had lasted 19 seconds. After the call, the Participating Agent told the Surveillance Officer that the caller of the Second Call was a person unrelated to the investigation. The conversation in this call contained casual chats.

7.16 Ten minutes later, at about 1307 hours, the Participating Agent's telephone rang again displaying the Subject's phone number ('**the Third Call**'). The call ended at about 1315 hours. It was recorded by the LEA.

7.17 At about 1325 hours, the Surveillance Officer reported the outcome of the covert surveillance on the three calls to his supervisor ('the Supervisor'). The Supervisor considered that the covert surveillance carried out on the Second Call might be outside the ambit of the executive authorization. He instructed the Surveillance Officer not to conduct any further Type 2 surveillance and to return to office. The Supervisor then reported the matter up the chain of command, including his assessment on the possible non-compliance regarding the covert surveillance conducted on the Second Call.

7.18 On the afternoon of the same day, the Supervisor decided to discontinue the Type 2 surveillance having assessed the situation that no further contact between the Participating Agent and the Subject prior to the expiry of the executive authorization was anticipated, and that there was possible non-compliance in the covert surveillance on the Second Call. He submitted a discontinuance report to the authorizing officer but he only mentioned the first ground of discontinuance in the discontinuance report, without mentioning the second ground of discontinuance (ie the non-compliance regarding the Second Call). The authorization was revoked by the authorizing officer on the same day.

The LEA's investigation

7.19 The LEA's investigation confirmed that the caller of the Second Call was not the Subject but an unrelated third party, and his conversation with the Participating Agent for 19 seconds had been recorded and partly listened to by the Surveillance Officer. Such recording and listening fell outside the ambit of the executive authorization and hence unauthorized, constituting a non-compliance.

7.20 The Surveillance Officer explained that at the time, he was concerned that the caller of the Second Call could be the Subject because the Subject had undertaken in the First Call to return call to the Participating Agent shortly and he could not rule out the possibility of the Subject using a different telephone to contact the Participating Agent. The LEA considered that the Surveillance Officer should have taken reasonable steps to verify the identity of the caller first before he proceeded with the covert surveillance on the Second Call. Had he been more vigilant in the execution of the Type 2 surveillance, the unauthorized covert surveillance could have been avoided. The LEA suggested that a **verbal warning** be given to the Surveillance Officer.

7.21 The LEA also examined whether the Surveillance Officer had complied with paragraph 9 of the Code of Practice ('the Code') prevailing at the time of this incident, which stated:

'Law enforcement officers are also reminded to observe the requirements of the prescribed authorization fully in carrying out interception / covert surveillance under the Ordinance, and nothing should be done in excess of what is authorized. Should any officer discover that any interception or covert surveillance is being or has been carried out without the authority of a prescribed authorization, it should be stopped immediately, followed by a report to the management of the department as soon as reasonably practicable.' (Emphasis added.)

7.22 The LEA was of the view that the Surveillance Officer had taken immediate action to stop the unauthorized covert surveillance (the Second Call) in compliance with paragraph 9 of the Code given the fact that once he realized that the caller of the Second Call was not the Subject, he immediately instructed the Participating Agent to end the call and

ceased the recording. Ten minutes after the conclusion of the Third Call, he reported to the Supervisor on the outcome of the monitoring including the recording of the Second Call and the surrounding circumstances. The LEA therefore was of the view that the Surveillance Officer had duly complied with the requirement under paragraph 9 of the Code by reporting the unauthorized covert surveillance as soon as reasonably practicable.

7.23 On the other hand, the LEA considered that the Supervisor's omission to mention the possible unauthorized covert surveillance in the discontinuance report had not complied with the requirement under paragraph 160 of the Code which stated:

‘Where any interception or covert surveillance operation has been discontinued, the officer who has caused the discontinuance shall, as soon as reasonably practicable after the discontinuance, cause a report on the discontinuance and the ground for the discontinuance to be forwarded to the same relevant authority to whom an application under the Ordinance for the issue or renewal of the prescribed authorization concerned has last been made, for revocation of the prescribed authorization concerned. Departments should give the full reasons with specific and clear description of the ground for discontinuance and/or relevant circumstances leading to the discontinuance in the report.’
(Emphasis added.)

7.24 The Supervisor explained that at the time he wrongly believed that it would suffice for him to state the first reason as the ground for discontinuance ie the operational ground. The LEA, however, considered that it was incumbent upon the Supervisor to make full and frank disclosure of all relevant information leading to the discontinuance in his report to the authorizing officer. Unlike Type 1 surveillance where there was in

existence a requirement to file an REP-11 report in the event of initial material inaccuracies or material change of circumstances, there was no such requirement in Type 2 surveillance. Therefore, it was all the more important that full and frank disclosure of all relevant information must be made in the discontinuance report to be submitted to the authorizing officer so as to protect the integrity of Type 2 surveillance under the ICSO regime. The LEA considered that this had constituted a case of non-compliance and considered that the Supervisor should be given a **written warning** for the non-compliance with paragraph 160 of the Code.

My review and findings

7.25 My review focussed on three aspects:

- (a) the unauthorized covert surveillance and the proposed punishment;
- (b) whether the Surveillance Officer had complied with paragraph 9 of the Code by stopping immediately and reporting the unauthorized covert surveillance to the management as soon as reasonably practicable; and
- (c) whether the proposed written warning to the Supervisor was appropriate.

The unauthorized covert surveillance and the punishment

7.26 Regarding paragraph 7.25(a) above, I agree with the department that the covert surveillance on the Second Call lasting 19 seconds was outside the ambit of the executive authorization and was

unauthorized. The Surveillance Officer should be held responsible for this non-compliance because the caller display on the Participating Agent's phone showed that the Second Call was from a phone number different from that of the Subject but the Surveillance Officer still instructed that covert surveillance be conducted on this call. He should have exercised due caution in the light of a call from a different phone number, but he failed to do so. There was a lack of due caution on his part and this was perhaps caused by his over-zealousness. I considered that a verbal warning as suggested by the LEA was an appropriate action for this unauthorized covert surveillance.

Whether paragraph 9 of the Code had been complied with?

7.27 Regarding paragraph 7.25(b) above, paragraph 9 of the Code prevailing at the time of this incident stated:

‘... Should any officer discover that any interception or covert surveillance is being or has been carried out without the authority of a prescribed authorization, it should be stopped immediately, followed by a report to the management of the department as soon as reasonably practicable. For guidance on situations where an operation is regarded as being or has been carried out without the authority of a prescribed authorization, see paragraph 148. ...’ (Emphasis added.)

7.28 Paragraph 148 of the Code stated that the term ‘without the authority of a prescribed authorization’ covered a number of scenarios, for example,

‘if there has been an authorization but it does not confer the proper authority for the operation, including where the operation is beyond the terms contained in the authorization, for example,

- (i) the interception / covert surveillance has been carried out on a person, telephone number or address not intended to be covered by the authorization;'

7.29 In the present case, the Surveillance Officer immediately instructed to stop the recording on the Second Call once he realized that the caller was not the Subject. But he did not report the non-compliance to his supervisor immediately after the conclusion of the Second Call at 12:56:19 hours. Instead, he proceeded with the recording of the Third Call which came 10 minutes after the conclusion of the Second Call.

7.30 Did the Surveillance Officer comply with the stopping requirement of paragraph 9 of the Code? Did paragraph 9 of the Code permit the Surveillance Officer to proceed with the surveillance (including recording) of the Third Call in the circumstances of this case? Does the 'it' in 'it should be stopped immediately' in paragraph 9 of the Code refer only to that part which is unauthorized that should be stopped immediately (**Meaning 1**)? If so, the Surveillance Officer had complied with this requirement by stopping the recording on the Second Call immediately after discovering that the call was not from the Subject. Or does 'it' refer to the whole operation that should be stopped immediately (**Meaning 2**)? If so, the Surveillance Officer had not complied with the stopping requirement as he proceeded with the surveillance and recording of the Third Call.

7.31 If what should be stopped immediately means only that the **part** of the operation which is without the authority of a prescribed authorization should be stopped immediately, of course it can be stopped immediately if it is being carried out but how can it be stopped immediately

if it has already been carried out? It appears to me that Meaning 1 cannot fit squarely into the wording of paragraph 9 of the Code which reads:

‘Should any officer discover that any ... covert surveillance ... has been carried out without the authority of a prescribed authorization, it should be stopped immediately, ...’

It seems that Meaning 2 can better fit into the above wording, ie the whole operation should be stopped immediately should any officer discover that any covert surveillance has been carried out without the authority of a prescribed authorization.

7.32 Knowing that the covert surveillance on the Second Call was outside the ambit of the executive authorization, the Surveillance Officer should have after the conclusion of the Second Call and after ascertaining with the Participating Agent the identity of the caller, reported the matter to the Supervisor. But the Surveillance Officer failed to take this step. Instead, he allowed the operation to continue and reported to the Supervisor only after he had recorded the Third Call. He failed to act in accordance with paragraph 9 of the Code regarding ‘stopped immediately, followed by a report to the management of the department as soon as reasonably practicable’. Indeed, there was a gap of 10 minutes between the conclusion of the Second Call and the start of the Third Call during which the Surveillance Officer could and should have reported the unauthorized covert surveillance regarding the Second Call to the Supervisor had he wished to do so.

7.33 For this breach of paragraph 9 of the Code in failing to stop the entirety of the surveillance operation at once upon realization of the unauthorized surveillance on the Second Call, which might well have been

caused by the difficulty with the construction of the paragraph itself, I **recommended** that the Surveillance Officer should be **verbally warned**. Had the Surveillance Officer appreciated Meaning 2, I would consider that even a written warning might be too lenient.

7.34 More importantly, I considered that the LEA should seek the assistance of the Security Bureau in making paragraph 9 of the Code less cryptic, whatever the meaning intended in the first place actually was.

Non-compliance with paragraph 160 of the Code

7.35 Regarding paragraph 7.25(c) above, the LEA suggested the issue of a written warning to the Supervisor for his failure to mention in the discontinuance report the possible unauthorized covert surveillance on the Second Call. The LEA made the point that unlike Type 1 surveillance where there was a requirement to file an REP-11 report in case of initial material inaccuracies or material change of circumstances, there was no such requirement in Type 2 surveillance. It was therefore all the more important that full and frank disclosure of all relevant information must be made in the discontinuance report to be submitted to the authorizing officer so as to protect the integrity of Type 2 surveillance under the ICSO regime.

7.36 I considered that while it might be correct to highlight the importance of making full and frank disclosure of all relevant information in a discontinuance report in a Type 2 surveillance case because of the lack of a form such as the REP-11 form applicable to interception and Type 1 surveillance cases to report on initial material inaccuracies or material change of circumstances, it would be unreal to use the reasoning to raise the officer's proper level of appreciation of the necessity to make full and

frank disclosure in the discontinuance report in the present case. The lack of such a form in Type 2 surveillance cases could well be said to be the responsibility of the management of the LEA and the Security Bureau. In fact, there was no good reason why no similar form was designed for Type 2 surveillance at the time when REP-11 form was designed for interception and Type 1 surveillance in late 2006. In July 2009 (which was several months before the occurrence of this incident), I suggested to the LEA that a form similar to REP-11 should be developed for Type 2 surveillance. But it was not until November 2010 (after the occurrence of this case) that such a form for Type 2 surveillance (REP-13) was put into use. Had earlier action been taken by the LEA or the Security Bureau to design the REP-13 form, the Supervisor could have used it to report the non-compliance to the authorizing officer as a material change of circumstances.

7.37 I was sure that there was no deliberate concealment on the part of the Supervisor. He verbally reported the non-compliance to the officer-in-charge of the Central Registry (responsible for ICSO matters) shortly after 1545 hours which was even before his submission of the discontinuance report to the authorizing officer that day. Upon the advice of the officer-in-charge of the Central Registry, he also reported the matter to the unit in the department tasked with investigating non-compliance under the ICSO ('the Unit'). The fact that he reported to the Central Registry and the Unit without delay and before his submission of the discontinuance report countered any suggestion that he was trying to conceal the unauthorized covert surveillance from anybody. However, the Supervisor did fail to comply with the requirement expressly stated in paragraph 160 of the Code. Taking into account all the circumstances of

this case, I was of the view that the suggested written warning by the LEA against the Supervisor for the breach might be considered too severe; a **verbal warning** might be more appropriate.

7.38 However, to avoid recurrence and for clarity, I **recommended** that paragraph 160 of the Code should be expanded to make it clear that if there had been any unauthorized interception / covert surveillance or any irregularity leading or contributing to the discontinuance, this should be clearly stated in the discontinuance report.

7.39 I notified the LEA of my above findings and requested it to follow up with the Security Bureau regarding my recommendations on the need to improve paragraphs 9 and 160 of the Code as stated in paragraphs 7.34 and 7.38 above.

Outstanding Case (iv): Type 2 surveillance on seven phone calls conducted on the representative of the subject [Report 9, paragraphs 7.119 to 7.122 of Annual Report 2009]

7.40 An LEA obtained an executive authorization for conducting Type 2 surveillance on the conversations between a participating agent and the subject of the investigation. However, Type 2 surveillance was also conducted on telephone conversations between the participating agent and a person representing the subject which was outside the ambit of the executive authorization. In November 2009, the LEA made an initial report to me on the non-compliance. In May 2010, the LEA submitted a full investigation report to me under section 54 of the Ordinance.

Facts of the case

7.41 The officer-in-charge of the investigation ('OC Investigation') applied for and was granted an executive authorization for conducting Type 2 surveillance on conversations between a participating agent ('the Participating Agent') and the Subject of the investigation. Prior to the conduct of the Type 2 surveillance, the OC Investigation gave a copy of the executive authorization and the supporting statement in writing to the Case Officer and the Field Control Officer who were responsible for the execution of the Type 2 surveillance operation. These two officers were subordinate to the OC Investigation.

7.42 On Day 1, Type 2 surveillance was carried out on the conversations between the Participating Agent and the Subject. Later that day, the Participating Agent told the LEA that a person acting on behalf of the Subject ('the Representative') had approached him. The OC Investigation instructed that the Participating Agent should contact the Representative the following day. The OC Investigation then reported the situation and the latest development to a superior officer ('the Superior Officer') who instructed that subject to further development, preparation should be made for arresting the Subject and the Representative, who in his view was an accomplice, on the following day. During the discussion, the OC Investigation did not mention to the Superior Officer whether any conversation between the Participating Agent and the Representative would be monitored or recorded. The OC Investigation then gave general instructions to the Case Officer and the Field Control Officer that the Type 2 surveillance should continue the following day and that subject to

further development, arrest actions might be taken against the suspects, including the Subject and the Representative.

7.43 On Day 2, between 1115 hours and 1415 hours, seven telephone calls exchanged between the Participating Agent and the Representative and one call between the Participating Agent and the Subject were recorded by the LEA. Throughout the Type 2 surveillance operation, the Field Control Officer kept the OC Investigation and the Case Officer informed of the progress and contents of the telephone conversations recorded. The OC Investigation in turn reported to the Superior Officer the progress of the operation including a gist of the telephone conversations. After the discontinuance of the covert surveillance operation later that day, the OC Investigation listened to all the recordings of these telephone calls to assess the evidence against the Subject and the Representative.

7.44 A week later, the OC Investigation conducted an operational briefing on the impending arrest of the Subject and the Representative. In this briefing in which the Superior Officer was also present, the OC Investigation revealed that the conversations between the Participating Agent and the Representative had been recorded.

7.45 After the arrest of the Subject and the Representative, the OC Investigation reviewed the operation and realized that the Type 2 surveillance conducted on the phone calls between the Participating Agent and the Representative was outside the ambit of the executive authorization which only authorized covert surveillance on conversations between the Participating Agent and the Subject. The OC Investigation immediately reported the non-compliance to the LEA management.

The LEA's investigation

7.46 The terms of the executive authorization were such that it only authorized the conduct of Type 2 surveillance on the Subject, but not the Representative. The recording and monitoring of the seven telephone calls between the Participating Agent and the Representative were not covered by the terms of the executive authorization and were therefore unauthorized.

7.47 Given the fact that it was the OC Investigation who discovered the unauthorized Type 2 surveillance and reported it to the management and that the conduct of the covert surveillance, though unauthorized, was fully documented by the officers involved, the LEA saw no reason to suspect that the unauthorized covert surveillance was due to any bad faith on the part of the OC Investigation or for that matter, the other officers involved.

7.48 According to the LEA, this was the first time the OC Investigation took up the duty of a direct supervisor of a Type 2 surveillance operation, and this was the second time the Case Officer took up the responsibility as the case officer of an investigation in which covert surveillance operation was involved.

7.49 The LEA found that the Case Officer, the Field Control Officer, the OC Investigation and the Superior Officer were responsible for the unauthorized covert surveillance and should each be given a **written warning** for their negligence of duty and lack of vigilance, as described below.

(a) The Case Officer and the Field Control Officer

The Case Officer had the overall responsibility in the conduct of the investigation and was expected to be in full control of the investigative actions undertaken, including any covert surveillance that might be carried out in a manner that is legal and proper. The Field Control Officer was specifically tasked to be in charge of the conduct of the Type 2 surveillance operation. Both the Case Officer and the Field Control Officer had received a copy of the executive authorization and the supporting statement in writing from the OC Investigation prior to the conduct of the Type 2 surveillance, and were expected to be fully conversant with the operational plan and the terms of the executive authorization. However, both officers failed to realize that the instructions given by the OC Investigation in light of the unexpected emergence of the Representative were in conflict with the terms of the executive authorization. They also failed to realize that the Type 2 surveillance which had been conducted on the Representative was unauthorized even after the case was turned overt with the arrest of persons including the Representative.

(b) The OC Investigation

When the Representative surfaced in the investigation, the OC Investigation only gave general instructions to the Case Officer and the Field Control Officer that the Type 2 surveillance should continue the following day. Given her knowledge of the ambit of the executive authorization and the

continuous development stemming from the Type 2 surveillance operation, the OC Investigation failed as a direct supervisor to give clear instructions to the subordinate officers particularly on how to deal with the Representative who, given the change in operational circumstances, had appeared to be subject of continuous monitoring the following day. As it transpired, both the Case Officer and the Field Control Officer erroneously believed that Type 2 surveillance could be conducted on both the Subject and the Representative. In addition, the OC Investigation had failed to realize that there had been unauthorized covert surveillance conducted on the Representative even when she was listening to the recordings of the telephone conversations between the Participating Agent and the Representative, and when she conducted an operational briefing in preparation for the arrest actions.

(c) The Superior Officer

When the OC Investigation reported to him on the progress of the operation, the Superior Officer should have been more vigilant and proactively probed into details of the intended course of action and should have reminded the OC Investigation either to obtain a fresh executive authorization if the OC Investigation was minded towards conducting covert surveillance on the Representative or to withhold any covert surveillance on the Representative in view of the restrictive terms of the authorization. There were other occasions when the Superior Officer should have been alerted to the fact that

unauthorized covert surveillance had been conducted on the Representative. Being the supervisor of the OC Investigation, he had the supervisory responsibility in respect of the execution and review of the Type 2 surveillance. Had he been more vigilant when receiving verbal reports from the OC Investigation before and after the conduct of the unauthorized Type 2 surveillance, he would have been able to prevent the occurrence of the non-compliance or discover or report it at an earlier opportunity.

7.50 Following this incident, the OC Investigation who was acting at that time was removed from the acting appointment. The OC Investigation, the Case Officer and the Field Control Officer were also suspended from all ICSO-related duties pending conclusion of the investigation into the non-compliance. Regarding the Superior Officer, in view of his involvement in this case and the fact that he was also given a written warning relating to his performance as the endorsing officer in another Type 2 surveillance case, he was subsequently transferred from operational duties to a non-investigative post in which he was not required to perform any ICSO duties, initially for one year.

7.51 To prevent recurrence of similar non-compliance, instructions were issued by the LEA to the effect that all members of the team taking part in covert surveillance operation must familiarize themselves with the terms of the prescribed authorization by being provided with a copy of the prescribed authorization and being briefed by the relevant officer in charge of the investigation on the operational plan, the terms of the prescribed authorization, as well as any restrictions imposed by the relevant authority.

My review and findings

7.52 Having conducted a review, I was in agreement with the findings of the LEA. There was no indication of ulterior motive in this case and that the disciplinary actions against the officers concerned were appropriate.

Outstanding Case (v): Wrong interception of a call [Report 12, paragraph 7.131 of Annual Report 2009]

7.53 In December 2009, I received an initial report from a department *not* made under section 54 of the Ordinance. It reported an irregularity where a call was intercepted wrongly due to a technical problem. I received a full investigation report in July 2010.

7.54 Briefly, an LEA listener listened to calls intercepted on a subject of a prescribed authorization. Among them, there was a call in which the listener found that the voice was different from that of the subject. In order to clarify the matter, the listener listened to it a second time but still could not quite figure out what the conversation was about as the call was conducted in a language which he did not understand. Apart from this call, other calls in which the subject was a participant were correctly intercepted. Feeling strange, the listener reported the matter to the management. Pending further enquiry into the cause and magnitude of the problem, the department decided to discontinue the interception first. The department submitted a discontinuance report to the panel judge reporting what had happened, and the panel judge duly revoked the authorization.

7.55 It was found after investigation that the call was made between the telephone numbers of two innocent parties. The call was inadvertently intercepted due to a system fault of the CSP. The CSP also submitted a report to me.

7.56 After conducting a review, I was satisfied that there was no indication of any ulterior motive in this case. The unauthorized interception of the call was due to a functional deficiency in the CSP's system and was not due to any fault of the department or any of its officers. The call, which lasted 90 seconds, was only listened to by the aforesaid listener and not by any other listeners. The listener listened to it partially, the first time for 20 seconds and the second time for 47 seconds. According to the listener, he did not understand the language of the conversation in the call concerned. But as I did not listen to the recording of this call in the absence of express power in the Ordinance for me to do so, there is no way for me to verify this point. Remedial measures were also taken by parties concerned to prevent recurrence of similar incidents.

CASES OCCURRING OR DISCOVERED IN 2010

Report 1: Failure to declare previous applications in the affidavit supporting an application for prescribed authorization for Type 1 surveillance

7.57 Part 2 of Schedule 3 to the Ordinance provides that an affidavit supporting an application for the issue of a judge's authorization for Type 1 surveillance is to set out:

- '(b) (xii) if known, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in

which any person set out in the affidavit ... has also been identified as the subject of the interception or covert surveillance concerned, and if so, particulars of such application; ...'

7.58 At an inspection visit to a department, I inspected the application documents of a prescribed authorization ('Authorization Y'). The authorization was applied for by Division 2 of the department and was granted to conduct Type 1 surveillance on three persons, namely Subject (1), Subject (2) and Subject (3). When inspecting the affidavit in support of the application, I found that while the applicant ('the Applicant') stated that there had been previous ICSO applications on Subject (1) and Subject (2), he declared that to the best of his knowledge, within the preceding two years, there had been no application for the issue or renewal of a prescribed authorization to which Subject (3) had been subject.

7.59 The applicant's declaration of no previous ICSO application against Subject (3) was contrary to my understanding as I recalled that Subject (3) had been a subject of a number of ICSO authorizations within the two years before this application. For instance, he was the subject of a prescribed authorization ('Authorization X') which was issued for interception within two years before Authorization Y. To substantiate my observation, I requested the department to retrieve the application file of Authorization X which showed that the subject of Authorization X was the same person as Subject (3) of Authorization Y.

7.60 At the inspection visit, I requested the department to conduct an investigation into this non-compliance with paragraph (b)(xii) of Part 2 of Schedule 3 to the Ordinance and submit a report to me.

The department's investigation

7.61 The department submitted an investigation report to me which only dealt with Authorization X and Authorization Y. It stated that Authorization X was applied for by Division 1 of the department in January 2008 and granted by the panel judge. When the applicant of Authorization Y prepared the supporting affidavit, he made use of his personal knowledge to make the 'if known' declaration in regard to whether Subject (3) had been the subject of other ICSO applications during the preceding two years. As he was not made aware of the fact that Subject (3) had been the subject of another ICSO application made by Division 1, he made his declaration accordingly.

7.62 Regarding the 'if known' declaration, the department had all along been providing the 'personal knowledge' of the applicant on previous ICSO application(s). Under the compartmentalization principle within the department, sensitive information of one unit would not normally be disclosed to officers of other units. Therefore the applicant of Division 2 had no knowledge of previous ICSO applications made by Division 1 against Subject (3). Notwithstanding this practice of providing 'personal knowledge', upon my previous advice on the interpretation of the provision in the Ordinance regarding the 'if known' requirement and my recommendation on the need to provide 'departmental knowledge', the department was in the process of upgrading its ICSO database system such that departmental knowledge of previous ICSO applications would be provided in future applications for prescribed authorizations under the Ordinance.

7.63 A few months later, the department implemented a new procedure for provision of departmental knowledge of previous ICSO applications against the subject and/or telecommunications service. Under the new arrangement, an applicant making an ICSO application is required to conduct a search of the ICSO database to ascertain if the subject and/or telecommunications services concerned had also been the subject of any previous ICSO application within the preceding two years. The result of the search will be included in the affidavit in support of the application. In the event of a match during the database search but the information cannot be disclosed to the applicant, the application for a judge's authorization will be taken over by another applicant who has a higher level of security clearance and is allowed access to the sensitive information.

My review and findings

7.64 My review of the documents revealed that the applicant of Authorization Y was not the same applicant of Authorization X and they belonged to different divisions.

7.65 Regarding the question as to whether the officer who approved the making of the application in Authorization Y was aware of the fact that Subject (3) had been the subject of Authorization X, I found from the respective affidavits supporting the two applications that the making of the applications was approved by two different officers of different divisions.

7.66 Insofar as Authorization X is concerned, I am satisfied that the failure of the applicant of Authorization Y to mention this previous authorization in the affidavit in support of Authorization Y was due to the compartmentalization principle of the department at the time of this

incident. Neither the applicant of Authorization Y nor the endorsing officer who approved the making of the application was made aware of the previous application in Authorization X in Division 1 in accordance with the compartmentalization principle.

7.67 However, I considered that the department's investigation should not only deal with Authorization X. To my knowledge, Authorization X was not the only previous ICSO authorization to which Subject (3) had been subject. He was also the subject of a number of other ICSO authorizations which were granted pursuant to applications made within the two years preceding the application in Authorization Y. Authorization X was only an example I gave in the inspection visit to bear out that there had been previous applications against Subject (3). The scope of the department's enquiry and the report to me should not confine to Authorization X but should have covered all previous ICSO applications against Subject (3) within the two years preceding Authorization Y. In this connection, I requested the department to conduct a further enquiry to see if all other ICSO applications against Subject (3) within the two years preceding Authorization Y were similarly **not** made known to the Applicant and the endorsing officer when Authorization Y was applied for.

7.68 After conducting a further enquiry, the department submitted a further report to me with a summary of all the 27 ICSO applications made against Subject (3) within the preceding two years of Authorization Y. The further report showed that the applicants of and the officers approving the making of these 27 ICSO applications were different from the applicant of and the endorsing officer of Authorization Y. Hence, there was no

evidence to prove that these two officers had knowledge of those 27 previous ICSO applications against Subject (3).

7.69 This case illustrates clearly the inadequacy of giving personal knowledge for the 'if known' provision. With the full implementation of the new procedure mentioned in paragraph 7.63 above, a similar mistake can be avoided.

Report 2: Type 2 surveillance conducted on an incoming call whose caller was not the subject of the executive authorization

7.70 The case concerned a Type 2 surveillance operation conducted on an incoming call, allegedly from a person other than the subject which was outside the ambit of the executive authorization. But the LEA was not sure whether the voice of the caller had really been captured by the recording device used by its officer. Hence, it was unable to conclude whether there was any non-compliance and deferred to my advice.

Facts of the case

7.71 A woman was arrested for an offence. She complained to an LEA that the officer investigating her case had abused his power. She agreed to be the participating agent in a covert surveillance operation to be conducted by the LEA on this officer ('the subject'). Accordingly, the LEA obtained an executive authorization for the use of listening device(s) to record the telephone conversation between the participating agent and the subject during which matters relating to the alleged abuse of power might be discussed.

7.72 On Day 1, the participating agent, under the LEA's monitoring, made two calls to the subject but they were unanswered. About 15 minutes later, the mobile phone of the participating agent rang. The participating agent quickly picked up her mobile phone and answered the call ('**the Incoming Call**'), while at the same time nodded her head to indicate that the call was from the subject. The female LEA officer responsible for conducting the covert surveillance (Officer C) put on the earphones and switched on the recording device. However, as Officer C had not been able to verify the telephone number of the caller from the caller display of the mobile phone of the participating agent given the latter's quick response, Officer C intended to further confirm with the participating agent as to whether the caller was indeed the subject before connecting the recording device to the mobile phone. After a short while, the participating agent indicated, by swaying her head, to Officer C that the call was not from the subject. Officer C immediately ceased the recording. The participating agent also ended the call shortly. Officer C estimated that the recording lasted for about 20 seconds, but Officer C believed that apart from the voice of the participating agent, the voice of the caller could not have been recorded because the recording device had not yet been linked to the mobile phone. Officer C also claimed that although she herself had already worn the earphone, she was unable to hear the voice of the caller of the Incoming Call.

7.73 After ending the call, the participating agent told Officer C that the call was from her friend unrelated to the investigation and that at the time she received the call, the calling number was not shown in the caller display of her mobile phone. When asked why she gave conflicting signals to Officer C, the participating agent explained that she was a bit nervous at

the time when she was carrying out the covert surveillance. At that time, Officer C did not check the call log in the participating agent's mobile phone to see if there was really no caller display on the Incoming Call as claimed by the participating agent. According to Officer C, she had no reason to doubt the participating agent's claim.

7.74 Later that day, Officer C reported the development and results of the covert surveillance operation to her supervisor (Supervisor D) but she did not mention the Incoming Call and the surrounding circumstances in which the recording device was switched on. She explained that at the time, she believed that no recording was made of the telephone conversation relating to the voice of the caller and therefore it did not occur to her at that time that switching on the recording device and the recording made might possibly amount to irregularity or non-compliance.

7.75 On Days 3 and 4, further monitored calls between the participating agent and the subject pursuant to the executive authorization were conducted but these calls were again unanswered.

7.76 On Day 5, Supervisor D reviewed the surveillance products and sought clarification with Officer C regarding the Incoming Call. Based on Officer C's account, Supervisor D took the same view that the recording could have only contained the voice of the participating agent but not the voice of the caller, and that it did not amount to any irregularity or non-compliance with the executive authorization. He instructed Officer C to proceed with further covert surveillance operation. That afternoon, further monitored telephone calls between the participating agent and the subject were conducted. On the evening of that day, Supervisor D decided to discontinue the Type 2 surveillance on the ground that no further contact

between the participating agent and the subject was expected prior to the expiration of the authorization.

7.77 On Day 7, when Supervisor D briefed his superior about the Incoming Call, his superior instructed him to report the matter to the departmental management for whatever action deemed necessary. Supervisor D acted accordingly.

7.78 In February 2010, the LEA submitted an initial report to me, followed by a full investigation report in February 2011.

The LEA's investigation

7.79 The LEA considered that the first question to be addressed was whether anything said by the caller of the Incoming Call was recorded by the LEA's recording device. The LEA had carried out an in-house experiment which suggested that the voice of or things said by the caller were unlikely to have been recorded. The LEA decided not to listen to the recording for fear of possible intrusion into the caller's privacy in the event that the caller's voice had really been recorded. Its assessment was that the recording was unlikely to contain any material that had been obtained without authorization, but this was only an assessment which could not be verified.

7.80 The LEA's investigation report stated that if the recording made when the Incoming Call was received contained any material that had been obtained without authorization, then there was a case of non-compliance. But it was not clear that, if no material was obtained from the caller, whether the action or non-action by Officer C (switching on the recording device and not reporting the matter immediately after the

incident) might still constitute a case of non-compliance. The LEA stated that arguments could be advanced both ways and it could not come to a conclusive view.

7.81 According to the LEA, the view in favour of a case of irregularity/non-compliance is founded on the following:

- (a) The executive authorization authorized, among other things, the use of listening devices in telephone conversations during which matters relating to the alleged crime might be discussed. The Incoming Call was not made by the subject. As such, matters relating to the alleged crime could not possibly be discussed. Any use of the listening device(s) relating to the Incoming Call therefore may constitute a case of irregularity or non-compliance with the terms of the executive authorization.
- (b) The executive authorization stipulated the purposes of using the listening device(s) to be to record the words spoken by the participating agent and the subject, and to enable LEA officers to listen to and monitor their words. The use of device(s) for other purposes therefore may constitute a case of irregularity or non-compliance.

7.82 On the other hand, the view against a case of irregularity/non-compliance is based on the reasons below:

- (a) The mere act of switching on the recording device when the Incoming Call was received did not violate the requirements of the executive authorization because Officer C exercised

prudence and did not connect the recording device with the participating agent's mobile phone.

- (b) The use of listening device would entail (i) switching on the recording device and (ii) linking up the recording device with the participating agent's mobile phone. The mere act of switching on the recording device by itself did not amount to the 'use of listening device(s)' purportedly pursuant to the executive authorization. As the process of recording the words of the incoming caller and the process of LEA officers listening to the words spoken by the incoming caller did not materialise, it would not constitute a case of irregularity or non-compliance.

7.83 Irrespective of whether the case constitutes irregularity or non-compliance, the LEA considered that the method adopted by Officer C in the present case to confirm the identity of the caller before switching on the recording device (ie by relying on the signal given by the participating agent) was ineffectual and might inadvertently lead to unauthorized covert surveillance being conducted.

7.84 Depending on my finding as to whether there had been an irregularity/non-compliance, the LEA considered that Officer C should be given **an advice** (non-disciplinary in nature) for:

- (a) her inadequacy in handling the 'incoming call' situation in the course of execution of the Type 2 surveillance operation, by relying solely on an ineffectual non-verbal signal given by the participating agent to confirm the identity of the caller before

switching on the recording device, which might run the risk of conducting unauthorized covert surveillance; and

- (b) not having acted vigilantly in making a prompt report of the attempted recording of the Incoming Call to her supervisor for determination of any possible irregularity or non-compliance during the course of the covert surveillance pursuant to the executive authorization.

7.85 The LEA also considered that Supervisor D should be given **an advice** (non-disciplinary in nature) for not having acted vigilantly in making a prompt report of the possible recording of the Incoming Call to his supervisor for determination of any possible irregularity or non-compliance during the course of covert surveillance pursuant to the executive authorization.

7.86 The LEA stated that more severe measure(s) of a disciplinary nature against the two officers would be considered if I advised that unauthorized covert surveillance or non-compliance had been involved in this case.

My review

7.87 I had conducted a review including interviewing Officer C to explain the situation, how she used the recording and listening device, the seating arrangement of the LEA officers and the participating agent at the time of the attempted recording of the Incoming Call, and the approximate distance between the recording device and the participating agent's mobile phone.

7.88 The CSP's call record showed that the duration of the Incoming Call was 36 seconds. Officer C claimed that the recording should be about 20 seconds. To verify this, I asked the LEA if it was technically feasible to ascertain the duration of the recording without listening to the recording. The LEA replied that it was technically feasible but at the time the disc containing the recording of the Incoming Call had been sealed in a tamper proof bag and included as unused material in the impending criminal trial against the subject, hence the duration of the recording could not be known.

My finding

7.89 No finding can be made as to whether there was non-compliance.

7.90 To determine whether there was non-compliance or otherwise, the first question to ask is whether the Incoming Call was from the subject. According to the CSP's call records, the Incoming Call was from a fixed line, not from the subject's mobile line. But the possibility that the subject was using a fixed line to return call to the participating agent could not be ruled out.

7.91 Officer C claimed that she had not been able to hear the voice of the caller of the Incoming Call. The LEA had not listened to the recording of the Incoming Call. The only evidence was from the participating agent who claimed that the Incoming Call was from her friend, not from the subject. Though the chances are slim, what if the participating agent was not telling the truth? She first nodded her head to signal that the

call was from the subject and then swayed her head to signal that the call was not from the subject. How reliable and trustworthy was her version?

7.92 If the Incoming Call was from the subject, then there is no question of irregularity or non-compliance.

7.93 If the Incoming Call was not from the subject, the second question to ask is whether the voice of the caller or for that matter, things said by the caller had been recorded by the LEA. If it had been recorded, then the case is a case of non-compliance because the executive authorization only authorized the LEA officers to use listening device to record the conversation between the participating agent and the subject but not between the participating agent and any other person.

7.94 The two questions converge on the same requirement, which is to listen to the recording of the Incoming Call made by the recording device.

7.95 The LEA did not listen to the recording, but based on an in-house experiment, it assessed that the voice of the caller was unlikely to be captured. I wish to point out that this assessment had relied on two factors: (i) Officer C's claim of the distance between the recording device and the participating agent's mobile phone; and (ii) Officer C's claim that she could not hear the voice of the caller through the earphone linked to the recording device. Just as the LEA had based on the claim of the participating agent to say that the Incoming Call was not from the subject, the LEA had similarly based on the claim of Officer C to assess that the voice of the caller of the Incoming Call had not been captured by the recording device.

7.96 The only means of ascertaining whether there had been any non-compliance in this case is for me to listen to the recording of the Incoming Call. But there is no express provision in the Ordinance empowering me to listen to the recording of surveillance products. In the absence of such power, I have decided not to listen to the recording.

7.97 Even if the LEA is able to provide me with the duration of the recording after the conclusion of the trial against the subject, this also would not help in determining whether there was non-compliance because the answers to the two questions remain unknown.

7.98 This case illustrates clearly that I cannot carry out my review function effectively if I am not given the power to listen to the recording of surveillance products. As all would agree, I cannot assume that the caller of the Incoming Call was not the subject to say that there was an irregularity. Nor can I assume that the voice of the caller had not been captured by the recording device to say that there was no non-compliance. It would also be imprudent for me to base on such assumptions to advise the LEA on what actions to be taken against the two officers concerned.

Report 3: Listening to intercept product by an officer below the rank specified in the prescribed authorization

7.99 This case was a breach of a condition of a prescribed authorization imposed by the panel judge. It concerned the listening to intercept products by an officer below the rank specified in the prescribed authorization.

Facts of the case

7.100 In July 2010, an LEA obtained a prescribed authorization to intercept a telephone number of a subject. At the time of application, it was already known that the subject had been arrested for an offence unrelated to that under investigation and was given court bail. It was therefore assessed that there was likelihood of obtaining information subject to LPP through interception and the panel judge issued the prescribed authorization with additional conditions imposed, one of which was that listening to the intercept product should be undertaken by officers not below a certain rank ('the Specified Rank').

7.101 In compliance with the additional condition, the officer-in-charge of the interception ('**the Chief Interception Officer**') assigned two officers not below the Specified Rank to take turn to listen to the intercept product of this case ('**Senior Listening Officer (1) and Senior Listening Officer (2)**').

7.102 On Day 1, Senior Listening Officer (1) became aware that the subject's court case had been concluded. The Chief Interception Officer prepared a draft REP-11 report for verification and signature by her superior officer, the **Section Head**. At 1511 hours of that day, Senior Listening Officer (1) ceased listening after he had finished listening to the last call made to the subject.

7.103 On the morning of Day 2, the Section Head verified the contents of the REP-11 report and signed it. Senior Listening Officer (1) then delivered the report to the Panel Judges' Office. The REP-11 report (**the First REP-11 Report**) notified the panel judge of the court case result

and stated that since the commencement of interception operation against the subject, no LPP material had surfaced. After considering the REP-11 report, at **1156 hours**, the panel judge lifted the additional conditions previously imposed in the prescribed authorization. Senior Listening Officer (1) then informed the Section Head of the panel judge's decision.

7.104 At 1240 hours, a junior supervisor of the listening team was informed of the lifting of the additional conditions. This junior supervisor was below the Specified Rank and was responsible to the Chief Interception Officer for assigning listening duty to listeners below the Specified Rank. He also performed listening duty at times. At 1309 hours, the junior supervisor checked and found that since the last listening by Senior Listening Officer (1) at 1511 hours on Day 1, there were 51 outstanding calls intercepted before the lifting of the additional conditions that had not been listened to. Between 1309 hours and 1342 hours, the junior supervisor listened to the 51 calls which were intercepted after 1511 hours on Day 1 and before 0030 hours on Day 2 (ie intercepted before the lifting of the additional conditions).

7.105 After he had finished listening to the 51 outstanding calls, at 1400 hours, the junior supervisor handed over the listening duty to another listener (below the Specified Rank). The calls listened to by this other listener was those intercepted after the lifting of the additional conditions.

7.106 No one was aware of the listening by the junior supervisor to the 51 outstanding calls until later in the afternoon when he had a general discussion with a colleague (also a listener) about the additional conditions. The colleague opined that the period for which the additional conditions were imposed should refer to the period when the calls were intercepted

and hence all calls captured and recorded during the period while the additional conditions were still in force should only be listened to by officers not below the Specified Rank even though the additional conditions were lifted at a later time. However, the junior supervisor believed that the additional conditions would have effect if they were still in force when the intercept product was listened to. He thus believed that once the additional conditions were lifted, the intercept product could be listened to by any officers regardless of the rank. The junior supervisor attempted to check the department's guidelines for listeners but there was no explicit directive on this aspect. At 1715 hours, the junior supervisor sought clarification from the Chief Interception Officer. The listening by the junior supervisor to the 51 outstanding calls intercepted before the lifting of the additional conditions then came to light. The LEA directed that the operation against the subject be suspended in view of the possible breach of the condition of the prescribed authorization and that a report should be made to the panel judge in respect of the incident.

7.107 On Day 3, the LEA verbally reported the incident to me during my inspection visit to it. On the same day, an REP-11 report on initial material inaccuracies (**the Second REP-11 Report**) was submitted to the panel judge. Upon the panel judge's enquires, the Section Head submitted another REP-11 report (**the Third REP-11 Report**). This report stated that although the junior supervisor stated that no LPP material had been revealed from the 51 outstanding calls to which he had listened, these calls would be re-listened to by a listener not below the Specified Rank to ascertain that no LPP material was involved. The report was noted by the panel judge. Later that day, the Chief Interception Officer instructed Senior Listening Officer (1) to re-listen to the 51 outstanding calls. Senior

Listening Officer (1) confirmed afterward that they contained no LPP information.

7.108 On Day 6, the Section Head submitted an REP-11 report on material change of circumstances (**the Fourth REP-11 Report**) to the panel judge stating that a listener of the Specified Rank had re-listened to the 51 outstanding calls and no LPP material was involved. The REP-11 report stated that as no LPP material had surfaced, the interception operation against the subject would resume. The panel judge noted the report.

7.109 On Day 10, the LEA submitted an initial report to me on this non-compliance followed by a full investigation report several months later.

The LEA's investigation

7.110 In the course of investigation, the LEA found that the re-listening by Senior Listening Officer (1) on Day 3 covered only 41 calls but not all the 51 calls that had been accessed by the junior supervisor. Because of this, the Chief Interception Officer was instructed to listen to the 10 calls that had been omitted. After listening, the Chief Interception Officer confirmed that they contained no LPP information. Subsequently, an REP-11 report (**the Fifth REP-11 Report**) was submitted to the panel judge to report the omission, the re-listening by the Chief Interception Officer and the result of the re-listening. The report was noted by the panel judge.

7.111 The LEA's investigation report concluded that the junior supervisor listened to the 51 outstanding calls of his own volition and the mistake was due to his misinterpretation of the effective period of the

additional conditions. He thought that the period should refer to the timing of listening. His interpretation was that during the period when the additional conditions were imposed, the listening could only be undertaken by Specified Rank officers. Once the conditions were lifted, all the calls, including those intercepted when the additional conditions were in force, could be listened to by officers below the Specified Rank.

7.112 The LEA considered that the inadvertent listening by the junior supervisor to the 51 outstanding calls was a case of non-compliance under section 54 of the Ordinance. In considering the punishment, the LEA took into account the following:

- (a) the mistake was due to the junior supervisor's misinterpretation. There was no evidence to suggest ill-intent or deliberate defiance of the additional conditions by the officer;
- (b) after realizing that he might have misinterpreted the effective period of the additional conditions, the officer took initiative to seek clarification from his supervisory officer;
- (c) he frankly admitted the mistake;
- (d) the inadvertent listening took place after the panel judge had lifted the additional conditions; and
- (e) the calls that were listened to by the junior supervisor were made when the court case of the subject had already concluded. Therefore the likelihood that LPP information would be

obtained was very low and no LPP information had actually been obtained.

7.113 The LEA considered that the junior supervisor was to be **advised**, with a record on file, for the need to exercise care and vigilance when handling interception operations with LPP likelihood and to seek advice from his supervisory officers whenever in doubt. The advice is disciplinary in nature.

7.114 The LEA had conducted a review of the past interception operations of the Section that involved the imposing and subsequent lifting of additional LPP conditions. No similar mistakes were found.

7.115 To prevent recurrence of the same mistake, the LEA had taken remedial actions including the setting of a time bar on the system so that non-Specified Rank officers could only listen to intercept products obtained after the lifting of additional conditions, and revising the guidelines to give clear instructions to listeners.

My review

7.116 In my review, I made the following enquiries:

- (a) This was not the first case where a panel judge lifted the additional conditions after considering an REP-11 report on material change of circumstances. Was there a normal practice in dealing with such a situation and if so, was the junior supervisor acting in accordance with the normal practice? If there was no normal practice, was any instruction given to the junior supervisor on how to deal with the situation

when he was informed that the additional conditions had been lifted?

- (b) It appeared to me that once the court case result was known, Senior Listening Officer (1) stopped listening to the remainder of the intercepted calls. There was no listening to the 51 outstanding calls by any of the listeners in the Specified Rank before the junior supervisor's listening came to light at 1715 hours on Day 2. If the junior supervisor was not instructed or expected to listen to these unfinished calls intercepted before the lifting of the additional conditions, why was there no listening to these calls on the afternoon of Day 1 and throughout the whole day of Day 2 by any of the listeners in the Specified Rank?
- (c) In the First REP-11 Report submitted to the panel judge on the morning of Day 2 requesting the lifting of additional conditions, the Section Head stated that since the commencement of the interception operation against the subject, no LPP material had surfaced. Why were the 51 outstanding calls not listened to before the Section Head made such a statement? Did the Section Head, the Chief Interception Officer and Senior Listening Officer (1) know of the existence of these outstanding calls at the time of submission of the report? If so, without listening to these outstanding calls, how could the Section Head be so sure as to state that these calls did not contain LPP information?

- (d) Why did Senior Listening Officer (1) omit 10 of the outstanding calls and why was this not detected by his supervisors before submitting the Fourth REP-11 Report to the panel judge that all the outstanding calls had been re-listened to?

The junior supervisor's listening

7.117 In reply, the LEA stated that there was a normal practice to deal with interception after the lifting of additional conditions in the midst of a telecommunications interception operation. Hence no specific instruction was given to the junior supervisor in this particular case. Upon my analysis, the normal practice consisted of five parts including (i) marking the time of the lifting of additional conditions; (ii) releasing access to the intercept product to non-Specified Rank listeners; (iii) assigning a non-Specified Rank officer to take over the listening duty; (iv) other listeners to stand in when the dedicated non-Specified Rank listener was absent on the day; and (v) the designated Specified Rank listeners would still be expected to finish the outstanding calls intercepted before the additional conditions were lifted.

7.118 The LEA explained that in the present case, Senior Listening Officer (2) was the designated Specified Rank listener to listen to the outstanding calls on Day 2 but she was engaged in other commitments so that she did not have time to listen to the 51 outstanding calls before the junior supervisor's listening came to light at 1715 hours that day. Pursuant to normal practice part (iii), the junior supervisor had assigned a non-Specified Rank officer to take over the listening duty but the officer was off that day, hence the junior supervisor stood in for that officer until

he handed over the listening duty to another officer at 1400 hours. The junior supervisor listened to the 51 outstanding calls because of his misinterpretation.

7.119 In my view, the junior supervisor must have known the normal practice, or otherwise specific instruction had to be given to him. By knowing the normal practice, he must have known that there would be a dedicated Specified Rank officer to listen to the outstanding calls intercepted before the lifting of the additional conditions. What he had to do was to assign a non-Specified Rank listener to take over the listening duty of calls intercepted after the lifting of the additional conditions. Even if the listener assigned by the junior supervisor under normal practice part (iii) was absent that day and the junior supervisor himself stood in to take over the listening duty according to normal practice part (iv), it still could not explain why he listened to the outstanding calls intercepted before the lifting of additional conditions knowing that these calls would be listened to by a designated Specified Rank listener according to normal practice part (v).

7.120 I therefore made further enquiries on:

- (a) whether the junior supervisor knew the entirety of the normal practice, and in particular whether he knew that there was a designated Specified Rank listener to listen to the outstanding calls intercepted before the lifting of the additional conditions; and
- (b) whether all other listeners knew the entirety of the normal practice.

I also required the LEA to obtain a statement from the junior supervisor on (a) above.

7.121 The LEA replied that the junior supervisor confirmed that he was fully aware of the normal practice. He was aware that a designated Specified Rank listener would listen to the outstanding calls intercepted before the lifting of the additional conditions. However, at that particular time in his mind he only thought that since the additional conditions were lifted by the panel judge, any listener might then commence to listen to the intercept product. Hence, instead of leaving the outstanding calls to the two Specified Rank listeners (referring to Senior Listening Officer (1) and Senior Listening Officer (2)) who were busy in other duties at the time and on the fact that the assigned non-Specified Rank listener was absent that day, he decided to listen to the calls himself. A statement taken from the junior supervisor to the same effect was provided to me by the LEA.

7.122 The LEA stated that the junior supervisor's interpretation (or misinterpretation) that '*any listener might commence listening to the intercept product at that particular point of time after the additional conditions were lifted*' clearly contradicted the normal practice that a designated Specified Rank listener would listen to the outstanding calls intercepted before the lifting of the additional conditions. The junior supervisor was aware of the normal practice and had he put the two points in the same perspective and considered them comprehensively, the incident could have been avoided.

7.123 The LEA also stated that since the junior supervisor's posting to the Section, there had been four occasions where additional conditions had been imposed and subsequently lifted. The junior supervisor's

interpretation (or misinterpretation) was not challenged on those occasions because he was acting up in the Specified Rank on the first occasion, and there was no outstanding call during the period in question on the other three occasions. The present incident is the first time when the junior supervisor's misunderstanding came to light.

7.124 The LEA also confirmed that other officers of the Section all declared that they were aware of the entirety of the normal practice.

Why were the outstanding calls not listened to before submitting the First REP-11 Report?

7.125 The LEA replied that at 0845 hours on Day 2, the Section Head verified the First REP-11 Report. He was aware that Senior Listening Officer (1) last listened to the calls at 1511 hours on Day 1 and that there might be outstanding calls that had not been listened to though he or his staff had not physically checked the record. Assessing that the outstanding calls were intercepted after the court case of the subject was concluded, he was thus satisfied that the following statement made in the REP-11 report was valid even when those calls had not been listened to:

‘Since the commencement of the interception operation against the subject ..., there has been no legal professional privilege material surfaced.’

7.126 The LEA did not agree with the approach of the Section Head. All reports that are submitted to the panel judges should be based on established facts and if such is not practicable, the reasons should be clearly explained. The LEA considered that the Section Head should be **advised**

with a record on file. The advice is disciplinary in nature. All other officers involved in ICSO matters would also be reminded.

Omission of 10 calls by Senior Listening Officer (1)

7.127 On Day 3, Senior Listening Officer (1) was tasked with listening to the 51 outstanding calls that had been accessed by the junior supervisor to see if they contained any LPP information. However, he omitted 10 of the calls. He was unable to recall or explain why he had omitted the calls. There was no non-functioning of the system and Senior Listening Officer (1) should be held accountable for the omission. The LEA concluded that the omission could well be a momentary lapse of concentration on the part of Senior Listening Officer (1).

7.128 After Senior Listening Officer (1) finished the re-listening of the calls on Day 3, he reported to the Chief Interception Officer that he had checked all the calls. Considering that the re-listening to the outstanding calls was a simple task for an officer at the Specified Rank, neither the Section Head nor the Chief Interception Officer had checked the audit trail report to see if Senior Listening Officer (1) did listen to all the 51 outstanding calls. Had they done so, they could have spotted the calls missed out by Senior Listening Officer (1).

7.129 The LEA stated that the three officers concerned, ie the Section Head, the Chief Interception Officer and Senior Listening Officer (1), would be **advised**, with a record on file, that they should exercise due care and vigilance when handling interception operations in future. The advice is disciplinary in nature.

My findings

7.130 Having conducted a review, I made the following findings:

- (a) The listening to the 51 outstanding calls intercepted before the lifting of the additional conditions by the junior supervisor after the lifting of the additional conditions was a breach of the condition of the prescribed authorization which restricted the listening to Specified Rank officer and the junior supervisor was below the Specified Rank.

- (b) The junior supervisor attributed his mistake to his misinterpretation of the effective period of the condition in the light of its being lifted. Be that as it may, it is difficult to understand that on the one hand, he knew the normal practice and he knew that a designated Specified Rank officer (ie Senior Listening Officer (2) referred to above) had been assigned to listen to the outstanding calls on Day 2, but on the other hand, he listened to the outstanding calls which was supposed to be the job of the Senior Listening Officer and he did not care to tell the Senior Listening Officer beforehand. This is unimaginable. What if the designated Senior Listening Officer preferred to listen to these calls herself? While I have strong doubt on the junior supervisor's explanation about his listening to the outstanding calls, I have no evidence to prove that he was under instruction or expected by the Specified Rank listeners to complete the unfinished calls intercepted before the lifting of the additional conditions. Nor do I have proof that the Specified Rank listeners similarly

misunderstood the effective period of the additional conditions as all officers in the Section declared that they were aware of the entirety of the normal practice.

- (c) While no similar mistake was made in the Section on the previous occasions, I had required the LEA to conduct similar checks on other sections of the department involved in telecommunications interception with additional conditions imposed and lifted. The checking is underway. Initially, a few cases with similar mistakes had been spotted. The LEA will submit a separate report to me after it has completed the checking.
- (d) Knowing that there were outstanding calls not yet listened to, the Section Head should not have stated in the First REP-11 Report that no LPP material had surfaced since the commencement of interception against the subject. At least he should have qualified his statement.
- (e) Senior Listening Officer (1) did not exercise care and vigilance when examining the outstanding calls listened to by the junior supervisor to the extent that 10 of the 51 calls had been omitted. His supervisors were also at fault in not ensuring that all the calls had been re-listened to before reporting to the panel judge in the Fourth REP-11 Report that these calls did not contain LPP information and that the interception operation would resume.

7.131 Pending revision to the Ordinance to empower me to listen to intercept product, I have not listened to the recording of the 51 outstanding calls. Hence, no finding can be made as to the veracity of the claim that no LPP material had been involved.

7.132 I was satisfied with the remedial actions taken by the department.

7.133 I also considered that the disciplinary awards by the LEA to the officers concerned were appropriate save that related to the junior supervisor, as referred to in paragraphs 7.112 to 7.113 above.

7.134 The junior supervisor's breach of one of the additional conditions of the prescribed authorization in this case was a serious one. He took it upon himself to listen to the intercepted calls that were obtained before the lifting of the additional conditions ignoring the normal practice and the fact that there had been a designated Senior Listening Officer for the calls intercepted before the lifting of the additional conditions ('the pre-lifting calls'). He presumed that the designated Senior Listening Officer might not listen to the pre-lifting calls in the afternoon and that she might not wish to listen to these calls. He did not feel the need to inform the Senior Listening Officer before he decided to listen to the pre-lifting calls and after he had listened to these calls. All these show his reckless failure to heed or give effect to the normal practice part (v), which was inexcusable. The matter could not simply be explained away as his misunderstanding of the effective period of the additional conditions when they were lifted. His fault was not limited to the non-compliance with the requirement of the Ordinance (ie breaching an additional condition of the prescribed authorization), but also included a flouting of the normal

practice, which was apparently adopted by the LEA for ensuring its officers' compliance with their ICSO-related duties. The flouting of the normal practice must be viewed as very serious since the junior supervisor was tasked to lead several junior listeners and was entrusted with the duty of assigning listening duties to them. In the circumstances of this case, I considered that the disciplinary award of an **advice** for the junior supervisor's faults was too lenient.

7.135 I notified the head of the LEA of my view on the disciplinary action accordingly. His response was that due to the 'double jeopardy' consideration, the LEA was unable to administer additional disciplinary action against the junior supervisor, but taking note of my concerns, the LEA was prepared to take further action to address the matter by way of the Divisional Head (under whom the junior supervisor carried out his duties) issuing a formal letter to him to strengthen the previous advice given to him and warn him of the serious consequences of his mistakes and that any recurrence would be dealt with seriously. The 'double jeopardy' was based on the fact that the disciplinary advice had already been given at the end of 2010, to which my attention had not been drawn during the course of my inquiries mentioned above. I was compelled to accept the further action proposed. I also made a recommendation so as to ensure that an appropriate disciplinary award should be given to any offending officer after the head of any LEA should first be apprised of my view at the conclusion of my review, whether he agrees with that view or not. Details of the recommendation can be found under the heading of 'Time to make disciplinary award' in Chapter 9.

Report 4: Type 1 surveillance carried out on persons in a meeting not allowed by the terms of the prescribed authorization

7.136 In paragraphs 7.123 to 7.130 of the Annual Report 2009, I described two investigation cases where the quantity of devices used might be in excess of what was authorized in the relevant prescribed authorizations for Type 1 surveillance. In 2010, I continued to probe into these cases to see if there had been abuse of the devices issued. My scope of enquiry was extended to the preceding prescribed authorizations of the two investigation cases. This further probing led to the discovery of a case where the Type 1 surveillance conducted in early 2009 was outside the terms of the prescribed authorization granted.

Circumstances leading to the discovery of the non-compliance

The singular 'device' in the prescribed authorization

7.137 To start with, during an inspection visit to a department in November 2009, my staff and I inspected the application documents and prescribed authorizations of certain Type 1 cases. I found that there were three versions in four of the cases, as follows:

- (a) In a case, the prescribed authorization authorized the 'use of optical surveillance device and listening device(s), namely, concealed video recorder(s), concealed audio recorder(s) ...'.
- (b) In another case, the wording in the prescribed authorization was 'the surveillance devices that are sought to be used to carry out the Type 1 surveillance are optical surveillance

devices and listening devices, namely concealed video recorders, concealed audio recorders ...’.

- (c) In two other cases, the prescribed authorizations authorized the ‘use of optical surveillance device and listening device, namely concealed video recorder, concealed audio recorder ...’.

7.138 In the two investigation cases in (c) above, I found that more than one set of optical surveillance device and more than one set of listening device were issued which seemed to be in excess of what was authorized in the respective prescribed authorizations which used the word ‘device’ in singular form. The department explained that the applicants used the word ‘device’ in singular form which was meant to refer, in a generic sense, to the kind of device sought to be used. They did not intend the word to carry any numerical or quantitative meaning.

7.139 I tended to think that since applications from the department to the panel judges used ‘device’, ‘device(s)’ and ‘devices’, it might have misled the panel judges to think that the word ‘device’ should mean one device only or otherwise the word ‘device(s)’ or ‘devices’ would be used. The department explained that different applicants might have different interpretations.

7.140 As the quantity of devices issued in the two investigation cases seemed to be in excess of what had been authorized in the prescribed authorizations which might be possible non-compliance, I requested the department to submit a report on each of the two investigation cases for my further review, which the department duly did in December 2009.

Report on Case 1

7.141 In the report on Case 1, the department stated that although the devices issued were more than one set of optical surveillance device and one set of listening device, no covert surveillance was eventually carried out as the anticipated meeting did not materialize.

Report on Case 2

7.142 The prescribed authorization in Case 2 authorized:

‘The use of optical surveillance **device** and listening **device**, namely, concealed video recorder, concealed audio recorder ... to be deployed or installed inside restaurant ... or any place ..., where [Subject H] and his **associate nicknamed ‘J’**, with or without their other associates, would meet to discuss the details of their [criminal activities].’ (Emphasis added.)

7.143 The department’s report stated that Type 1 surveillance was carried out pursuant to the above authorization on a meeting between Subject H and Subject J and a Chinese male who was an associate of Subject J. Although three sets of surveillance devices with both optical and listening functions were issued, only one set was switched on during the covert surveillance.

7.144 Having examined the report on Case 2, in January 2010, I wrote to the department seeking answers to the following issues:

Issue (a): If only one set of surveillance device was sufficient for the purpose of the covert surveillance, why were three sets issued in the first instance?

Issue (b): Could the department provide evidence to substantiate its claim that only one set of surveillance device was switched on during the covert surveillance?

Issue (c): Since Subject J was only known by a nickname without other details, how did the department know that one of the persons meeting with Subject H was the intended Subject J mentioned in the prescribed authorization when the department conducted the covert surveillance by switching on the surveillance device? Could the department provide proof?

7.145 I raised issue (c) because the only description about Subject J in the affirmation supporting the application for Type 1 surveillance authorization was that he was a Chinese male nicknamed J and an associate of Subject H and that the two would have lunch on a certain day but the exact time and place were unknown at the time of application for the prescribed authorization. The panel judge granted the prescribed authorization which was not confined to any particular restaurant. I was concerned that if the department took one or the other of the two persons who had meeting or lunch with Subject H on that certain day as the nicknamed Subject J, the covert surveillance undertaken could have been an unauthorized operation if neither of them was Subject J. I requested the department to explain how its officers could have identified this nicknamed Subject J before switching on the surveillance device for the covert surveillance.

7.146 I requested the department to address these issues in its full investigation report to be submitted on Case 2.

Related prescribed authorizations of these two investigation cases

7.147 Although in Case 1, no covert surveillance was carried out and in Case 2, the number of surveillance devices eventually used was only one, I considered it necessary to conduct a similar review on other prescribed authorizations of these two investigation cases to see if the quantity of devices used exceeded the quantity authorized. For Case 1, there were two other prescribed authorizations. For Case 2, there were 14 other prescribed authorizations. I shall term these 16 other prescribed authorizations as 'related authorizations' hereafter.

7.148 Upon my request, the department provided details on the quantity of device(s) authorized and quantity of device(s) used in respect of the 16 related authorizations. These 16 related authorizations authorized the use of optical surveillance device and listening device in singular form similar to Case 1 and Case 2. I found that:

- (a) for one of the related authorizations, there was no issue of surveillance device at all;
- (b) for six of the related authorizations, although the number of surveillance devices issued was more than one set of optical surveillance device and more than one set of listening device, no covert surveillance was actually carried out;
- (c) for five of the related authorizations, although the number of surveillance devices issued ranged from three to four sets, the number of devices used in the covert surveillance was only one set; and

- (d) for the remaining **four related authorizations**, the number of devices issued ranged from three to six sets and the number of devices used in the covert surveillance was two sets both having optical and audio functions.

7.149 I queried whether the covert surveillance conducted under (d) above with the use of more than one optical surveillance device and more than one listening device was authorized in accordance with the terms of the respective prescribed authorizations, which described both optical surveillance device and listening device in singular form. In March 2010, I requested the department to submit a report on each of the four related cases to the panel judge to obtain the panel judge's view as to the true ambit of the prescribed authorizations concerned which were granted by the panel judges. The report should say that there was uncertainty as to whether the relevant prescribed authorization covered the devices (plural) issued and used, and whether the covert surveillance performed with the use of more than one optical surveillance device and more than one listening device was authorized. The report should invite the panel judge's comments, if any.

7.150 The department submitted reports on the four related cases to the panel judge accordingly. The panel judge noted the four reports without making any comment.

7.151 In April 2010, the department wrote to me that since the panel judge noted the four reports without adding any comment, the department considered that the panel judge accepted the understanding of the applicants on the meaning of the word 'device' as stated in paragraph 7.138 above, and hence there was no non-compliance in the conduct of the covert

surveillance operations in the way they took in the four related cases. The department sought my advice as to whether the investigation into the possible non-compliance in Case 1 and Case 2 should continue. In response, I asked the department to provide first the answers to the issues that I raised on Case 2 in paragraph 7.144 above.

My review on Case 2

7.152 In May 2010, the department provided the answers to the issues.

7.153 On the first issue (If only one set of surveillance device was sufficient for the covert surveillance, why were three sets issued in the first instance?), the department explained that at the time of the grant of the prescribed authorization, the exact time and place of the meeting were still unknown. In the absence of such information, the officer in charge of the operation was uncertain as to how the covert surveillance operation would unfold. In the circumstances, he requested the issue of three sets of surveillance devices in order to maximize the possibility of successfully monitoring the meeting and to cater for any unexpected changes.

7.154 On the second issue (evidence to substantiate that only one surveillance device was switched on during the operation), the department advised that the two officers conducting the covert surveillance both stated that only one surveillance device was switched on. One of them had made an entry in his official notebook (after conducting the covert surveillance earlier the day) stating that he had used one surveillance device (with serial number stated) to record the meeting.

7.155 On the third issue (How could the department's officers identify the nicknamed Subject J before switching on the surveillance device?), the department explained how through other intelligence, its officers were able to identify the nicknamed Subject J before the start of the covert surveillance. I do not intend to disclose the content of the intelligence because to do so would be prejudicial to the prevention or detection of crime. The department also informed me that subsequent to the covert surveillance, the officer in charge of the operation had listened to the recording of the meeting and found that the issues discussed during the meeting were highly relevant to the subject matters of the crime investigation. This further strengthened their belief that one of the two persons who attended the meeting with Subject H was the intended nicknamed Subject J.

7.156 At my inspection visit to the department on 4 August 2010, I inspected the relevant documents and the officer's official notebook to verify the answers given by the department. However, I did not listen to the recording of the meeting as the Ordinance does not make express provision empowering me to listen to the recording of surveillance products.

7.157 **3-minute absence of Subject H.** In the course of inspecting the officer's official notebook, I found that the officer had made an entry in the notebook that covert surveillance was conducted between 1230 hours and 1423 hours, and that at 1413 hours, Subject H left the table for the restroom and returned to the table at 1416 hours. During the three minutes when Subject H was absent, Subject J and the associate remained at the table and covert surveillance was continued on these two persons.

7.158 Since the prescribed authorization authorized covert surveillance be conducted on meeting(s) between Subject H and his associate the nicknamed Subject J, I considered that during the 3-minute period when Subject H was absent, the covert surveillance operation that was continued on Subject J and the Chinese male might have become unauthorized. I advised the department to submit a report to the panel judge on this possible non-compliance and to invite the panel judge's comments, if any.

7.159 The department duly submitted a report to the panel judge. After noting the report, the panel judge wrote thereon:

‘Noted. This is not a matter for the PJO’s comments; it is a matter of interpretation of and compliance with the authorization.’

My review on the four related authorizations

7.160 Regarding the above-mentioned four related authorizations which authorized the use of surveillance device in singular form, I found that the number of devices issued pursuant to these authorizations was on some occasions as many as six sets but eventually only two sets were used. To review whether there was any irregularity in the issue of devices more than necessary and to see if there was any abuse of the unused devices, at another inspection visit to the department on 6 August 2010, I required the department to provide a written reply to the following questions:

- (a) In each of the four related cases, why was the number of surveillance devices issued more than the number of surveillance devices used?

- (b) How were the unused surveillance devices kept before they were returned to the device registry?

7.161 In reply to the above questions, on 10 September 2010, the department provided a report on the use of surveillance devices in each of the above four related cases, setting out in respect of each covert surveillance operation that had been conducted the reason for issuing a certain number of surveillance devices, the number of surveillance devices actually used and how they were deployed, and how the unused ones were kept.

7.162 Also on 10 September 2010, the department submitted another report to me that in the course of conducting an enquiry to provide the above answers to me, the department discovered that one of the Type 1 surveillance operations carried out in early 2009 pursuant to one of the four related authorizations might have been outside the ambit of the prescribed authorization. In that case, the prescribed authorization authorized Type 1 surveillance to be carried out when Subject 1 and Subject 2 met, with or without their associates. But the department carried out Type 1 surveillance on a meeting between Subject 2 and two other persons without the presence of Subject 1 at all. This initial report was followed by a full investigation report in April 2011.

The non-compliance in the Type 1 surveillance conducted pursuant to the related authorization

7.163 In April 2011, pursuant to section 54 of the Ordinance, the head of department submitted a full investigation report, prepared by the unit in the department tasked with investigating non-compliance under the

ICSO ('the Unit'), on the non-compliance referred to in the preceding paragraph. In the covering letter, the head of department stated that the organization setup provides for the Unit in conducting investigations into alleged cases of irregularity or non-compliance under ICSO to report directly to the Senior Assistant Head of Department of Division A. Exception was made of the present case because of the officer's personal involvement in it as the Reviewing Officer. The Unit was instructed to report directly to the deputy head of department and the head of department without routing through the Senior Assistant Head of Department of Division A. Hence the latter had no knowledge of the contents of the investigation report or its recommendations.

Facts of the case

7.164 In early 2009, the department was investigating a case where Subject 1, Subject 2 and others might have conspired to commit crimes. The department obtained a prescribed authorization for conducting Type 1 surveillance, the terms of which were as follows:

'The use of optical surveillance device and listening device, ... to be deployed or installed inside [description of place] where **Subject 1 and Subject 2 would meet, with or without their other associates**, to discuss the details of their [criminal activities].' (Emphasis added.)

7.165 On Day 1, pursuant to the prescribed authorization, covert surveillance was conducted on Subject 1 and Subject 2 meeting at a place (**'the First CS'**).

7.166 On Day 2, pursuant to the same prescribed authorization, covert surveillance was conducted on a meeting between Subject 1,

Subject 2 and three unidentified persons at another place (**‘the Second CS’**). One of the unidentified persons was later identified to be Mr A.

7.167 After the Second CS, the officer in charge of the operation (**‘the OC Operation’**) became aware that Subject 2 would meet Mr A on Day 3 but the exact time and place of the meeting were not known. In the mistaken belief that the intended meeting would fall within the ambit of the prescribed authorization, the OC Operation decided to conduct covert surveillance on the meeting.

7.168 According to the OC Operation, he had that mistaken belief because the events that unfolded on Day 1 and Day 2 tallied exactly with the department’s assessment of the intelligence obtained. The OC Operation further explained that as mentioned in the affirmation supporting the application for the prescribed authorization, it was their intention ‘to cover the meetings between Subject 1, and Subject 2 and their associates and the subsequent meetings among Subject 1, Subject 2 and their associates’. Hence, when he knew that Subject 2 would meet Mr A on Day 3, he considered that was a subsequent meeting of the Day 2 meeting to discuss the criminal activities which was in line with the operational plan set out in the supporting affirmation. Therefore without realizing that the way the prescribed authorization was termed would not authorize the conduct of covert surveillance when either Subject 1 or Subject 2 was absent in the meeting, he decided to deploy officers to conduct covert surveillance on the meeting to be held on Day 3.

7.169 On the evening of Day 3, the OC Operation became aware that Subject 2, Mr A and a Chinese female turned up at the meeting held at a place. The OC Operation therefore instructed officers to conduct covert

surveillance on the meeting. These officers were not briefed of the specific terms of the prescribed authorization or given a copy of the prescribed authorization. Covert surveillance was carried out for one hour (**‘the Third CS’**).

7.170 As covert surveillance had been carried out and another meeting was unlikely, the OC Operation made a decision to discontinue the operation later that day.

7.171 For each of the covert surveillance operations conducted on Day 1, Day 2 and Day 3, the OC Operation reported to his supervisor (**‘the Supervisor’**) the development prior to the operation and the outcome subsequent to the operation including who were present in the meetings and the contents of the discussion. The Supervisor was the applicant of the prescribed authorization.

7.172 The department had an internal review procedure in that after the discontinuance of an operation or expiry / revocation of a prescribed authorization for Type 1 surveillance, the officer in charge of the operation would submit a review report via his supervisors to the Reviewing Officer for conducting a review on whether there was any irregularity or non-compliance with the requirements of the Ordinance in respect of the Type 1 surveillance that had been carried out. The Reviewing Officer was a Senior Assistant Head of Department. To ensure that such reviews are conducted in an independent and impartial manner, the Senior Assistant Head of Department of Division A would be the Reviewing Officer of cases investigated by Division B and vice versa.

7.173 As the Type 1 surveillance in this case was conducted by officers of Division B, the Senior Assistant Head of Department of Division A ('Senior Assistant HoD (Division A)') was the Reviewing Officer.

7.174 Weeks later, in accordance with the department's internal review procedures, the OC Operation submitted a review folder containing, inter alia, a completed Review Form, a copy of the prescribed authorization and a copy of the supporting affirmation to:

- (i) an acting supervisor (the Supervisor referred to in paragraph 7.171 above was on leave at that time),
- (ii) the Assistant Head of Department (Division B), and
- (iii) the Senior Assistant HoD (Division A) as the Reviewing Officer.

7.175 In the Review Form, the OC Operation stated:

'Three surveillance operations were conducted:

- (1) Mr 1 met Mr 2 at [place, date and time].
- (2) Mr 1 and Mr 2 met two men and a woman at [place, date and time].
- (3) Mr 2 met Mr A ... and a woman at [place, date and time].'

7.176 The acting supervisor and the Assistant Head of Department (Division B) signed on the Review Form without giving any comment, meaning that they endorsed the contents of the report.

7.177 The Reviewing Officer conducted a review on the compliance of officers with the relevant requirements of the Ordinance in respect of the three surveillance operations that had been carried out. He endorsed the Review Form with the finding that there was no non-compliance / irregularity.

7.178 Pursuant to my enquiries made at the inspection visit on 6 August 2010 as to (i) why the number of surveillance devices issued on each occasion was more than the number of devices used and (ii) how the unused surveillance devices were kept before they were returned to the device registry, the Unit conducted enquiries by examining the relevant documents and interviewing the officers concerned including the OC Operation with a view to ascertaining the answers to my questions.

7.179 In the course of the above enquiries, and sometime between 6 and 13 August 2010, a female investigating officer of the Unit examined the prescribed authorization and the Review Form (she could not recall the exact date when this was done). She noticed that the meeting held on Day 3 was attended by Subject 2, Mr A and a Chinese female but Subject 1 was not present at the meeting. She was not certain as to whether there was any irregularity. She reported her observation to the head of the Unit. The head of the Unit instructed her to collect all relevant facts and to further interview the OC Operation so that a proper assessment could be made. Then, the head of the Unit reported the observation of the female investigating officer to his superior officer, an Assistant Head of Department in charge of ICSO matters ('Assistant HoD') (not the one mentioned in paragraph 7.174(ii) above). The head of the Unit could not recall the date of reporting to the Assistant HoD. The Assistant HoD

agreed that the Unit should gather the relevant facts and conduct initial enquiries into the case to determine its nature, before considering further action to be taken. He also advised the head of the Unit that the Unit should in the meantime continue with their original enquiries for the purpose of preparing a written reply in answer to the questions raised by me on 6 August 2010.

7.180 In accordance with the advice of the Assistant HoD, the head of the Unit proceeded in parallel with both (i) the original enquiries with a view to ascertaining the answers to my questions raised on 6 August 2010 and (ii) the initial enquiries with a view to determining the case nature arising from the observation made by the female investigating officer.

7.181 About a month after the discovery of the non-compliance, on 10 September 2010, the department submitted an initial report to me. In April 2011, a full investigation report was submitted.

The department's investigation

7.182 The Unit found that the Third CS, which was carried out on a meeting in which Subject 2 but not Subject 1 was present, was conducted not in compliance with the terms of the prescribed authorization and was unauthorized. The non-compliance was attributable to the negligence of duty and lack of vigilance on the part of the OC Operation, as the officer in charge of the planning and execution of the covert surveillance operations.

7.183 Apart from the OC Operation, the Unit considered that the non-compliance was also due to the lack of vigilance on the part of the Supervisor who failed to exercise sufficient supervision on the execution of the Third CS. He was the applicant of the prescribed authorization and

being the supervisor of the OC Operation, he had the responsibility to ensure that the Type 1 surveillance conducted or to be conducted by his subordinates was / would be in strict compliance with the terms of the prescribed authorization. Had he exercised due diligence and vigilance when the OC Operation reported to him on the afternoon of Day 3 that the Third CS was to be carried out, the present non-compliance could have been avoided.

7.184 The Supervisor explained that when the OC Operation informed him of the intended Third CS, he thought that it was permitted by the terms of the prescribed authorization because he had expected, as stated in the supporting affirmation, that after Subject 1 had introduced Subject 2 to Mr A, there would be subsequent meetings among Subject 1, Subject 2 and their associates (including Mr A). Since matters had developed as expected, he was not alerted to the fact that the absence of Subject 1 in the meeting might render the Third CS unauthorized. He was still not alerted to this fact when the OC Operation reported the outcome of the Third CS to him. He was alerted to this fact only during the investigation by the Unit.

7.185 The Unit also considered that the acting supervisor, the Assistant Head of Department (Division B) and the Reviewing Officer had not been vigilant in the review process in their failure to detect the non-compliance.

7.186 The Reviewing Officer explained that he was not aware of any possible irregularity or non-compliance arising from the covert surveillance operations which were reviewed by him in early 2009. He stated that at the time of conducting a review of this Type 1 surveillance, he was satisfied that the sequence of events unfolding as represented by the covert

surveillance operations carried out tallied with the information provided in the supporting affirmation. He admitted that at the time of his review, he failed to notice that the form of covert surveillance that was sought to be carried out (which was reflected in the prescribed authorization) was so restrictive that the operation was to be conducted where Subject 1 and Subject 2 would meet, with or without their associates.

7.187 Regarding the officers deployed by the OC Operation to conduct the Third CS, the Unit considered that they should not be held accountable because they were acting on the instructions of OC Operation without knowing the specific terms of the prescribed authorization.

7.188 The Unit found no evidence to suspect that the unauthorized covert surveillance or the failure to detect it during the review process was due to bad faith on the part of the officers concerned, taking into account the following:

- (a) Had the OC Operation and/or the Supervisor realized at the time that the intended covert surveillance to be conducted on the evening of Day 3 would not fit the terms of the prescribed authorization, they could have sought redress by making a fresh application for another prescribed authorization with a wider coverage in order to cover the intended meeting.
- (b) The events unfolded between Day 1 and Day 3 corresponded closely with the investigators' assessment as stated in the supporting affirmation. This could have given them a false sense of comfort that they were authorized under the

prescribed authorization to conduct covert surveillance on the meeting to be held on Day 3.

- (c) The outcome of the Third CS was properly recorded by the OC Operation in the Review Form indicating that there was no attempt to conceal Subject 1's absence in the meeting during the review process.
- (d) Several days after the discontinuance of this prescribed authorization, the OC Operation made another application to the panel judge for Type 1 surveillance authorization to cover another meeting, also on the same investigation case. The outcome of the Third CS was reported in the affirmation made in support of this subsequent application which again indicated that there was no attempt to conceal Subject 1's absence in the meeting on Day 3.

7.189 The Unit recommended that a **written warning** be given to the OC Operation and the Supervisor, and a **verbal warning** be given to the acting supervisor for his failure to detect the irregularity concerning the Third CS in the review process.

7.190 The Assistant Head of Department (Division B) who also failed to detect the irregularity in the Third CS in the review process had ceased active service with the department before the discovery of the non-compliance and had left the department by the time the full investigation report was submitted.

7.191 The Unit recommended that a **written warning** be given to the Reviewing Officer. As the Reviewing Officer, he was expected to

critically review the information provided in the Review Form and the relevant documentation, with a view to determining whether the officers had complied with the relevant requirements under the Ordinance in respect of the application for and conduct of Type 1 surveillance. There was a lack of vigilance in his review of the case and his performance fell short of the expectation of an officer with his seniority and experience. In making this recommendation, the Unit had taken into account the factor that there was no evidence suggesting any bad faith on the part of the Reviewing Officer.

7.192 The investigation report also stated that the prescribed authorization in this case was one of those cases in respect of which the quantity of devices used in the covert surveillance operation was in excess of what had been authorized in the prescribed authorization which authorized the use of optical surveillance device and listening device in singular form. Pending my finding on whether this amounted to non-compliance, the department would need to further consider whether any departmental actions in this regard have to be taken in respect of the officers concerned. In this regard, the investigation report further stated that officers undertaking ICSO duties had been duly reminded to ensure that the quantity of devices issued should not be in excess of what had been authorized by the respective prescribed authorization.

7.193 In the light of the mistake in this incident, the department had taken a series of improvement measures including stepping up training of its officers at all levels and advising them to carefully assess their operational requirements and prepare a prescribed authorization with terms that appropriately suit these requirements.

7.194 In this case, officers deployed to carry out the covert surveillance operations had not been given a copy of the prescribed authorization or briefed on the exact terms of the prescribed authorization. It has now become an ongoing requirement that all members of the team taking part in a covert surveillance operation should be provided with a copy of the prescribed authorization and briefed by the officer-in-charge on the operational plan, the terms of the prescribed authorization as well as any restrictions imposed by the panel judge.

7.195 In my review of the irregularity in a previous Type 2 surveillance case also of this department, I had recommended the department to adopt an improved review form requiring the applicant to account for the use and non-use of surveillance devices issued. The department has now decided that the improved review form should also be adopted in the review of Type 1 surveillance cases.

My review on the non-compliance in the related authorization

7.196 My review on the non-compliance in this case focussed on the following aspects:

- (a) whether there was any bad faith on the part of the OC Operation and the Supervisor;
- (b) whether the non-discovery of the irregularity in the Third CS when the Reviewing Officer reviewed the case in early 2009 was a genuine failure in not being able to detect the irregularity or otherwise;

- (c) whether there was a cover up or attempt to cover up after the irregularity was discovered by the Unit sometime between 6 and 13 August 2010 and before it was reported to me on 10 September 2010; and
- (d) Why did the head of the Unit report the observation of the female investigating officer to the Assistant HoD? Was this in accordance with the normal procedure? Was this in accordance with the command structure?

Was there any bad faith on the part of the OC Operation and the Supervisor?

7.197 One reason given in the investigation report to support the conclusion that there was no bad faith was that had the OC Operation and/or the Supervisor realized at the time that the covert surveillance operation to be conducted on Day 3 would not fit the terms of the prescribed authorization, they could have sought redress by making a fresh application for another prescribed authorization with a wider scope in order to cover the intended meeting. To this, I considered it necessary to make enquiry with the department to know on which day and at what time the OC Operation was aware of the intended meeting, at what time on Day 3 that he reported the intended meeting to the Supervisor, and at what time that the OC Operation knew that the meeting was changed from the afternoon to the evening to see if there was really sufficient time, as claimed in the investigation report, for them to make a fresh application to a panel judge to cover the intended meeting had they wished to do so.

Was the non-discovery of the irregularity in the Third CS genuine?

7.198 The failure of the Reviewing Officer in detecting the irregularity in the Third CS stood out for closer and cautious examination as the mistake in the Third CS was too obvious to be unnoticed.

7.199 Regarding the Reviewing Officer's version in paragraph 7.186 above, I requested the department to provide explanations on the following for resolving my doubts:

- (a) According to the Reviewing officer, he had checked the supporting affirmation when he reviewed the case. Did he check the prescribed authorization? If not, why not?
- (b) If the Reviewing Officer had checked the prescribed authorization, what was his reaction when he saw the words in the prescribed authorization 'where Subject 1 and Subject 2 would meet' but it was clearly stated in the review report that Subject 2 met Mr A and a woman, without mentioning Subject 1 at all?
- (c) If on the face of the prescribed authorization, the Third CS did not fit into the terms of the prescribed authorization and that the Reviewing Officer had to go into details to see what was described in the supporting affirmation to satisfy himself that the sequence of events unfolding tallied with the information in the supporting affirmation, why did he not make a record of his interpretation of the prescribed authorization vis-à-vis the supporting affirmation or raise the matter for discussion with Senior Assistant Head of Department of Division B (the covert

surveillance operation was carried out by Division B officers) or other high-ranking officers of the department or raise the matter with the panel judge or with me?

- (d) If the Reviewing Officer did not check the prescribed authorization but simply checked what was stated in the review report against the affirmation, was this a logical way of conducting the review to see that the covert surveillance operation complied with the terms of the prescribed authorization?

Was there a cover up?

7.200 The female investigating officer of the Unit discovered the irregularity sometime between 6 and 13 August 2010. But it was not until one month later on 10 September 2010 that the department submitted an initial report to me. The delay in reporting to me aroused suspicion of covering up.

7.201 To examine whether there had been a cover up after the discovery of the irregularity by the Unit, it is necessary to check the sequence of events against various dates. The only information given in the full investigation report was that the female investigating officer discovered the irregularity sometime between 6 and 13 August 2010, the exact date of which she could not recall. The investigation report did not mention the date of her reporting the discovery to the head of the Unit. If she had forgotten the date of her reporting to the head of the Unit, could the head of the Unit recall? Similarly, the head of the Unit could not recall the date of his relating the observation of the female investigating officer to the

Assistant HoD. If the head of the Unit could not recall, could the Assistant HoD remember the date? It would be a strange coincidence if all the three officers could not remember the date or dates concerned.

7.202 Unlike the 3-minute absence of Subject H in Case 2, in the present case, Subject 1 was totally absent in the meeting on Day 3. The prescribed authorization authorized covert surveillance on meetings between Subject 1 and Subject 2. A meeting between Subject 2 and other persons was plainly outside the ambit of the prescribed authorization. The irregularity was too obvious that the advice given to the head of the Unit by the Assistant HoD appeared to be artificial, to say the least. Given the two-step approach in reporting irregularity as mentioned in paragraph 7.3 above, ie, an initial report to report the occurrence of the incident and a subsequent investigation report to report the details and findings, I did not understand why an initial report was not submitted to me promptly but had to wait until one month later. Had the department promptly submitted an initial report, say, within a couple of days after discovery, there was no question of officers forgetting the date of discovering the mistake. Furthermore, at the time when the head of the Unit related the observation of the female investigating officer to the Assistant HoD and during their discussion on it, no matter how brief, if they or either of them were minded of eventually making an initial report to me on such discovery, it is difficult to understand why none of the three officers (including the female investigating officer) cared to record such matters on file or in writing for future reference when an initial report had to be prepared. For such a discovery which might involve a very senior officer (the Senior Assistant HoD failing to detect the irregularity in his capacity as Reviewing Officer),

it is difficult to imagine that all the three officers were coincidentally so forgetful about the date(s).

Command structure of the Unit

7.203 It was previously represented by the department that although administratively the Unit comes under the supervision of the Assistant HoD, the Unit conducts inquiries into alleged cases of irregularity or non-compliance independently of the Assistant HoD and reports directly to Senior Assistant HoD (Division A).

7.204 In the present case, it is obvious that it would not be appropriate for the head of the Unit to report the discovery of the non-compliance to Senior Assistant HoD (Division A) because the latter might be an involved party in having made a mistake for failing to discover the irregularity in his review of the covert surveillance operations under the prescribed authorization. In order to maintain independence, to avoid conflict of interest and (to say the least) to save embarrassment, the head of the Unit should have reported the matter to the deputy head of department instead of to the Assistant HoD, whose direct superior officer was Senior Assistant HoD (Division A). If it was a normal practice for the head of the Unit to report his discovery or findings to the Assistant HoD, it might have deviated from what the department had previously represented as the command structure of the Unit.

Reply from the department and my observations

7.205 In a letter dated 24 May 2011, the department replied to the questions I raised.

7.206 Regarding the argument that had the OC Operation and/or the Supervisor realized at the time that the covert surveillance operation to be conducted on Day 3 would not fit the terms of the prescribed authorization, they could have sought redress by making a fresh application for another prescribed authorization with a wider scope in order to cover the intended meeting, the department's answers to my inquiry were that the officers concerned had intelligence at the earliest on the late evening of Day 2 that Subject 2 and Mr A would meet on the afternoon of Day 3. In the circumstances, I considered that there would not be sufficient time for the remedial action as argued to be taken. Be that as it may, there was documentary evidence to prove that the OC Operation and the Supervisor had never tried to hide the fact that the Third CS was conducted on a meeting in which Subject 2 and others participated but in Subject 1's absence. In the circumstances, I considered that most probably the officers concerned conducted the unauthorized covert surveillance operation because they failed to realize that it would be outside the ambit of the prescribed authorization. There was no or no sufficient evidence of bad faith or ulterior motive on the part of these officers that could be discerned.

7.207 As regards whether the Reviewing Officer's failure to detect the Third CS being unauthorized when he reviewed the case in early 2009 was genuine, the department stated that the Reviewing Officer did check the prescribed authorization and the supporting affirmation but he did not spot any irregularity. He apologetically admitted that it was due to his oversight that he failed to detect the non-compliance. There remained no evidence, let alone sufficient evidence, upon which I could conclude that he deliberately refrained from detecting the non-compliance.

7.208 On my suspicion of a cover up by some officers after the discovery by the female investigating officer of the possible irregularity, according to the department's reply, while the possible irregularity was discovered sometime between 6 and 13 August 2010, the Unit took time to investigate whether indeed an irregularity had occurred. Investigation was carried out in tandem to obtain answers to the queries on devices I raised in my inspection visit on 6 August 2010. The non-compliance was eventually ascertained and it was reported to me on 10 September 2010. The department was unable to provide me with any certainty the dates on which various acts of the officers concerned occurred. There was no documentary evidence of any of those dates and the officers claimed that they could not remember. Without the certainty of the dates, I could not draw proper inferences that there was a cover up. From all the answers provided by the department, I could not discern sufficient evidence that the head of the Unit and the Assistant HoD to whom he had reported the observation of the female investigating officer attempted to cover up the matter. I could not say that they intended to hide the matter from me merely upon the fact that there was delay in reporting it to me.

7.209 On my questions relating to the reason why the head of the Unit reported the observation of the female investigating officer to the Assistant HoD and whether it was in accordance with normal procedure and the command structure of the department, the department replied that the Unit was administratively under the supervision of the Assistant HoD but it acted independently in investigating cases of irregularity or non-compliance under the ICSO and reported directly to Senior Assistant HoD (Division A). Among other duties, the Assistant HoD was responsible for the day-to-day supervision over the operation of the ICSO

regime, including compilation of weekly report returns and related reports on ICSO applications and implementation to the Commissioner on Interception of Communications and Surveillance ('C/ICS'). As the Unit was in support of the Assistant HoD's overall responsibility in respect of ICSO matters, the Assistant HoD held the supervisory accountability in ensuring the proper discharge of the Unit's duties. Whenever a case of possible irregularity or non-compliance was encountered and before a full investigation was carried out, the Unit would prepare an incident (initial) report for submission to C/ICS by the Assistant HoD. Therefore, the head of the Unit reporting the observation of the female investigating officer to the Assistant HoD was in accordance with the normal procedure and command structure.

Conflict of interest

7.210 Normal procedure aside, as alluded to in paragraph 7.204 above, there was a conflict of interest that was obvious from the possible involvement of the Senior Assistant HoD (Division A) in his failure as the Reviewing Officer to detect the non-compliance of the Third CS (see paragraph 7.216 below) and the fact that the Unit was investigating this non-compliance or at least the possibility of it while the Unit was to conduct the investigation and report its findings to him. The head of the Unit with hindsight accepted my view that since Senior Assistant HoD (Division A) was the direct superior officer of the Assistant HoD, he should have been more vigilant and reported the matter to the superior officer of Senior Assistant HoD (Division A) or even to the head of the department, instead of to the Assistant HoD. The Assistant HoD also accepted that with hindsight, he should have been more alert to the particular situation and

reported what had been reported to him by the head of the Unit to one of those most senior officers of the department or asked the head of the Unit to do so. The department proposed to take disciplinary action against both of the officers, but would await my view.

7.211 This aspect of the case was entangled with the question whether there was any cover up of the non-compliance from me. I duly raised a number of queries with the department to seek clarification and explanation. By a letter dated 19 June 2011, apart from providing me with dates when the head of the Unit realized the possible conflict of interest and when the Assistant HoD did so, the department also answered my other queries. It also informed me of the proposed disciplinary actions to be taken against the two officers and the reasons in support, for their lack of alertness, sensitivity and professionalism in failing to appreciate the conflict of interest and in failing to take appropriate steps to handle the matter. A **written warning** would be given against both of them and they would be subjected to **administrative measures** that they be debarred from acting appointment for one year and that they be transferred out of their current posts in the department.

My findings and recommendations

(a) The singular 'device' in the prescribed authorization

7.212 It can be strongly argued that the singular form of 'device' mentioned in the prescribed authorization could well be generic in the sense of the kind or quality of the device used instead of numerical or quantitative, as used in the affidavit in support of an application for Type 1 surveillance to indicate the kind of device sought to be employed as

required by paragraph (b)(i) of Part 2 of Schedule 3 to the Ordinance. Therefore, the understanding of the department's officers concerned that was based on this argument was not unreasonable and I considered that a breach of the terms of the prescribed authorization was not established. However, in future, to avoid any misunderstanding, confusion or argument, it is better to use singular or plural form for devices, as the cases may be, in accordance with the need required, especially in view of the tight control to be exercised over the use of surveillance devices.

(b) Quantity of devices issued versus quantity used

7.213 I found that

- (a) in the First CS, four surveillance devices were issued but only one was used;
- (b) in the Second CS, six surveillance devices were issued but only one was used; and
- (c) in the Third CS, six surveillance devices were issued but only two were used.

7.214 A similar situation also occurred in other covert surveillance operations under some of the 16 related authorizations though not to such an extent as the present case.

7.215 Devices seemed to have been issued indiscriminately when in fact not so many devices were required to be used. The department should advise its officers not to request devices excessively and should base the quantity on the operational need.

(c) The non-compliance in the Third CS and suspicions arising from it

7.216 The Third CS was conducted on a meeting between Subject 2 and other persons. It was beyond the terms of the prescribed authorization which authorized meetings between Subject 1 and Subject 2. Hence, the Third CS was unauthorized.

7.217 The disciplinary awards proposed by the Unit for the officers involved in the non-compliance were reasonable and acceptable to me.

7.218 Regarding the acceptance by the head of the Unit and the Assistant HoD of their inadequate vigilance in dealing with the conflict of interest that was consequent upon the Reviewing Officer being possibly an involved party in the investigation of the Third CS being non-compliant with the prescribed authorization, the department considered that they lacked alertness, sensitivity and professionalism in failing to appreciate the distinct conflict of interest and proposed to take the disciplinary actions in conjunction with the administrative measures mentioned in paragraph 7.211 above.

7.219 Despite my in-depth inquiries into the various issues and suspicions, I was not able to find any or any sufficient evidence of any bad faith, ulterior motive or cover up relating to any of the officers of the department in this case.

7.220 I agreed with the department's view and considered that the disciplinary actions and administrative measures proposed against the two officers who failed to heed the conflict of interest in their dealing with the non-compliance appropriate and proper.

(d) Line of command of the Unit

7.221 Senior Assistant HoD (Division A) was the reviewing officer of Type 1 surveillance cases conducted by officers under the charter of Senior Assistant HoD (Division B).

7.222 On the other hand, Senior Assistant HoD (Division B) was the reviewing officer of Type 1 surveillance cases conducted by officers under the schedule of Senior Assistant HoD (Division A).

7.223 It was inappropriate in the circumstances of this case for the head of the Unit to report the incident to the Assistant HoD even though he might have followed the normal practice. It would also be inappropriate if the head of the Unit were to act in accordance with the normal practice to conduct the investigation under and report the findings to Senior Assistant HoD (Division A). The reason for the inappropriateness in both aspects is the conflict of interest mentioned above.

7.224 To ensure impartiality and perception of fairness, I recommended that the normal procedure and command structure should be qualified with **a rule** that in case of any possible conflict of interest, the Unit should report the incident (including the initial report) and conduct and report the ensuing investigation directly under and to the head of department or at least to the deputy head of department, instead of reporting through or to the Assistant HoD and Senior Assistant HoD (Division A).

7.225 The department accepted my views and recommendations.

(e) 3-minute absence of Subject H in Case 2

7.226 In the review of this matter, I invited the department to make representations as to why they considered that the covert surveillance conducted on the nicknamed Subject J and another person during the 3-minute absence of Subject H was not unauthorized. The department submitted the following views expressed by a panel judge when considering an application for prescribed authorization for Type 1 surveillance in April 2011 in respect of a different investigation:

‘Once the meeting has been constituted, by both subjects being present, then if during the course of the meeting one of the subjects is temporarily absent e.g. going to restroom temporarily, that meeting has been constituted and is still ongoing despite the temporary absence of one of the subjects and there can be no difficulty with the wording of the authorization in that respect since that meeting is still ongoing.’

7.227 I agreed with the panel judge’s reasoning. The meeting between Subject H and Subject J could not reasonably be said to be at an end during Subject H’s brief absence for going to the restroom. The covert surveillance that was continued during Subject H’s absence in the circumstances did not constitute a non-compliance with the prescribed authorization.

Report 5: Old ATR setting used

7.228 Hitherto, there has been an audit trail report (‘ATR’) to check the access of listeners to intercept products. Prior to November 2009, the ATR only showed the start time of access by listener to the intercept product but was unable to show the end time and duration of the listening by the listener (‘old ATR setting’). In November 2009, the ATR system

was enhanced such that the ATR is able to show additional information such as the duration of the call and the length of listening by the listener ('the enhanced ATR setting'). The enhanced ATR is an important means for me to check whether a listener has listened to a call and for how long. It also enables me to know which listener has accessed the intercept product. Since November 2009, workstations of all interception units have been installed with the enhanced ATR settings.

7.229 In December 2010, my office received an incident report from an LEA reporting that a technical problem had resulted in the failure of certain ATRs to record the listeners' activity in the enhanced format. As the report lacked essential information to enable me to understand and analyse the cause, the consequence and implications of the incident, I requested the head of department to submit a detailed report on the incident.

7.230 Briefly, the LEA's detailed report revealed that the LEA replaced all listening workstations of its interception unit by new ones because they were beyond economical service. Two listener's workstations were inadvertently configured with old ATR settings during the workstation replacement exercise. As a result, listening activities of telecommunications interception operations that were conducted through the two workstations were not recorded in the ATR system. This was not discovered until about two months later when a supervisor found that certain listening activities that had been conducted by his staff were not shown in the corresponding ATR record. As a remedial action, the two workstations were immediately updated with the enhanced ATR settings and both were put back to normal use. But the error had resulted in the loss

of records of listening activities that had been conducted through the two workstations in the period concerned. In other words, if anyone had accessed the intercept product through these two workstations during the said period, I would not have known it through checking the ATR record. Even if part of the data could be reconstructed technically, information about the end time of listening and the duration of listening in respect of the two workstations during the affected period had been permanently lost.

7.231 The LEA had identified several probable causes of the technical problem resulting in old ATR settings being installed in the two new workstations but could not determine the real cause.

7.232 In my review of the case, I did not find any evidence suggesting ulterior motive and was convinced that the mistake was due to technical problem the real cause of which could not be ascertained.

7.233 However, I found that there was no testing by the technical staff or listeners immediately after the new workstations were installed with ATR settings. Had such tests been conducted immediately after installation, the error could have been detected much earlier. I recommend that in future similar cases, the staff concerned should conduct a test immediately after installation so that mistakes, if any, can be detected at an early stage.

Report 6: Listening to a call made to a prohibited telephone number

7.234 When granting a prescribed authorization, the panel judge had imposed an additional condition that any call made to or received from a certain telephone number was prohibited from being listened to, in order to guard against the risk of obtaining information subject to LPP. In early

December 2010, during an inspection visit to the LEA, I examined the relevant documents and records and found that a listener had partially listened to a call made from the subject facility to the aforementioned prohibited telephone number, which amounted to a breach of the additional condition. In late December 2010, the LEA submitted an initial report to me under section 54 of the Ordinance. I have not yet received the full investigation report pending the completion of this Annual Report.

Report 7: Listening to two prohibited calls

7.235 In late December 2010, I received a report from an LEA under section 54 of the Ordinance reporting the listening to two calls intercepted between the subject facility and a specified facility number during a telecommunications interception authorized by a prescribed authorization, when the listening to calls made through the specified facility number was prohibited by the panel judge by virtue of an additional condition imposed in the prescribed authorization. The investigation is ongoing and a full investigation report has not yet been submitted to me.

Others

7.236 In addition to the above irregularities and non-compliance, there were four cases where the panel judge revoked the prescribed authorizations after considering REP-11 reports on obtaining or heightened likelihood of obtaining LPP information. In these cases, interception continued for a short while after the panel judge revoked the prescribed authorization. The interception during the period between the revocation of prescribed authorization and disconnection of facilities was unauthorized. These cases are mentioned in Chapter 5 under LPP Cases 1 to 4.

Notification to the relevant person

7.237 It may have been noticed that in all the above cases referred to in this Chapter, I have not mentioned anything about my notification to the relevant person or persons affected by the unauthorized activities carried out by officers of the LEAs. The reason in some detail had been given in Chapter 7 of my Annual Report 2008, which is cited below for ease of reference:

‘7.4 Before describing my reviews of the irregularities and incidents, it is relevant to bring out the dilemma which I have mentioned in my 2007 Annual Report. Section 48(1) requires me to notify the relevant person if I consider there is any case in which any interception or covert surveillance has been carried out by an officer of a department without the authority of a prescribed authorization, unless the giving of a notice would be prejudicial to the prevention or detection of crime or the protection of public security or the intrusiveness of the operation on the relevant person is negligible or the relevant person cannot be identified or traced [section 48(3) and (6)]. When notifying the relevant person, the only information that I am permitted to disclose is: whether the case is one of interception or covert surveillance and the duration of the interception or covert surveillance [section 48(1)(a)]. I am not permitted to give reasons for my findings or any other details of the unauthorized operation concerned [section 48(4)] such as whether the unauthorized activity is caused by mistake. For unauthorized interception, I am not even permitted to state

whether it is one of telecommunications interception or postal interception.

7.5 In Chapter 7 of my 2007 Annual Report (paragraphs 7.70 to 7.79 thereof), I pointed out how a relevant person could, by reading the chapter on irregularities in my annual report, learn of all the details of the unauthorized interception (or covert surveillance) that I am not allowed by the Ordinance to disclose when giving a notice to him under section 48. This is particularly so if there is only one notice issued during the report period concerned. One way to avoid this is to restrict the information to be disclosed in this chapter of the annual report to only the information allowed to be disclosed under section 48. This would mean that my description of the irregularity case in the chapter would be as brief as follows:

“There has been a case of interception (or covert surveillance) carried out by an officer of a department without the authority of a prescribed authorization for ___ days and I have [have not] given a notice to the relevant person under section 48.”

If I were to give full effect to the provisions of section 48(1) and (4), I could not say in my annual report whether the unauthorized activity was caused by careless mistake or with wilful intent, nor name the LEA concerned even if I considered that there was good ground to do so, or otherwise the relevant person would know all these which are regarded as undisclosable details under section 48(4).

7.6 On the other hand, section 49(2)(e) requires me to provide an assessment on the overall compliance with the relevant requirements during the report period. How could I make any assessment without stating facts in support if I were not allowed to disclose the facts of the irregularities in the annual report? Without facts, how could the public understand why I criticize a particular LEA and whether my criticism is justified? Without facts, how could the public know whether the disciplinary action taken by the department in respect of any officer is fair and appropriate? It should be borne in mind that for cases where I decided to notify a relevant person, it must be that the intrusiveness of the unauthorized activity is not negligible [section 48(6)(b)]. Ironically, for such cases, I am not allowed to state the facts in my annual report so as not to defeat the legislative intent or purpose of section 48. If so, my assessment on compliance of LEAs with relevant requirements could only be a sweeping generalization or skeletal statement.

7.7 The conflicting requirements of section 48 and section 49(2)(e) and the predicament that I am in should be tackled in the next review of the Ordinance. At the very least, I should be given the discretion to disclose relevant facts of the irregularities in support of my assessment on compliance or observations in the annual report without any fear of criticism that I do not comply with the spirit and intent of section 48.

7.8 Against this backdrop and pending a review of the Ordinance, I shall describe irregularity cases in this chapter without indicating whether I have decided to give, or have given, a notice to the relevant person in respect of the unauthorized interception concerned. However, information on the number of notices that I gave under section 48 during the report period can be found in Chapter 6 and Chapter 10.’

7.238 As a temporary measure to resolve the dilemma, I have preferred the provision of more details and particulars of the irregularities and non-compliance over the non-disclosure of information to the relevant persons, so that my handling of the irregularities and my assessment of the performance of the LEAs under the Ordinance could be more easily understood and judged by members of the public. My notification to a relevant person during the report period is referred to in paragraph 6.12 above and in Chapter 10 below.

CHAPTER 8
RECOMMENDATIONS TO
THE SECRETARY FOR SECURITY AND
HEADS OF LAW ENFORCEMENT AGENCIES

My function to recommend

8.1 My functions and duties as the Commissioner are clearly defined in section 40 of the Ordinance. Under section 40(b)(iv), without limiting the generality of my function of overseeing the compliance by the LEAs and their officers with the relevant requirements of the Ordinance, I may make recommendations to the Secretary for Security and heads of the LEAs as and when necessary. Further elaboration on the issue can be found in sections 51 and 52. Pursuant to section 51(1), in the course of performing any of my functions under the Ordinance, if I consider that any provision of the Code of Practice issued by the Secretary for Security under section 63 should be revised to better carry out the objects of the Ordinance, I may make such recommendations to the Secretary for Security as I think fit. Section 52(1) provides that if I consider that any arrangements made by any LEA should be changed to better carry out the objects of the Ordinance, I may make such recommendations to the head of the LEA as I think fit.

8.2 Section 52(3) also confers on me the discretion to refer the recommendations and any other matters I consider fit to the Chief Executive, the Secretary for Justice and any panel judge or any one of them. During the report period, there was no occasion on which I considered it appropriate to have the recommendations referred to the Chief Executive or

the Secretary for Justice, although wherever certain matters or recommendations concerned the panel judges, they were informed of the same, so that they were fully apprised of those matters and my recommended arrangements well in time.

Recommendations to the Secretary for Security

8.3 The recommendations I made to the Secretary for Security during the report period are set out below.

(1) **Report on the discontinuance of interception/Type 1 surveillance (COP-7)**

8.4 Section 57(3) stipulates that where any officer has caused any interception or covert surveillance to be discontinued, he shall, as soon as reasonably practicable after the discontinuance, cause a report on the discontinuance and the ground for the discontinuance to be provided to the relevant authority. To cater for the scenario where the interception/covert surveillance operation was discontinued at the same time when the decision to discontinue the operation was made, the Secretary for Security proposed to amend the form COP-7 (report on the discontinuance of interception/Type 1 surveillance carried out under a prescribed authorization). When the Secretary for Security informed me of the proposed amendment, I suggested that the presentation of the form COP-7 should be improved to make it clearer that it was necessary to set out in the form the details of how the conditions for continuance were not met in all the scenarios shown in the form. My suggestion was accepted and COP-7 was accordingly amended.

(2) *Report on initial material inaccuracies/material change of circumstances under an executive authorization for Type 2 surveillance (REP-13)*

8.5 For a prescribed authorization issued by a panel judge, if an LEA is aware of any initial material inaccuracy or any material change of circumstances upon which the authorization was granted or renewed, the LEA should submit a report using form REP-11 ('the REP-11 report') to the relevant authority (a panel judge) to report the initial material inaccuracy or material change of circumstances. However, there was no similar reporting system for executive authorizations granted by the authorizing officer of an LEA. As stated in paragraph 4.24 of my Annual Report 2009, I recommended that a form similar to the REP-11 report should be designed so that the applicant for executive authorization can properly report to the authorizing officer any initial material inaccuracy or material change of circumstances whenever necessary.

8.6 In the light of my advice, the Secretary for Security had designed a new form REP-13 (report on initial material inaccuracies/material change of circumstances under an executive authorization for Type 2 surveillance). See also paragraph 7.36. The reporting officer was required to state in the form the name of the authorizing officer as well as the name and rank of the reporting officer. For clarity of the identity of the authorizing officer and the reporting officer, I advised that their name, rank and post should all be stated in the form REP-13. The Secretary for Security accepted my advice and revised the form accordingly.

Recommendations to heads of LEAs

8.7 Through the discussions with the LEAs during my inspection visits and the exchange of correspondence with them in my review of their compliance with the relevant requirements of the Ordinance, I have made a number of recommendations to the LEAs to better carry out the objects of the Ordinance. From time to time, the Secretary for Security and his staff have also been actively involved in coordinating the responses from the LEAs and drawing up their implementation proposals. All of my recommendations of substance to the LEAs during the report period are set out in the ensuing paragraphs.

(1) Reporting to the Commissioner under paragraph 120 of the Code of Practice

8.8 Paragraph 120 of the Code of Practice ('COP 120') requires the LEAs to notify me of interception/covert surveillance operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. While using a separate letter to report cases where LPP information had been obtained inadvertently, the LEAs reported to me operations that were likely to involve LPP information by way of weekly reports. In this connection, I advised the LEAs that instead of waiting until the submission of weekly reports, they should use a separate letter for reporting to me all cases pursuant to COP 120 so that my attention can immediately be drawn to them. All relevant records should be preserved for the performance of my review functions, which should not be destroyed without my prior consent. See paragraphs 5.13 to 5.15.

8.9 Although there is no similar provision in the Code of Practice requiring the LEAs to report to me cases where information which may be the contents of any JM has been obtained or where there is a heightened risk of obtaining JM through interception or covert surveillance, I requested that such cases should be reported by the LEAs to me and that the reporting arrangement and the requirement of preservation of records referred to in the preceding paragraph should also be applicable to JM cases. See paragraph 5.20.

(2) **Report of previous applications in affirmation or statement in support of an application**

8.10 Part 1(b)(xi), Part 2(b)(xii) and Part 3(b)(xii) of Schedule 3 to the ICSO require the affirmation or statement supporting an application for the issue of an authorization for interception, Type 1 surveillance or Type 2 surveillance to set out, if known, whether during the preceding two years, there has been any application for the issue or renewal of a prescribed authorization in which any person set out in the affirmation or statement has also been identified as the subject of the interception or covert surveillance concerned. Regarding interception, disclosure of previous applications for interception of the telecommunications facilities concerned is also required.

8.11 During my inspection visit to an LEA, I noted that the following declaration in respect of applications in the preceding two years was stated in the affirmation in support of an application for the issue of an authorization for interception:

‘As far as I know from the result of the checks, other than the application set out in Annex 1 of this Affirmation, there is no other previous

application having been made in the preceding two years for the issue or renewal of a prescribed authorization ...’

I considered that the declaration was quite confusing and, therefore, advised the LEA concerned that for the purpose of clarity, the declaration should be drafted in a direct and positive manner, ie ‘As far as I know from the result of the check, there is/are previous application(s) ... set out in Annex 1 to this affirmation.’ or ‘As far as I know from the result of the check, there is no previous application ...’. The recommendation was accepted by the LEA.

(3) Preservation of ATR

8.12 Under a standard condition in a judge’s authorization, an LEA is under a continuing duty to bring to the attention of any panel judge any material change of the circumstances upon which the authorization was granted or renewed, and such circumstances include the obtaining or likely obtaining of LPP information or heightened likelihood of obtaining LPP information. The material change of circumstances should be reported to the panel judge by using the REP-11 report. As mentioned in paragraph 5.19(c) of my Annual Report 2009, I recommended previously that, in cases where LPP information was obtained or likely obtained or there was a change in LPP risk, if the LEA concerned intended to listen to or re-listen to any intercept products obtained prior to the revocation of the authorization if it occurred, the LEA should ensure full disclosure of its intention in the REP-11 report submitted and expressly seek the panel judge’s approval to do so. The same notification of intention should also apply in a section 57 (discontinuance) report or a section 58 (arrest) report when likely LPP information has been obtained or encountered.

8.13 To enable me to check whether the LEAs had listened to or re-listened to intercept products (including LPP-related calls) after revocation or natural expiry of authorizations, I advised that whenever LPP or likely LPP information was involved, the LEAs should preserve the relevant ATR up to three weeks after disconnection of the facility concerned, be it occasioned by revocation or natural expiry of the authorization. This arrangement should also be applied to JM cases. This advice was accepted by the LEAs.

(4) Review form for regular reviews by LEAs

8.14 Section 56 requires the head of LEA to make arrangements to keep under regular review the compliance by officers of the LEA with the relevant requirements under the Ordinance. In reviewing the irregularity in a previous Type 2 surveillance case of an LEA, I found that its review system was ineffective in monitoring whether there had been inappropriate issue of devices or misapplication of devices drawn under a prescribed authorization for unauthorized use. The review form at the time did not require the applicant of a prescribed authorization to account for the use and non-use of surveillance devices issued. In this connection, I recommended that the LEA should improve its review system to enable the detection of malpractice or abuse in the issue and use of surveillance devices. Based on my recommendation, the LEA revised the review form for Type 2 surveillance. I checked the revised review form and considered further amendments should be made as follows:

- (a) In any case where an application for the issue or renewal of a prescribed authorization for Type 2 surveillance is refused, information should be provided in the review form to enable

the reviewing officer to know that no unauthorized activity was ever carried out after the refusal to issue or renew the prescribed authorization.

- (b) The applicant should confirm that each of the surveillance operations conducted was in compliance with the terms of the prescribed authorization (in respect of subject(s), use of device(s), meeting place(s), etc).
- (c) To facilitate checking and review by the reviewing officer, the applicant should be required to state in a table for each surveillance operation conducted information such as the date(s) of issue of device(s), device(s) issued, device(s) used, reason for not using any of the device(s) issued and whether the device(s) was issued under the prescribed authorization concerned (if not, full details of the circumstances under which the device(s) was issued should be provided) instead of allowing the applicant to give the details in whatever form he or she prefers.

With effect from April 2011, the LEA adopted a new review form for Type 2 surveillance which incorporated all my suggested amendments above. I considered that this recommendation should apply to all the LEAs.

(5) **Recommendations in connection with covert surveillance**

8.15 As mentioned in Chapters 3 and 4, I also made a number of recommendations to the LEAs through my inspection visits to their offices and the checking of their inventory lists and device registers. The recommendations concerned are summed up below:

(a) *Inclusion of all devices capable of performing covert surveillance in the inventory list*

The LEA was reminded of my requirement that all devices (excluding fixtures) capable of performing covert surveillance should be included in the inventory lists provided to me, even though they might not be used for covert surveillance under the ICSO [paragraph 3.28(a)].

(b) *More information to be recorded in the device register*

The ICSO number for the revocation of a prescribed authorization should be added in the column 'Date and Time of Revocation' of the device register for easy reference and checking [paragraph 3.28(b)].

(c) *Possible conflict of roles of the same officer acting as both the applicant for a prescribed authorization and the device issuing officer*

The LEA was requested to explore if the existing arrangement that the same officer acted as both the applicant for a prescribed authorization for covert surveillance and the device issuing officer could be improved [paragraph 3.28(c)].

(d) *Amendments on the device register and the request forms for withdrawal of surveillance devices*

The officer who had made the amendments on the device register and the request forms should state the reason, date and

time and his identity on the device register so as to give a complete record and account for the amendments [paragraph 3.28(d)].

(e) Enhancement of the computerized device recording system

The computerized device recording system should be enhanced to automatically generate a return slip after each withdrawal of surveillance device(s), to have the ability to spot any duplicated use of a request memo reference number, and to capture the time when any post-entry record was made [paragraph 3.29].

(f) Interpretation of 'person' under the 'if known' declaration

An LEA was advised to better educate the officers concerned on the meaning of 'person' under the 'if known' declaration which should include 'legal personality' (eg a company) [paragraph 4.22].

(g) To provide sufficient information in application and discontinuance report

The reason for the proposed end time of a prescribed authorization and detailed information or the sequence of occurrences in respect of a surveillance operation should be provided in the statement in writing and the discontinuance report respectively [paragraphs 4.23 and 4.24].

(h) Authorized period of an executive authorization to be justified

The authorized period sought should be reasonably supported and limited to the shortest possible time. When considering the proposed duration of authorization, the applicant should not take too much time as a buffer for the sake of operational convenience. Instead, he should consider the duration strictly according to the actual need of the operation. The authorizing officer should check the content of the statement in writing and ensure that all the relevant information (including the proposed starting date and time and finishing date and time of the Type 2 surveillance) had been filled in before granting the authorization [paragraphs 4.25 to 4.27].

(i) Stringent requirements of an application

I advised an LEA of my concern whether it should have invoked ICSO powers to investigate a case where only the least serious offence among the three offences investigated was within its ambit. The least serious offence by itself might not fully satisfy the stringent requirements for an application for Type 2 surveillance [paragraph 4.28].

(6) Recommendations made upon review of LPP cases

8.16 In my review of the LPP cases in Chapter 5 of this report, I made a number of recommendations to the Secretary for Security and the LEAs concerned. The recommendations that apply to LPP cases are set out comprehensively below:

- (a) The reporting officer of the REP-11 report that reports obtaining of LPP or likely LPP information or heightened likelihood of obtaining LPP information should disclose in the REP-11 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 [paragraph 5.10].
- (b) The reporting officer of the REP-11 report on a call that may involve LPP information ('the Reported LPP Call') should include in it the following information:
 - (i) whether, other than the Reported LPP Call, there are any calls between the telephone number concerned and the subject's telephone number(s) authorized to be intercepted, irrespective of whether such calls are intercepted before or after the Reported LPP Call; and
 - (ii) whether such other calls mentioned in (i) above have been listened to and if so, the identity of the listener(s).

For the purpose of (a) and (b) above, the reporting officer should check the relevant ATR that records all accesses to the calls together with the corresponding call data when preparing the REP-11 report [paragraphs 5.11 and 5.12].

- (c) When encountering cases of obtaining of LPP or likely LPP information or heightened likelihood of obtaining LPP information and irrespective of whether the department has decided to discontinue the operation, the department should

make sure that the following should be preserved for the performance of my review functions:

- (i) The intercept products of all intercepted calls on the facilities authorized by the prescribed authorizations from the time when such products or records are still available at the time of discovery of the Reported LPP Call up to 24 hours after the disconnection of the facilities.
- (ii) The transcripts, summaries, notes, ATRs, and records in whatever form for the same period.

The preservation requirement further applies to any renewed applications in respect of the case [paragraphs 5.13 and 5.14].

- (d) All the records preserved for the performance of my review functions should not be destroyed without my prior consent [paragraph 5.15].
- (e) LEAs should use a separate letter for reporting an LPP case or likely LPP case to me pursuant to paragraph 120 of the Code ('COP 120 report'). They should not wait until the submission of the weekly report but should report such cases to me as soon as they have submitted an REP-11 report or a discontinuance report to the panel judge [paragraph 5.16].
- (f) At the time of submitting a COP 120 report to me, the LEA should attach to the report a sanitized copy each of the application and supporting affirmation, prescribed

authorization, REP-11 report, the panel judge's determination, discontinuance report (if applicable), ATR, etc [paragraph 5.17].

- (g) If at the time of the grant of the prescribed authorization, it is already assessed that there will be likelihood of obtaining information subject to LPP, this should be so reported to me under COP 120, using a separate letter (instead of just reporting it in the weekly report form). The LEA should preserve the records referred to in (c) above covering the period from the start of the prescribed authorization up to 24 hours after the disconnection of the facilities. Other requirements mentioned above also apply where appropriate [paragraph 5.18].
- (h) The formatting or presentation of the ATR should be improved to put in the reference of the prescribed authorization and the reference of the facility number, the total number of pages with each page paginated (for example, 'page 1 of 5, page 2 of 5' and so on), the word 'End' after the last entry, the date and time of publishing the ATR record, and the name, post and signature of the publishing officer of the ATR printout [paragraph 5.88].

(7) **Recommendations made upon review of cases of non-compliance, irregularities and incidents**

8.17 In the course of my review of the non-compliance, irregularities and incidents mentioned in Chapter 7, I also made a number of recommendations to the Secretary for Security and the LEAs concerned, which are summed up below:

Outstanding case from 2009

Outstanding Case (iii): Type 2 surveillance conducted on telephone conversation between a participating agent and a person unrelated to the investigation

- (a) The meaning of paragraph 9 of the Code of Practice is cryptic – it is not clear whether the whole operation or the part of the operation which is unauthorized should be stopped immediately after discovery of any unauthorized interception / covert surveillance. The LEA should seek the assistance of the Security Bureau in making this paragraph less cryptic, whatever its meaning intended in the first place [paragraph 7.34].
- (b) Paragraph 160 of the Code of Practice should be expanded to make it clear that if there has been any unauthorized interception / covert surveillance or any irregularity leading or contributing to the discontinuance, this should be clearly stated in the discontinuance report [paragraph 7.38].

Cases occurring or discovered in 2010

Report 3: Listening to intercept product by an officer below the rank specified in the prescribed authorization

- (c) Disciplinary actions should only be taken against any offending officer after the LEA is first apprised of my view at the conclusion of my review, whether it agrees with that view or not [paragraph 7.135].

Report 4: Type 1 surveillance carried out on persons in a meeting not allowed by the terms of the prescribed authorization

- (d) To avoid any misunderstanding, confusion or argument, in the prescribed authorization, it is better to use singular or plural form for devices authorized, as the cases may be, in accordance with the need required, especially in view of the tight control to be exercised over the use of surveillance devices [paragraph 7.212].
- (e) The department should advise its officers not to request devices excessively and should base the quantity on the operational need [paragraph 7.215].
- (f) The normal procedure and command structure should be qualified with a rule that in case of any possible conflict of interest, the unit tasked with investigating non-compliance under the ICSO of the department should report the incident (including the initial report) and conduct and report the ensuing investigation directly under and to the head of

department or at least to the deputy head of department, instead of reporting through or to the Assistant Head of Department in charge of ICSO matters and the Senior Assistant Head of Department of Division A [paragraph 7.224].

Report 5: Old ATR setting used

- (g) A test should be conducted immediately after installation of ATR settings in listening workstations so that mistakes, if any, can be detected at an early stage [paragraph 7.233].

Additional recommendations

8.18 I have made a number of other recommendations on a few matters relating to interception of telecommunications services to the LEAs. However, no further details can be given in this annual report because the disclosure of the matters and issues involved would be prejudicial to the prevention or detection of crime or the protection of public security.

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CHAPTER 9

OTHER RECOMMENDATIONS

Covert surveillance: Need to hear recording

9.1 In Chapter 7 under Report 2, I described a case where I needed to investigate whether an LEA had contravened the terms of a prescribed authorization ('PA') for a Type 2 surveillance operation. The PA was for using listening and recording devices to record conversations over the telephone between a female participating agent and the subject so as to obtain evidence against the subject regarding his commission of criminal offences. When the mobile phone of the participating agent rang, a woman LEA surveillance officer (called Officer C in Chapter 7) at once switched on the recording device in preparation for recording the expected telephone conversation. It was only after the participating agent answered the call that she signalled the officer to indicate that the call was from someone unrelated to and unconnected with the subject, and the officer desisted from linking the recording device to her mobile phone to record the conversation. The officer claimed that she was not able to hear the conversation between the caller and the participating agent with her naked ears and considered that the conversation was not recorded by the recording device. However, she was not absolutely sure if the recording device, albeit not linked to the mobile phone, was not sensitive enough to be able to catch the caller's voice. Had the caller's voice been recorded, the surveillance officer would be acting beyond the terms of the PA since it only authorized the recording of the conversation between the participating agent and the subject but not any unrelated person. In order to prevent any intrusion into the privacy of

the caller, the LEA did not attempt to listen to what had in fact been recorded by the recording device. On our part, without any express authority from the provisions of the Ordinance, my staff and I are in no better position although the only means of ascertaining whether there was any breach of the PA is to listen to the product of the recording.

9.2 I therefore recommend that apart from authorizing me and my staff to examine and listen to intercept products, we should also be given express power to inspect and listen to products of covert surveillance as and when necessary. Apart from the purpose mentioned in the preceding paragraph, such power would enable me to ascertain if any LPP information has been obtained, for better protection of individuals' right to confidential legal advice. Appreciation of such power of mine by the LEA officers would more importantly operate as a deterrent against any possible breach of the terms of PAs or any infringement of LPP.

9.3 My position as a reviewer and supervisor of the actions of officers of the LEAs should not merely be considered as that of a detector of any possible non-compliance, malpractice or misdeeds of the officers after the event. My functions would be better accomplished if there were ways to ensure that no such contravention would be attempted: prevention is always better than cure! I fervently hope that my recommendations that are chiefly aimed to be used as deterrence against possible malpractices in both telecommunications interception and covert surveillance operations will be adopted and implemented through amendments to the Ordinance.

Section 2(3) and section 2(4) of the ICSO

9.4 Under the ICSO, applications for authorizations for Type 1 surveillance (and also interception) are approved by the panel judges, whereas those for Type 2 surveillance, which is less privacy intrusive, may be approved by an authorizing officer of the LEA to which the applicant belongs. Section 2(3) and section 2(4) of the ICSO, which are reproduced below, set out the situations where an LEA applies for a prescribed authorization for covert surveillance from a panel judge instead of an authorizing officer even though the covert surveillance falls within the definition of Type 2 surveillance in section 2(1).

‘(3) For the purposes of this Ordinance, any covert surveillance which is Type 2 surveillance under the definition of "Type 2 surveillance" in subsection (1) **is regarded as** Type 1 surveillance if it is likely that any information which may be subject to legal professional privilege will be obtained by carrying it out.’

‘(4) An officer of a department **may apply** for the issue or renewal of a prescribed authorization for **any Type 2 surveillance** as if the Type 2 surveillance were Type 1 surveillance, and the provisions of this Ordinance relating to the application and the prescribed authorization apply to the Type 2 surveillance as if it were Type 1 surveillance.’
(Emphasis added.)

9.5 In the course of my examination of a weekly report submitted by an LEA, I noticed that a prescribed authorization for Type 1 surveillance was, upon review, revoked by a panel judge. The case was Type 2 surveillance in nature and originated from an application for an authorization for Type 1 surveillance under section 2(4). However, the LEA did not state at the outset in the affidavit supporting the application

that it was an application for a prescribed authorization for Type 2 surveillance as if the Type 2 surveillance were Type 1 surveillance. It was assessed that no LPP information might possibly be involved or obtained in the case. An authorization for Type 1 surveillance was issued and later renewed by a panel judge. Upon our inquiry as to why the LEA treated the case as Type 2 surveillance applied for as Type 1 surveillance whereas the PJO treated the case as Type 1 surveillance, the panel judge reviewed the matter and revoked the renewed authorization.

9.6 In his 'Reasons for revocation', the panel judge stated that the case was not Type 1 surveillance and therefore not a matter for a judge's authorization. Instead, an application for authorization for Type 2 surveillance should be made to an authorizing officer of the LEA. The panel judge considered that section 2(4) should be read together with, and subject to, section 2(3). When section 2(4) mentions a Type 2 surveillance operation is to be applied for as if it were Type 1 surveillance, it is referring to a Type 2 surveillance operation which should be 'regarded as Type 1 surveillance' in accordance with the provisions of section 2(3) (ie if it is likely that any information which may be subject to LPP will be obtained by carrying out the covert surveillance), and nothing else. He did not find that the applicant might, at his discretion, choose to treat Type 2 surveillance as Type 1 surveillance.

9.7 I do not agree with the above interpretation. If only Type 2 surveillance with LPP likelihood can be applied for as if the Type 2 surveillance were Type 1 surveillance, why does section 2(4) use the words 'may apply' and 'any Type 2 surveillance'? It therefore appears that under section 2(4), an LEA **has the discretion** to apply for an authorization for

any Type 2 surveillance as if it were Type 1 surveillance from the panel judge where it is justified. In my view, for any Type 2 surveillance with LPP likelihood, it is to be regarded as Type 1 surveillance by virtue of section 2(3), which is a mandatory provision without leaving any discretion to the intended LEA applicant. But this does not rule out other circumstances where Type 2 surveillance may be applied for as if it were Type 1 surveillance. It may be argued that the word ‘**may**’ in ‘**may** apply’ in section 2(4) gives a power to the applicant and should be treated as ‘shall’ if he wants to make an application, and section 2(4) only caters for the single situation provided for in section 2(3) that deems Type 2 surveillance to be Type 1 surveillance where the only justifiable condition is the likelihood of obtaining LPP information. This argued interpretation would ignore or fail to give due weight to the word ‘any’ in ‘any Type 2 surveillance’ in section 2(4), and should therefore not be preferred.

9.8 During my inspection visits, I advised the LEA to seek legal advice on the interpretation of section 2(3) and section 2(4) and to inform the Security Bureau of the circumstances leading to the revocation of the prescribed authorization. To enable the panel judge to see the full picture and make an informed decision as to whether he should grant or refuse an application, I also advised the LEA that in all future appropriate cases, it should be expressly stated in the supporting affidavit that the application is made for the issue of an authorization for Type 2 surveillance as if it were Type 1 surveillance pursuant to section 2(4).

9.9 My view and advice stated above is limited to the proper construction of the two subsections of section 2. Whether resort being made to section 2(4) to apply to a panel judge for Type 2 surveillance as if it were Type 1 surveillance is or can be justified in the circumstances of

each particular case is another matter, insofar as the justification is not to be restricted or limited to LPP likelihood, the sole condition referred to in section 2(3).

9.10 According to the legal advice subsequently obtained by the LEA, section 2(4) is intended to provide that an officer of an LEA ‘may’ apply for the issue or renewal of a prescribed authorization for any Type 2 surveillance as if the Type 2 surveillance were Type 1 surveillance, whereupon the provisions of the ICSO relating to the application and prescribed authorization apply to the Type 2 surveillance as if it were Type 1 surveillance. Section 2(4) is an empowering provision which enables an officer of an LEA, in his discretion, to apply to a panel judge for an authorization for Type 2 surveillance through the process used for Type 1 surveillance. Such discretion is not available to an officer if the circumstances specified in section 2(3) exist, ie section 2(4) does not and should not apply if the proposed Type 2 surveillance has an LPP risk.

9.11 By a letter of 26 January 2011, the Security Bureau informed the panel judges of the legal advice and the legislative intent behind section 2(3) and section 2(4) of the ICSO. The panel judges noted the views without giving any comments.

9.12 I provided my view over the matter to the panel judges and subsequently had a meeting with them. They agreed with my suggestion that the Ordinance should be amended so as to make clear and unambiguous provisions regarding cases of Type 2 surveillance that should or may be applied for as Type 1 surveillance. They made two main observations in this connection, namely,

- (a) The provisions of the ICSO are highly restrictive (for safeguarding the privacy and other rights of citizens), and in this light little discretion should be given to the LEAs.
- (b) It would be unsatisfactory to provide that in a case that involves higher sensitivity or greater intrusion into the privacy of the subject, discretion is given to the LEA to apply for Type 2 surveillance as if it were Type 1 surveillance. Such a provision would be difficult to apply or enforce since the level or degree of sensitivity or intrusiveness may be subject to different views of the various stakeholders.

9.13 In order to avoid any possible argument that may obstruct the smooth operation of the ICSO scheme, I recommend and the panel judges agree that taking the opportunity of the impending comprehensive review of the ICSO, appropriate amendment should be made to the ICSO to better clarify the issue and clearly reflect the legislative intent, whatever it may be.

Cases where information that is or may be the contents of JM has been obtained or may likely be obtained

9.14 Schedule 3 to the Ordinance requires the applicant to state in the affidavit or statement in writing in support of an application the likelihood of obtaining information which may be subject to LPP or may be contents of any JM by carrying out the interception or covert surveillance operations sought to be authorized. Paragraph 120 of the Code requires the LEAs to notify me of any such operation that is likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. However, there is no similar provision in the Code

requiring the LEAs to report to me 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. In this regard, I have already requested that such cases should be reported by the LEAs to me as if they had been put within the scope of paragraph 120 of the Code. Paragraphs 8.8 and 8.9 of Chapter 8 are relevant.

9.15 I recommend that JM should be included in paragraph 120 of the Code so that the practice will be applied by the LEAs in a formalised and standardised manner.

Time to make disciplinary award

9.16 It had taken me several months to review the case under Report 3 in Chapter 7 since it was necessary to probe into various aspects involved and make searching inquiries at each of the stages as the review proceeded. When I finalised my review and formed a view on the disciplinary award proposed by the department on one of the offending officers being too lenient and notified the head of the department of it, the department, apparently agreeing with my view, was unable to administer additional disciplinary action against the officer because of the ‘double jeopardy’ consideration. The department could only propose to address my concern by taking other steps to strengthen the previous disciplinary advice given to the officer.

9.17 The factual basis of the ‘double jeopardy’ consideration was that the disciplinary advice had already been given months before. The department could not fairly increase the punishment in the fait accompli. My attention had not been specifically drawn to the disciplinary award

when it was made during the course of my inquiries mentioned above and I had been under the impression that the award was only being proposed instead of being made. I was compelled to accept the other steps proposed. I found the situation unsatisfactory.

9.18 I made a recommendation so as to ensure that an appropriate disciplinary award should be made against an offending officer after the head of the LEA should first be apprised of my view at the conclusion of my review.

9.19 The recommendation does not mean that I impose or intend to impose my view on disciplinary matters over that of the department's management which are particularly within its own ambit. The department is entitled to have its final say on such matters according to its established procedures and rules, only subject to appeal (if any) and judicial review proceedings taken out by an unsatisfied offending officer. The department is at liberty to agree with my view or otherwise. It can always enter into discussions with me as to the reasonableness of my view or the appropriateness of the disciplinary award I suggest. If for any reason, the department considers that it should make a disciplinary award in ICSO-related matters without delay and before the conclusion of my review of the case involved, it should inform me of it with the reasons in support so that I would deal with the situation as best I could in the circumstances.

9.20 This recommendation should apply to all the LEAs under the Ordinance.

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CHAPTER 10

STATUTORY TABLES

10.1 In accordance with section 49(2), this chapter appends separate statistical information in relation to interception and surveillance 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(a) and (b) – 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)].

Interception – Number of authorizations issued / renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]^{Note 5}

Table 1(a)

		Judge's Authorization	Emergency Authorization
(i)	Number of authorizations issued	541	0
	Average duration ^{Note 6}	29 days	-
(ii)	Number of authorizations renewed	834	Not applicable
	Average duration of renewals	30 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	53	Not applicable
(vi)	Number of applications for the issue of authorizations refused	9	0
(vii)	Number of applications for the renewal of authorizations refused	1	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

Note 5 Executive authorization is not applicable to interception.

Note 6 The average duration is arrived at by dividing the sum total of the duration of all cases under a category by the number of cases under the same category. The same formula is also used to work out the 'average duration' in 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)]

Table 1(b)

		Judge's Authorization	Executive Authorization	Emergency Authorization
(i)	Number of authorizations issued	31 ^{Note 7}	24	0
	Average duration	5 days	8 days	-
(ii)	Number of authorizations renewed	44 ^{Note 8}	16	Not applicable
	Average duration of renewals	24 days	22 days	-
(iii)	Number of authorizations issued as a result of an oral application	0	0	0
	Average duration	-	-	-
(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	5	1	Not applicable
(vi)	Number of applications for the issue of authorizations refused	0	1	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

Note 7 This figure included five cases in which Type 2 surveillance was elevated as Type 1 surveillance pursuant to section 2(4) of the Ordinance.

Note 8 This figure included two cases in which Type 2 surveillance was elevated as Type 1 surveillance pursuant to section 2(4) of the Ordinance.

Interception – Major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)]

Table 2(a)^{Note 9}

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Engaging in bookmaking	Cap. 148	Section 7, Gambling Ordinance
Managing a triad society/assisting in the management of a triad society	Cap. 151	Section 19(2), Societies Ordinance
Keeping a vice establishment/managing a vice establishment	Cap. 200	Section 139, Crimes Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Theft	Cap. 210	Section 9, Theft Ordinance
Burglary	Cap. 210	Section 11, Theft Ordinance
Handling stolen property/goods	Cap. 210	Section 24, Theft Ordinance
Conspiracy to inflict grievous bodily harm/shooting with intent/wounding with intent	Cap. 212	Section 17, Offences Against the Person Ordinance
Possession of arms/ammunition without a licence	Cap. 238	Section 13, Firearms and Ammunition Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance

Note 9 The offences in this Table are arranged in the order of the respective chapter numbers of the ordinances prohibiting them.

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

Table 2(b)^{Note 10}

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Criminal intimidation	Cap. 200	Section 24, Crimes Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Theft	Cap. 210	Section 9, Theft Ordinance
Conspiracy to commit forcible detention with intent to procure a ransom / forcible taking or detention of persons with intent to sell them	Cap. 212	Section 42, Offences Against the Person Ordinance
Possession for sale or for any purpose of trade or manufacture goods to which a false trade description was applied	Cap. 362	Section 7(1)(b), Trade Descriptions Ordinance

Note 10 The offences in this Table are arranged in the order of the respective chapter numbers of the ordinances prohibiting them.

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)]

Table 3(a)

	Number of persons arrested ^{Note 11}		
	Subject	Non-subject	Total
Interception	103	237	340

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)]

Table 3(b)

	Number of persons arrested ^{Note 12}		
	Subject	Non-subject	Total
Surveillance	43	73	116

Note 11 Of the 340 persons arrested, 91 were attributable to both interception and surveillance operations that had been carried out.

Note 12 Of the 116 persons arrested, 91 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 365.

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) & (ii)]

Table 4

(i)	Number of device retrieval warrants issued	0
	Average duration	-
(ii)	Number of applications for device retrieval warrants refused	0

Summary of reviews conducted by the Commissioner under section 41 [section 49(2)(d)(i)]

Table 5

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
<p><u>Section 41(1)</u> Reviews on compliance by departments and their officers with relevant requirements, as the Commissioner considers necessary</p>			
(a) Regular reviews on weekly reports	208	Interception & Surveillance	LEAs are required to submit weekly reports to the Commissioner providing relevant information on authorizations obtained, applications refused and operations discontinued in the preceding week, for the Commissioner's checking and review purposes. During the report period, a total of 208 weekly reports were submitted by the LEAs.
(b) Periodical inspection visits to LEAs	33	Interception & Surveillance	<p>In addition to the checking of weekly reports, the Commissioner had paid 33 visits to LEAs during the report period. During the visits, the Commissioner conducted detailed checking on the application files of doubtful cases as identified from the weekly reports. Moreover, random inspection of other cases would also be made. Whenever he considered necessary, the Commissioner would seek clarification or explanation from LEAs directly. From the said inspection visits, a total of 659 applications and 165 related documents / matters had been checked.</p> <p>(See paragraphs 2.32, 3.20, 3.31 and 4.19 of this report.)</p>
(c) LPP cases reviewed by the Commissioner	20	Interception	<p><u>LPP Case 1</u> The panel judge revoked a prescribed authorization upon considering an REP-11 report on the inadvertent obtaining of information which might be subject to LPP</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<p>and a further heightened likelihood of obtaining LPP information through interception. It involved two calls made between the subject and a male known only by a first name (who was probably a solicitor) about their concerted efforts in the selling of certain shares and the legal action they could take if opposition was encountered. The Commissioner examined the ATR, the summaries and other preserved materials and records. The summaries produced for the Commissioner's inspection did not contain any information subject to LPP. Although the LEA treated this case as information which might be (as opposed to was) subject to LPP had been obtained, the Commissioner opined that it was more probable than not that LPP information had been obtained by the listener, though inadvertently. As the Commissioner had not listened to the intercept products, no finding could be made as to the veracity of the contents of the two calls as stated in the REP-11 report and whether there were any communications subject to LPP in the intercept products listened to by the LEA officers other than the two calls reported in the REP-11 report. The facility concerned was disconnected shortly after the revocation of the prescribed authorization, resulting in unauthorized interception of nine minutes. No call was intercepted during the period of unauthorized interception.</p> <p>(See paragraphs 5.29 – 5.36 of Chapter 5.)</p> <p><u>LPP Case 2</u> The panel judge revoked a prescribed authorization for intercepting four facilities upon considering an REP-11 report on heightened likelihood of obtaining information subject to LPP. The Commissioner examined the relevant</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<p>documents, preserved materials and records and found nothing untoward save for the observation that despite the revocation of the prescribed authorization concerned, the interception operations in respect of seven related subjects which were authorized respectively by seven prescribed authorizations had continued. The Commissioner advised the LEA to seek confirmation from the panel judge which the LEA did.</p> <p>The four facilities concerned were disconnected after the revocation of the prescribed authorization, resulting in unauthorized interception of about 10 to 22 minutes. Three calls were intercepted during the unauthorized period but they were not listened to by the LEA. Based on the gist of the conversations as stated in the REP-11 report, no LPP information had actually been obtained. As the Commissioner had not listened to the audio recordings, no finding could be made as to the veracity of the gist of the conversations of the relevant calls as stated in the REP-11 report and whether there were any communications subject to LPP in the calls listened to by the LEA.</p> <p>(See paragraphs 5.37 – 5.46 of Chapter 5.)</p> <p><u>LPP Case 3</u> An LEA consecutively submitted two REP-11 reports on heightened / increased likelihood of obtaining information subject to LPP in respect of the same prescribed authorization. Upon consideration of the respective REP-11 reports, the panel judge allowed the authorization to continue with additional conditions imposed on the first occasion but revoked the authorization on the later occasion. The Commissioner conducted a review and found that the facility</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<p>concerned was disconnected after the revocation of the prescribed authorization, resulting in unauthorized interception of 16 minutes. No call was intercepted during the period of unauthorized interception. Based on the gist of the conversations as stated in the REP-11 reports, no LPP information had been obtained. As the Commissioner had not listened to the audio recordings, no finding could be made as to the veracity of the gist of the conversations of the relevant calls as stated in the two REP-11 reports and whether there were any communications subject to LPP in the calls listened to by the LEA.</p> <p>(See paragraphs 5.47 – 5.52 of Chapter 5.)</p> <p><u>LPP Case 4</u></p> <p>The panel judge revoked a prescribed authorization upon considering an REP-11 report on heightened likelihood of obtaining information subject to LPP. The Commissioner conducted a review and found that the facility concerned was disconnected after the revocation of the prescribed authorization, resulting in unauthorized interception of four minutes. No call was intercepted during the period of unauthorized interception. Based on the gist of conversation as reported in the REP-11 report, no LPP information had actually been obtained. As the Commissioner had not listened to the audio recordings, no finding could be made as to the veracity of the gist of the conversation of the call as stated in the REP-11 report and whether there were any communications subject to LPP in the calls listened to by the LEA.</p> <p>(See paragraphs 5.53 – 5.56 of Chapter 5.)</p>

Number of reviews conducted under section 41(1)	Interception / Surveillance	Summary of reviews
	Interception	<p><u>LPP Case 5</u></p> <p>The Commissioner was verbally informed by an LEA during an inspection visit in early 2010 that the panel judge had allowed a prescribed authorization to continue subject to further conditions upon considering an REP-11 report on heightened likelihood of obtaining information subject to LPP. At the meeting, the Commissioner requested the LEA to preserve those records that were still available at the time when the suspected LPP calls were detected (ie from the 9th day of the month) until disconnection for his review as intercept product, if not preserved, would be automatically destroyed after a certain period. The following day, the LEA stated in the letter covering the weekly report that the sanitized copies of the REP-11 report, the panel judge's determination and the further conditions were enclosed and the relevant intercept product since the 12th day of the month up to the time of disconnection had been and would be preserved for the Commissioner's examination. The Commissioner immediately enquired with the LEA why only the intercept product since the 12th day had been preserved but not since the 9th day and the LEA provided an explanation with which he was not satisfied. Pursuant to the Commissioner's advice at a subsequent inspection visit, the LEA submitted a report under paragraph 120 of the Code of Practice ('COP 120') on the said incident of heightened likelihood of obtaining LPP information.</p> <p>The Commissioner had reviewed the case and found no irregularity save that he was not satisfied with the fact that the intercept product preserved in this case only started from the 12th day of the month instead of</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<p>from the 9th day and the LEA's explanations for the delay in the preservation were not acceptable. This was not the first case in this LEA in which a panel judge allowed a prescribed authorization to continue after receipt of an REP-11 report on heightened LPP likelihood. The officers involved in making the decision that resulted in the late preservation seemed only to understand that the need for the preservation was to check whether or not there had been full and frank disclosure in the related REP-11 report concerning the LPP calls but seemed not to understand the other purpose of the pre-discovery preservation which was to check if there had been any previous LPP calls which should have been but were not reported to the panel judge. As the Commissioner had not examined the contents of the intercept product, no finding could be made as to the veracity of the gist of the conversations of the two calls as stated in the REP-11 report and whether there were any communications subject to LPP in the intercept product listened to by the LEA officers.</p> <p>(See paragraphs 5.58 – 5.67 of Chapter 5.)</p> <p><u>LPP Case 6</u> At the time of the issue of the prescribed authorization, it was not envisaged that the interception operation would likely involve LPP information. In the course of interception, the LEA submitted two REP-11 reports to the panel judge as it was considered that there would be such likelihood. On each occasion, the panel judge allowed the authorization to continue subject to additional conditions imposed. One of such conditions was that the LEA should refrain from listening to calls made to or from certain specified</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<p>telephone numbers ('the prohibited numbers'). On a third occasion when the LEA considered that there was further heightened likelihood of obtaining LPP information, the LEA decided to discontinue the interception operation. The panel judge revoked the prescribed authorization. When the Commissioner reviewed the case during an inspection visit in December 2010, he found that the content of a call from the subject's facility to one of the prohibited numbers was listened to by a listener, which was non-compliant with the additional condition imposed by the panel judge. The LEA then formally reported the non-compliance to the Commissioner under section 54 of the Ordinance. This is the case referred to in Report 6 in Chapter 7. The Commissioner has not yet received the full investigation report pending the completion of this annual report.</p> <p>(See paragraphs 5.68 – 5.69 of Chapter 5.)</p> <p><u>LPP Case 7</u> This case can be found in paragraphs 5.70 - 5.71 of Chapter 5. No review has yet been made.</p> <p><u>LPP Case 8</u> At the time of the issue of the prescribed authorization, it was assessed that the interception would not involve LPP information. In the midst of the interception, the LEA submitted three REP-11 reports to the panel judge to report on the change of circumstances relating to possible LPP involvement, as a result of which the panel judge imposed additional conditions in the prescribed authorization prohibiting the listening to calls made to or received from several telephone numbers ('the prohibited numbers'). When the Commissioner</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<p>reviewed this case, he discovered that after the imposition of the additional conditions, between November and December 2010, there were five occasions on which a listener listened to calls made to or received from three of the prohibited numbers, which were breaches of the additional conditions imposed by the panel judge. In March 2011, the LEA submitted an initial report of non-compliance on these five incidents to the Commissioner under section 54 of the Ordinance. The Commissioner has not yet received the full investigation report pending the completion of this annual report.</p> <p>(See paragraph 5.72 of Chapter 5.)</p> <p><u>LPP Case 9</u> A prescribed authorization was imposed with additional conditions by the panel judge because of an assessment of LPP likelihood. Upon detection by a listener that there would be added likelihood of obtaining LPP information when listening to a call ('the Reported LPP Call') on Day 1, she suspended monitoring and reported the matter to her supervisor and was instructed to continue with the suspension. On Day 3, an REP-11 report was submitted to the panel judge who allowed the prescribed authorization to continue subject to further conditions. In reviewing the case, the Commissioner found from the ATR that the listener had on Day 2 accessed another call intercepted after the Reported LPP Call when monitoring was supposed to be put on hold pending submission of the REP-11 report. When interviewed by the Commissioner, the listener suspected that there was 'accidental access' when she was preparing a draft REP-11 report on Day 2. However, the Commissioner found that</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<p>the ‘accidental access’ was not disclosed in the REP-11 report and doubted whether the reporting officer of the REP-11 report (the supervisor) had checked the ATR before submitting the REP-11 report to the panel judge. The Commissioner requested the department to submit an investigation report and a statement from the listener, which have yet to be received pending the completion of this annual report.</p> <p>(See paragraphs 5.73 – 5.75 of Chapter 5.)</p> <p><u>LPP Case 10</u> An LEA submitted an arrest report under section 58 of the Ordinance to the panel judge and sought to continue with the prescribed authorization. The panel judge allowed the authorization to continue with additional conditions imposed. On a later day, the listener listened to a call in which the subject discussed with an unknown male who might possibly be a legal professional. As the content of the call might likely involve LPP information, the LEA reported the interception of the call (‘the Reported LPP Call’) to the panel judge who allowed the authorization to continue with further conditions imposed. The REP-11 report also stated that other than the Reported LPP Call, another call (‘the Preceding Call’) intercepted between the same two telephone numbers three minutes before the Reported LPP Call was partially listened to by the same listener. The LEA claimed that the Preceding Call did not involve any LPP or likely LPP information. Having reviewed the case, the Commissioner found nothing untoward. However, as the Commissioner did not listen to the calls, no finding could be made on the veracity of the gist of the conversations of the Reported LPP Call as stated in the REP-11 report and the claim stated in the REP-11 report that the</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<p>Preceding Call did not involve any LPP or likely LPP information.</p> <p>(See paragraphs 5.76 – 5.79 of Chapter 5.)</p> <p><u>LPP Case 11</u></p> <p>At the time of the grant of the prescribed authorization, it was not envisaged that LPP information would be obtained. After listening to part of an incoming call from a solicitor to the subject for about one minute, the listener ('Listener A') considered that further listening might result in the obtaining of LPP information. The LEA submitted to the panel judge an REP-11 report to report on the call ('the Reported LPP Call') and a discontinuance report to discontinue the prescribed authorization. The panel judge duly revoked the authorization. The LEA also reported in the REP-11 report that checking of the call data showed that within about a week before the interception of the Reported LPP Call, there were another three calls made from the solicitor's telephone number to the subject and they were partly listened to by another listener ('Listener B'). The REP-11 report stated that according to Listener B, these three calls were irrelevant to the investigation and did not involve LPP information or likelihood. When questioned by the Commissioner about the three preceding calls, Listener B stated that she could not remember the callers and contents of these calls. She only listened to them partially as they were irrelevant to the investigation. She maintained that they did not contain any information subject to LPP or which might increase the likelihood of obtaining LPP information. In the absence of express power to permit the Commissioner to listen to the intercept product, no finding could be made as to the veracity of the gist</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Interception	<p>during relocation of equipment and there was no evidence to suggest ulterior motive or ill intent on his part. Both the technical staff and his supervisor were warned. The listener in Section B had listened to nine of the misdirected calls relating to one of the 26 prescribed authorizations for a total of five minutes. The Commissioner agreed with the LEA that given the exceptional circumstances of the misconnection, the listening to these calls should not be construed as a fault of the listener. Because of the early discovery by the listener, no other listener in Section B had listened to any of the misdirected calls. The cable misconnection which occurred at 1630 hours was rectified at 1022 hours the following day. Although the intercept product was listened to by a Section B officer, there was no non-compliance with the terms of the prescribed authorization because the prescribed authorization concerned did not restrict its application to Section A officers only. The Commissioner considered the measures taken by the LEA to prevent recurrence of the mistake satisfactory.</p> <p>(See paragraphs 7.8 – 7.12 of Chapter 7.)</p> <p><u>Outstanding Case (v) from 2009</u> This case was brought forward from Annual Report 2009. A call was intercepted wrongly due to a technical problem. Among the calls intercepted on a subject of a prescribed authorization, there was a call in which the listener found that the voice was different from that of the subject. The call was conducted in a language which the listener claimed he did not understand. The LEA discontinued the interception and submitted a discontinuance report to the panel judge, who then revoked the authorization. It</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Surveillance	<p>was found after investigation that the call was made between the telephone numbers of two innocent parties. Having conducted a review, the Commissioner was satisfied that there was no indication of any ulterior motive in this case. The unauthorized interception was due to a functional deficiency in the CSP's system but not any fault of the LEA or any of its officers. The call, which lasted 90 seconds, was only partially listened to by the aforesaid listener and not by any other listeners. However, as the Commissioner did not listen to the recording of this call in the absence of express power in the Ordinance, he could not verify the listener's saying that he did not understand the language of the conversation in the call concerned.</p> <p>(See paragraphs 7.53 – 7.56 of Chapter 7.)</p> <p><u>Non-compliance / Irregularity Report 1</u> Part 2 of Schedule 3 to the Ordinance provides that an affidavit supporting an application for prescribed authorization for Type 1 surveillance is to set out 'if known, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in which any person set out in the affidavit ... has also been identified as the subject of the interception or covert surveillance concerned, ...'. During an inspection visit to an LEA, the Commissioner inspected the application documents of a prescribed authorization ('Authorization Y') and found that while Subject (3) had been a subject of a number of ICSO authorizations (one of which was Authorization X) within the two years before this application, the applicant declared in the affidavit that there had been no application for the issue or renewal of a prescribed authorization to</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
			<p>which Subject (3) had been subject. At the request of the Commissioner, the LEA submitted an investigation report to him which, however, only dealt with Authorization X and Authorization Y. It stated that Authorization X was applied for by another Division in 2008. Under the compartmentalization principle of the department, sensitive information of one unit would not normally be disclosed to officers of other units. When the applicant of Authorization Y prepared the supporting affidavit, he made use of his personal knowledge to make the 'if known' declaration that Subject (3) had not been the subject of other ICSO applications. Upon the Commissioner's previous advice, the LEA was upgrading its ICSO database system such that departmental knowledge of previous ICSO applications would be provided in future applications for prescribed authorizations. A few months later, the new procedure was implemented.</p> <p>The Commissioner was satisfied that the failure of the applicant of Authorization Y to mention the previous Authorization X in the affidavit in support of Authorization Y was due to the compartmentalization principle of the department at the time of this incident. Neither the applicant of Authorization Y nor the endorsing officer who approved the making of the application was made aware of the previous application in Authorization X in the other Division in accordance with the compartmentalization principle. However, the Commissioner considered that the scope of the department's enquiry and the report to him should not confine to Authorization X but should have covered all previous ICSO applications against Subject (3) within the two years preceding Authorization Y. In this regard, he</p>

Number of reviews conducted under section 41(1)		Interception / Surveillance	Summary of reviews
		Surveillance	<p>requested the LEA to conduct a further enquiry to see if all other ICSO applications against Subject (3) within the two years preceding Authorization Y were also not made known to the applicant and the endorsing officer when Authorization Y was applied for. Further report from the LEA showed that there were 27 ICSO applications made against Subject (3) within the preceding two years of Authorization Y and the applicants of and the officers approving the making of these 27 ICSO applications were different from the applicant of and the endorsing officer of Authorization Y. There was no evidence to prove that these two officers had knowledge of those 27 previous ICSO applications against Subject (3).</p> <p>(See paragraphs 7.57 – 7.69 of Chapter 7.)</p> <p><u>Non-compliance / Irregularity Report 2</u> A woman who was arrested for an offence complained to an LEA that the officer investigating her case had abused his power. She agreed to be the LEA's participating agent in a surveillance operation to be conducted on this officer ('the subject'). Though an executive authorization was obtained for using listening device(s) to record the telephone conversation between her and the subject, the participating agent gave conflicting signals to the LEA officer ('Officer C') responsible for conducting the operation upon receipt of an incoming call ('the Call'). As a result, Officer C turned on the recording device for about 20 seconds. She later told Officer C that the caller was her friend. Officer C believed that apart from the voice of the participating agent, the voice of the caller could not have been recorded as the recording device had not been linked to the mobile phone of the participating</p>

Number of reviews conducted under section 41(1)	Interception / Surveillance	Summary of reviews
		<p>agent. The LEA decided not to listen to the recording for fear of possible intrusion into the caller's privacy if the caller's voice had been recorded. An investigation was conducted by the LEA with no conclusive view on whether the matter constituted a case of non-compliance. The LEA considered the method used by Officer C in confirming the identity of the caller before switching on the recording device (by relying on the participating agent's signal) ineffectual and might inadvertently lead to unauthorized covert surveillance. The LEA also considered that Officer C's supervisor failed to act vigilantly in making a prompt report to the senior management about the possible irregularity in the recording of the Call. Depending on the Commissioner's findings as to whether there had been an irregularity / non-compliance, the LEA considered that Officer C and her supervisor should each be given an advice (non-disciplinary in nature).</p> <p>The Commissioner had conducted a review including interviewing Officer C but no finding could be made as to whether there was non-compliance. The only means to ascertain whether there had been any non-compliance was to listen to the recording of the Call. However, as there is no express provision in the Ordinance empowering the Commissioner to listen to the recording of surveillance products, he decided not to. Thus, the Commissioner was uncertain whether the caller was not the subject and whether the voice of the caller had been recorded by the LEA. No conclusion could therefore be reached if there was any non-compliance with the terms of the authorization.</p> <p>(See paragraphs 7.70 – 7.98 of Chapter 7.)</p>

Number of reviews conducted under section 41(1)	Interception / Surveillance	Summary of reviews
	Interception	<p><u>Non-compliance / Irregularity Report 5</u></p> <p>An audit trail report ('ATR') is used to check the access of listeners to intercept products. In November 2009, the ATR system was enhanced such that apart from showing the time of access by the listener, the duration of the call and the length of listening by the listener could be shown. Workstations of all interception units had since been installed with the enhanced ATR settings. In December 2010, the Commissioner received an incident report from an LEA, followed by a detailed report, which revealed that two listener's workstations were inadvertently configured with the old ATR settings during the workstation replacement exercise. As a result, listening activities of telecommunications interception operations that were conducted through the two workstations were not recorded in the ATR system. Having reviewed the case, the Commissioner did not find any evidence suggesting ulterior motive and was convinced that the mistake was due to technical problem the real cause of which could not be ascertained. He recommended that in future similar cases, the staff concerned should conduct a test immediately after the new workstations were installed with ATR settings so that mistakes, if any, could be detected at an early stage.</p> <p>(See paragraphs 7.228 – 7.233 of Chapter 7.)</p> <p>[<u>Note</u>: There were four other interception cases where the panel judge revoked the prescribed authorizations after considering REP-11 reports on obtaining or heightened likelihood of obtaining LPP information, resulting in unauthorized interception for a short while. These cases are LPP Cases 1 to 4 referred to in Chapter 5 and item (c) above. Paragraph 7.236 of Chapter 7 is relevant.]</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews	
<p><u>Section 41(2)</u> 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</p>			
(a) Report submitted under section 23(3)(b) by the head of department to the Commissioner 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 to the Commissioner 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 to the Commissioner on any case of failure by the	4	Surveillance	<p><u>Outstanding Case (iii) from 2009</u> This case was brought forward from Annual Report 2009. An executive authorization was granted for conducting Type 2 surveillance on telephone conversations between a participating</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
<p>department or any of its officers to comply with any relevant requirement</p>		<p>agent and the Subject of the investigation. In the course of conducting covert surveillance, a call from a number (different from the Subject's phone number) made to the participating agent from a person unrelated to the investigation, and lasting 19 seconds, was recorded and partly listened to by an LEA officer ('the Surveillance Officer'). The Surveillance Officer stopped the surveillance on this call after knowing that the caller was not the subject but he allowed the operation to continue and reported the outcome to his supervisor ('the Supervisor') only after the conclusion of covert surveillance on another call. The Supervisor considered that the call from the unrelated person might be outside the ambit of the executive authorization and reported the matter up the chain of command. The Supervisor then submitted a discontinuance report stating that no contact between the participating agent and the Subject was expected before the expiration of the authorization as the ground for discontinuance but failed to mention the other ground of discontinuance which was the possible unauthorized covert surveillance on the call concerned.</p> <p>The LEA's investigation concluded that the recording and listening of the call in question fell outside the ambit of the executive authorization and was unauthorized. The LEA considered that the Surveillance Officer should have taken reasonable steps to verify the identity of the caller first before he proceeded with the covert surveillance on the call concerned. Had he been more vigilant in the execution of the Type 2 surveillance, the unauthorized covert</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>surveillance could have been avoided. While the Surveillance Officer had complied with paragraph 9 of the Code of Practice ('the Code') by reporting the unauthorized covert surveillance as soon as reasonably practicable, the LEA considered that the Supervisor's omission to mention the possible unauthorized covert surveillance in the discontinuance report had not complied with the requirement under paragraph 160 of the Code. The LEA suggested that a verbal warning be given to the Surveillance Officer and a written warning be given to the Supervisor.</p> <p>Having reviewed the case, the Commissioner made the following findings:</p> <ul style="list-style-type: none"> (i) The covert surveillance on the call was outside the ambit of the executive authorization and was unauthorized. The suggested verbal warning against the Surveillance Officer was appropriate. (ii) The Commissioner also looked into the construction of paragraph 9 of the Code and found that the Surveillance Officer failed to act in accordance with paragraph 9 of the Code in respect of the requirement that the whole operation 'should be stopped immediately, followed by a report to the management of the department as soon as reasonably practicable'. For this breach of paragraph 9 of the Code, the Commissioner recommended that the Surveillance Officer should be verbally warned and considered that the LEA should seek the assistance of the Security Bureau in making

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
	Surveillance	<p>paragraph 9 of the Code less cryptic.</p> <p>(iii) The Supervisor did fail to comply with the requirement expressly stated in paragraph 160 of the Code but it would be unreal for the LEA to use the reasoning of the lack of a form to report on initial material inaccuracies or material change of circumstances for Type 2 surveillance cases to raise the officer's proper level of appreciation of the necessity to make full and frank disclosure in the discontinuance report. The Commissioner was of the view that the suggested written warning against the Supervisor might be considered too severe and a verbal warning might be more appropriate. The Commissioner also recommended that paragraph 160 of the Code should be expanded to make it clear that if there had been any unauthorized interception / covert surveillance or any irregularity leading or contributing to the discontinuance, this should be clearly stated in the discontinuance report.</p> <p>(See paragraphs 7.13 – 7.39 of Chapter 7.)</p> <p><u>Outstanding Case (iv) from 2009</u> This case was brought forward from Annual Report 2009. An executive authorization was granted for conducting Type 2 surveillance on conversations between a participating agent and the Subject of the investigation. A person acting on behalf of the Subject ('the Representative') approached the participating agent. The officer-in-charge</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
	Interception	<p>of the investigation ('OC Investigation') instructed the participating agent to contact the Representative the following day. As a result, seven telephone calls exchanged between the participating agent and the Representative were recorded. It was only after the arrest of the Subject and the Representative and in reviewing the operation that the OC Investigation realized that the Type 2 surveillance conducted on the phone calls between the participating agent and the Representative was outside the ambit of the executive authorization. The OC Investigation immediately reported the non-compliance to the LEA management. After investigation, the LEA considered that the recording and monitoring of the seven telephone calls between the participating agent and the Representative were not covered by the terms of the executive authorization and were therefore unauthorized. The LEA also found that the OC Investigation, two subordinate officers and a superior officer of the OC Investigation were responsible for the unauthorized covert surveillance and should each be given a written warning for their negligence of duty and lack of vigilance. Having conducted a review, the Commissioner was in agreement with the findings of the LEA. There was no indication of ulterior motive in this case and that the disciplinary actions against the officers concerned were appropriate.</p> <p>(See paragraphs 7.40 – 7.52 of Chapter 7.)</p> <p><u>Non-compliance / Irregularity Report 3</u> The panel judge granted a prescribed authorization for interception with additional conditions imposed as it was assessed that there was likelihood of</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>obtaining information subject to LPP. One of the conditions was that listening to the intercept product should be undertaken by officers not below a certain rank ('the Specified Rank'). On Day 1, knowing that the subject's court case had been concluded, the officer-in-charge of the interception ('the Chief Interception Officer') prepared a draft REP-11 report for verification and signature by her superior officer, the Section Head. The REP-11 report notifying the panel judge of the court case result and stating that no LPP information had surfaced since the commencement of interception operation against the subject was submitted on the morning of Day 2. After considering the REP-11 report, at 1156 hours, the panel judge lifted the additional conditions previously imposed. Between 1309 hours and 1342 hours of the same day after the lifting of the additional conditions by the panel judge, a junior supervisor of the listening team, who was below the Specified Rank, listened to 51 outstanding calls intercepted before the lifting of the additional conditions. It was only at 1715 hours of that day when the junior officer sought clarification from the Chief Interception Officer that the incident of the inadvertent listening came to light. In view of the possible breach of the condition of the prescribed authorization, an REP-11 report on initial material inaccuracies was submitted to the panel judge the following day (ie Day 3). Upon the panel judge's enquiries, the Section Head submitted another REP-11 report stating that the 51 outstanding calls would be re-listened to by a listener not below the Specified Rank to ascertain that no LPP material was involved. The report was noted by the panel judge. Later that day, Senior</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>Listening Officer (1), an officer not below the Specified Rank, was instructed to re-listen to the 51 outstanding calls who confirmed afterwards that they contained no LPP information. On Day 6, an REP-11 report was submitted to the panel judge stating that a listener of the Specified Rank had re-listened to the 51 outstanding calls and no LPP material was involved. The panel judge noted the report. On Day 10, an initial report on the non-compliance was submitted to the Commissioner, which was followed by a full investigation report several months later.</p> <p>In the course of investigation, the LEA found that the re-listening by Senior Listening Officer (1) covered only 41 calls of the 51 outstanding calls. The Chief Interception Officer was therefore instructed to listen to the 10 calls that had been omitted, who confirmed that no LPP information was contained therein. Subsequently, an REP-11 report reporting such was submitted to the panel judge.</p> <p>The LEA's investigation concluded that the listening to the 51 outstanding calls by the junior supervisor was of his own volition and the mistake was due to his misinterpretation of the effective period of the additional conditions. The junior supervisor was to be advised, with a record on file, which is disciplinary in nature. The LEA had conducted a review of the past interception operations of the Section that involved the imposing and subsequent lifting of additional conditions and no similar mistakes were found. The LEA had also taken remedial actions to prevent recurrence of the same mistake.</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>In reviewing the case, the Commissioner looked into the following matters by raising enquiries with the LEA:</p> <ul style="list-style-type: none"> (i) whether there was a normal practice in dealing with the situation when the additional conditions were lifted and if so, whether the junior supervisor acted in accordance with the normal practice; and if there was no normal practice, whether there was any instruction given to the junior supervisor on how to deal with the situation; (ii) why the 51 outstanding calls were not listened to before submitting the first REP-11 report to the panel judge in which the Section Head stated that no LPP material had surfaced since the commencement of the interception operation against the subject; and (iii) why there was omission of 10 calls by Senior Listening Officer (1) and why this was not detected by his supervisors. <p>In view of the Commissioner's enquiry on (iii) above, the LEA stated in the reply, inter alia, that the Section Head, the Chief Interception Officer and Senior Listening Officer (1) would be advised, with a record on file, that they should exercise due care and vigilance when handling interception operations in future. The advice is disciplinary in nature.</p> <p>Having conducted a review, the Commissioner made the following findings:</p> <ul style="list-style-type: none"> (i) The listening to the 51 outstanding

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>calls intercepted before the lifting of the additional conditions by the junior supervisor after the lifting of the additional conditions was a breach of the additional condition which restricted the listening to Specified Rank officers.</p> <p>(ii) While the junior supervisor's explanation about his listening to the outstanding calls was dubious, there was no evidence to prove that he was acting under instruction or expected by the Specified Rank listeners to complete the unfinished calls intercepted before the lifting of the additional conditions.</p> <p>(iii) While no mistake was made in the Section on the previous occasions, the LEA was required to conduct similar checks on other sections involved in telecommunications interception with additional conditions imposed and lifted. The checking is underway. Initially, a few cases with similar mistakes had been spotted.</p> <p>(iv) The Section Head, knowing that there were outstanding calls not yet listened to, should not have stated in the first REP-11 report to the panel judge that no LPP material had surfaced since the commencement of interception against the subject. At least he should have qualified his statement.</p> <p>(v) Senior Listening Officer (1) did not exercise care and vigilance when examining the outstanding calls listened to by the junior supervisor to the extent that 10 of the 51 calls had been omitted. His supervisors</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
	Surveillance	<p>were also at fault in not ensuring that all the calls had been re-listened to before reporting to the panel judge.</p> <p>As the Commissioner had not listened to the recording of the 51 outstanding calls, no finding could be made as to the veracity of the claim that no LPP material had been involved.</p> <p>The Commissioner was satisfied with the remedial actions taken by the LEA.</p> <p>The Commissioner also considered that disciplinary awards against the officers concerned were appropriate save that the disciplinary award of an advice for the junior supervisor's faults, and in particular his reckless failure to follow the LEA's normal practice, was too lenient. Due to the 'double jeopardy' consideration, however, the LEA was unable to administer additional disciplinary action against the junior supervisor. Taking note of the Commissioner's concern, the LEA was prepared to issue a formal letter to the junior supervisor to strengthen the previous advice given to him. The Commissioner also made a recommendation on 'Time to make disciplinary award', which was detailed in Chapter 9 under this quoted heading.</p> <p>(See paragraphs 7.99 – 7.135 of Chapter 7.)</p> <p><u>Non-compliance / Irregularity Report 4</u> In paragraphs 7.123 to 7.130 of Annual Report 2009, the Commissioner described two investigation cases where the quantity of devices used might be in excess of what was authorized in the relevant prescribed authorizations for</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>Type 1 surveillance where ‘device’ was stated in singular form. The review of these cases continued in 2010.</p> <p>At the Commissioner’s request, the department submitted a report on each of the two investigation cases (ie Case 1 and Case 2) in December 2009. Having examined the reports, the Commissioner raised three issues on Case 2 in January 2010 and requested the department to address them in its full investigation report. The Commissioner also conducted a similar review on other prescribed authorizations of these two investigation cases to see if the quantity of devices used exceeded the quantity authorized. Among the 16 other prescribed authorizations examined in which the use of surveillance device in singular form was authorized, it was found that the number of devices issued pursuant to four prescribed authorizations (‘four related authorizations’) ranged from three to six sets and the number of devices used was two sets both having optical and audio functions. In response to the Commissioner’s request in March 2010, the LEA submitted respective reports on these four related authorizations to the panel judge explaining the matter and seeking the panel judge’s view as to the true ambit of the prescribed authorizations concerned. The panel judge noted the four reports without making any comment. In view of such, the department sought the Commissioner’s advice as to whether the investigation into the possible non-compliance in Case 1 and Case 2 should continue. In response, the Commissioner requested the department to provide the answers to the issues raised on Case 2 first.</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>At an inspection visit on 4 August 2010, in the course of verifying the answers given by the department to the issues raised on Case 2, the Commissioner found that covert surveillance was conducted on a meeting between Subject H, the nicknamed Subject J and a Chinese male but with Subject H's brief absence of three minutes for going to the restroom. During the 3-minute period, covert surveillance continued on Subject J and the Chinese male, which might have become unauthorized as the prescribed authorization authorized covert surveillance be conducted on meeting(s) between Subject H and his associate the nicknamed Subject J. On the Commissioner's advice, the LEA submitted a report to the panel judge on the possible non-compliance and to invite the panel judge's comments, if any. After noting the report, the panel judge wrote thereon: 'Noted. This is not a matter for the PJO's comments; it is a matter of interpretation of and compliance with the authorization.'</p> <p>Regarding the four related authorizations mentioned above, the Commissioner found that the number of devices issued was on some occasions as many as six sets but eventually only two sets were used. During another inspection visit on 6 August 2010, the Commissioner required the department to provide a written reply as to (i) why the number of surveillance devices issued was more than the number of surveillance devices used and (ii) how the unused surveillance devices were kept before they were returned to the device registry. In the course of conducting an enquiry to provide answers to the Commissioner, the department discovered a case of non-compliance in the Type 1</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>surveillance conducted pursuant to one of the four related authorizations, which was detailed in the ensuing paragraphs.</p> <p>The related authorization concerned was granted in early 2009 for conducting Type 1 surveillance between Subject 1 and Subject 2, with or without their other associates. Three covert surveillance operations were conducted under the command of the officer-in-charge of the operation ('the OC Operation') in Division B of the department. One of the surveillance operations was conducted for one hour on Subject 2, Mr A and a Chinese female without the presence of Subject 1. The supervisor of the OC Operation ('the Supervisor') was fully informed of the development and outcome of each of the operations. Weeks later following the discontinuance of the operation, the OC operation submitted a review folder via his supervisors to the Reviewing Officer, in this case, the Senior Assistant Head of Department of Division A ('Senior Assistant HoD (Division A)') in accordance with the internal review procedure. The Review Form was endorsed by an acting supervisor (the Supervisor referred to above was on leave) and the Assistant Head of Department (Division B) without giving any comments. The Reviewing Officer endorsed the Review Form with the finding that there was no non-compliance / irregularity. It was only in the course of conducting enquiries by the unit of the department tasked with investigating non-compliance under the ICSO ('the Unit') in ascertaining the answers to the Commissioner's questions raised on 6 August 2010, which was sometime between 6 and 13 August 2010, that a female investigating officer of the Unit</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>spotted the irregularity from the prescribed authorization and the Review Form. She reported her observation to the head of the Unit, who then reported to his superior officer, an Assistant Head of Department in charge of ICSO matters ('Assistant HoD'). About a month after the discovery of the non-compliance, on 10 September 2010, the department submitted an initial report to the Commissioner. A full investigation report, prepared by the Unit, was submitted in April 2011.</p> <p>After investigation, the Unit found that the covert surveillance carried out on a meeting in which Subject 2 but not Subject 1 was present, was conducted not in compliance with the terms of the prescribed authorization and was unauthorized. The non-compliance was attributable to the negligence of duty and lack of vigilance on the part of the OC Operation and the Supervisor. The Unit also considered that the acting supervisor, the Assistant Head of Department (Division B) and the Reviewing Officer had not been vigilant in the review process in their failure to detect the non-compliance. However, the Unit found no evidence to suspect that the unauthorized covert surveillance or the failure to detect it during the review process was due to bad faith on the part of the officers concerned. The Unit recommended that a verbal warning be given to the acting supervisor and a written warning be given to the OC Operation, the Supervisor and the Reviewing Officer. In the light of the mistake in this incident, the department had taken a series of improvement measures.</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>In reviewing the non-compliance in this case, the Commissioner focused on the following aspects:</p> <ul style="list-style-type: none"> (i) whether there was any bad faith on the part of the OC Operation and the Supervisor; (ii) whether the non-discovery of the irregularity in the covert surveillance operation concerned when the Reviewing Officer reviewed the case in early 2009 was a genuine failure; (iii) whether there was a cover up or attempt to cover up after the irregularity was discovered by the Unit sometime between 6 and 13 August 2010 and before it was reported to the Commissioner on 10 September 2010; (iv) why the head of the Unit reported the observation of the female investigating officer to the Assistant HoD and whether it was in accordance with the normal procedure and the command structure; and (v) the head of the Unit did not heed the conflict of interest when reporting the observation of the possible non-compliance to the Assistant HoD whose direct superior officer was the Reviewing Officer that was being suspected of having failed to detect the non-compliance, and the Assistant HoD similarly did not heed the conflict nor advise the head of the Unit to report the matter higher up.

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>Having reviewed the case, the Commissioner made the following findings and recommendations:</p> <ul style="list-style-type: none"> (i) Regarding the singular form of 'device' in the prescribed authorization, the Commissioner considered that a breach of the terms of the prescribed authorization was not established. However, in future, it is better to use singular or plural form for devices, as the cases may be, in accordance with the need required. (ii) In the three covert surveillance operations in this case and other covert surveillance operations under some of the 16 related authorizations, devices seemed to have been issued indiscriminately when in fact not so many devices were required to be used. The department should advise its officers not to request devices excessively and should base the quantity on the operational need. (iii) The covert surveillance conducted on the meeting between Subject 2 and other persons was beyond the terms of the prescribed authorization which authorized meetings between Subject 1 and Subject 2. Hence, it was unauthorized. (iv) The disciplinary awards proposed by the Unit for the officers involved in the non-compliance are reasonable and acceptable. (v) It was inappropriate in the circumstances of this case for the head of the Unit to report the

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>incident to the Assistant HoD even though he might have followed the normal practice. It would also be inappropriate if the head of the Unit were to act in accordance with the normal practice to conduct the investigation under Senior Assistant HoD (Division A) and report the findings to him. The reason for the inappropriateness in both aspects is that Senior Assistant HoD (Division A) himself was subjected to the Unit's investigation of suspicion of being at fault in not being able to detect the non-compliance in his capacity as the Reviewing Officer and he was the direct superior officer of the Assistant HoD. To ensure impartiality and perception of fairness, the Commissioner recommended that the normal procedure and command structure should be qualified with a rule that in case of any possible conflict of interest, the Unit should report the incident (including the initial report) and conduct and report the ensuing investigation directly under and to the head of department or at least to the deputy head of department, instead of reporting through or to the Assistant HoD and Senior Assistant HoD (Division A).</p> <p>(vi) The head of the Unit and the Assistant HoD both accepted with hindsight their inadequate vigilance in dealing with the conflict of interest issue. The Commissioner considered the disciplinary actions proposed by the department against both officers appropriate and proper, which were that a written warning be given to both officers in conjunction with administrative</p>

Number of reviews conducted under section 41(2)	Interception / Surveillance	Summary of reviews
		<p>measures that they be debarred from acting appointments for one year and be transferred out of their current jobs in the department.</p> <p>(vii) Despite in-depth inquiries into the various issues and suspicions, the Commissioner was not able to find any or any sufficient evidence of any bad faith, ulterior motive or cover up relating to any of the officers of the department in this case.</p> <p>(viii) For Case 2, the Commissioner agreed that the covert surveillance conducted on the nicknamed Subject J and another person during the 3-minute absence of Subject H did not constitute a non-compliance with the prescribed authorization.</p> <p>(See paragraphs 7.136 – 7.227 of Chapter 7.)</p>

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

Table 6

Number of cases of irregularities or errors identified in the reviews under section 41(1)	Interception / Surveillance	Broad nature of irregularities or errors identified
Section 41(1)		
(a) Reviews of LPP cases pursuant to paragraph 120 of the Code of Practice	10	<p data-bbox="699 663 1422 992">Interception <u>LPP Case 1</u> Unauthorized interception of nine minutes after the panel judge revoked the prescribed authorization following receipt of an REP-11 report on the inadvertent obtaining of information which might be subject to LPP and a further heightened likelihood of obtaining LPP information.</p> <p data-bbox="699 1025 1422 1283">Interception <u>LPP Case 2</u> Unauthorized interception of about 10 to 22 minutes after the panel judge revoked the prescribed authorization following receipt of an REP-11 report on heightened likelihood of obtaining LPP information.</p> <p data-bbox="699 1317 1422 1574">Interception <u>LPP Case 3</u> Unauthorized interception of 16 minutes after the panel judge revoked the prescribed authorization following receipt of the second REP-11 report on increased likelihood of obtaining LPP information.</p> <p data-bbox="699 1608 1422 1865">Interception <u>LPP Case 4</u> Unauthorized interception of four minutes after the panel judge revoked the prescribed authorization following receipt of an REP-11 report on heightened likelihood of obtaining LPP information.</p>

Number of cases of irregularities or errors identified in the reviews under section 41(1)	Interception / Surveillance	Broad nature of irregularities or errors identified
	Interception	<p><u>LPP Case 5</u> The panel judge allowed a prescribed authorization to continue subject to further conditions following receipt of an REP-11 report on heightened likelihood of obtaining LPP information. The Commissioner had reviewed the case and found no irregularity save that he was not satisfied with the fact that the intercept product preserved in this case only started from the 12th day of the month instead of from the 9th day.</p>
	Interception	<p><u>LPP Case 6</u> Listening to a call involving a prohibited number which was non-compliant with the additional condition imposed by the panel judge. This review has not been completed at the time of writing this report.</p>
	Interception	<p><u>LPP Case 8</u> A listener listened to calls made to or received from three of the prohibited numbers on five occasions, breaching the additional conditions imposed by the panel judge. This review has not been completed at the time of writing this report.</p>
	Interception	<p><u>LPP Case 9</u> A listener accessed a call intercepted after the Reported LPP Call when monitoring was supposed to be put on hold pending submission of the REP-11 report to the panel judge. This review has not been completed at the time of writing this report.</p>
	Interception	<p><u>LPP Case 10</u> This case has been summarized in Table 5 under the same title of LPP Case 10. As the Commissioner did not listen to</p>

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception / Surveillance	Broad nature of irregularities or errors identified
		Interception	<p>the calls, no finding could be made on the veracity of the gist of the conversations of the Reported LPP Call as stated in the REP-11 report and the claim that the Preceding Call did not involve any LPP or likely LPP information.</p> <p><u>LPP Case 11</u> This case has been summarized in Table 5 under the same title of LPP Case 11. In the absence of express power to permit the Commissioner to listen to the intercept product, no finding could be made as to the veracity of the gist of the conversation of the Reported LPP Call as stated in the REP-11 report and of the claim that the three preceding calls did not involve LPP information or likelihood.</p> <p>(For details, see item (c) under section 41(1) in Table 5 and Chapter 5.)</p>
(b) Other reviews	6	<p>Interception</p> <p>Interception</p> <p>Interception</p> <p>Surveillance</p>	<p><u>Outstanding Case (i) from 2009</u> Reactivation of four discontinued interceptions.</p> <p><u>Outstanding Case (ii) from 2009</u> Duplicated distribution of audio products of telecommunications interception authorized by 26 prescribed authorizations.</p> <p><u>Outstanding Case (v) from 2009</u> Wrong interception of a call due to a technical problem.</p> <p><u>Non-compliance / Irregularity Report 1</u> Failure to declare previous applications in the affidavit supporting an application for prescribed authorization for Type 1 surveillance.</p>

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception / Surveillance	Broad nature of irregularities or errors identified
		Surveillance	<u>Non-compliance / Irregularity Report 2</u> Surveillance conducted on an incoming call whose caller was not the subject of the executive authorization.
		Interception	<u>Non-compliance / Irregularity Report 5</u> Inadvertent configuration of old ATR settings in two listener's workstations. (For details, see item (d) under section 41(1) in Table 5 and Chapter 7.)

Number of cases of irregularities or errors identified in the reviews under section 41(2)		Interception / Surveillance	Broad nature of irregularities or errors identified
Section 41(2)			
(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.

Number of cases of irregularities or errors identified in the reviews under section 41(2)		Interception / Surveillance	Broad nature of irregularities or errors identified
(c) Reviews on non-compliance cases as reported by the head of department under section 54	4	Surveillance	<u>Outstanding Case (iii) from 2009</u> Surveillance on telephone conversation between a participating agent and a person unrelated to the investigation for 19 seconds.
		Surveillance	<u>Outstanding Case (iv) from 2009</u> Surveillance on seven telephone calls between a participating agent and a person representing the subject.
		Interception	<u>Non-compliance / Irregularity Report 3</u> Listening to intercept product by an officer below the rank specified in the prescribed authorization.
		Surveillance	<u>Non-compliance / Irregularity Report 4</u> Surveillance on a meeting between one of the two subjects and two other persons not the subject of the prescribed authorization which only allowed surveillance of meetings between the two subjects. (For details, see item (c) under section 41(2) in Table 5 and Chapter 7.)

Number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)]

Table 7

Number of applications received	Applications for examination in respect of			
	Interception	Surveillance	Both Interception and Surveillance	Cases that could not be processed ^{Note 13}
23	4	1	8	10

Note 13 Of the 23 applications received, two fell outside the ambit of the Commissioner's functions, two did not follow proper application procedures and six were subsequently not pursued by the applicants.

Respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)]

Table 8

Number of notices to applicants given by the Commissioner ^{Note 14}		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)]	13	4	1	8

Note 14 As mentioned in Note 13 above, there were 10 out of the 23 applications for examination that could not be processed. Therefore, the number of cases that the Commissioner had not found in the applicant's favour was 13. The number of notices given by the Commissioner under section 44(5) was therefore 13, eight of which were given during the report period and five of which thereafter.

Besides, the Commissioner had also issued five notices during the report period under section 44(5) in respect of applications for examination brought forward from 2009 which were reported in the Annual Report 2009.

In addition, the Annual Report 2009 had mentioned that there were seven applications brought forward from 2008 and in 2009 which were covered by section 45(2). During the report period, there were three cases (out of the related seven applications) in which the relevant criminal proceedings had been finally determined or finally disposed of, whereupon the examination of these three cases was carried out. The above-mentioned examination had been concluded and a notice was given by the Commissioner after the report period. At the time of the writing of this report, there are a total of four applications brought forward from 2009 which are covered by section 45(2) and are still pending.

Number of cases in which a notice has been given by the Commissioner under section 48 [section 49(2)(d)(v)]

Table 9

	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	1

Broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)]

Table 10

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 Code of Practice [section 51]	2	Interception & Surveillance	<p>(1) The presentation of COP-7 should be improved to make it clearer that it was necessary to set out in the form the details of how the conditions for continuance were not met in all the scenarios shown therein. (See paragraph 8.4 of Chapter 8.)</p> <p>(2) REP-13 should be amended so that the name, rank and post of both the authorizing officer and the reporting officer should all be stated in the form for clarity of identity. (See paragraphs 8.5 – 8.6 of Chapter 8.)</p>
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the Code of Practice [section 52]	7	Interception & Surveillance	<p>(1) Reporting to the Commissioner LPP cases or likely LPP cases pursuant to paragraph 120 of the Code of Practice ('COP 120') by using a separate letter instead of waiting until the submission of weekly reports. All relevant records should be preserved and should not be destroyed without the Commissioner's prior consent. Similar reporting arrangement and</p>

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			<p>preservation requirement should also be applicable to JM cases. (See paragraphs 8.8 – 8.9 of Chapter 8.)</p> <p>(2) Stating the previous applications in affirmation or statement in support of an application in a direct and positive manner. (See paragraphs 8.10 – 8.11 of Chapter 8.)</p> <p>(3) Preserving the relevant ATR up to three weeks after disconnection of the facility concerned whenever LPP or likely LPP information was involved. The arrangement should also be applied to JM cases. (See paragraphs 8.12 – 8.13 of Chapter 8.)</p> <p>(4) Revising the review form for Type 2 surveillance to enable the detection of malpractice or abuse in the issue and use of surveillance devices, non-compliance with the prescribed authorization and unauthorized surveillance. (See paragraph 8.14 of Chapter 8.)</p> <p>(5) Recommendations in connection with covert surveillance on:</p> <ul style="list-style-type: none"> (i) inclusion of all devices capable of performing covert surveillance in the inventory list; (ii) more information to be recorded in the device register;

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			<p>(iii) possible conflict of roles of the same officer acting as both the applicant for a prescribed authorization and the device issuing officer;</p> <p>(iv) amendments on the device register and the request forms for withdrawal of surveillance devices should be comprehensively accounted for;</p> <p>(v) enhancement of the computerized device recording system;</p> <p>(vi) interpretation of ‘person’ under the ‘if known’ declaration;</p> <p>(vii) provision of sufficient information in application and discontinuance report;</p> <p>(viii) authorized period of an executive authorization to be justified; and</p> <p>(ix) stringent requirements of an application.</p> <p>(See paragraph 8.15 of Chapter 8.)</p> <p>(6) Recommendations made upon review of LPP cases:</p> <p>(i) the reporting officer should disclose in the REP-11 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;</p> <p>(ii) the reporting officer should include in the REP-11 report</p>

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			<p>(a) whether, other than the Reported LPP Call, there are any calls between the telephone number concerned and the subject's telephone number(s); and (b) whether such calls have been listened to and if so, the identity of the listener(s);</p> <p>(iii) the department should preserve the intercept products, transcripts, summaries, notes, ATRs and records in whatever form from the time when such products or records are still available at the time of discovery of the Reported LPP Call up to 24 hours after the disconnection of the facilities when encountering LPP or likely LPP cases;</p> <p>(iv) all the records preserved for the performance of the Commissioner's review functions should not be destroyed without his prior consent;</p> <p>(v) LEAs should use a separate letter for reporting an LPP case or likely LPP case to the Commissioner pursuant to COP 120 as soon as an REP-11 report or a discontinuance report has been submitted to the panel judge;</p> <p>(vi) at the time of submitting a report to the Commissioner under COP 120, a sanitized copy each of the application and supporting affirmation, prescribed authorization, REP-11 report, the panel</p>

Recommendations made by the Commissioner	Interception / Surveillance	Broad nature of recommendations
		<p>judge's determination, discontinuance report (if applicable) and ATR, etc should be attached;</p> <p>(vii) if it is already assessed that there will be likelihood of obtaining information subject to LPP at the time of granting the prescribed authorization, the case should be so reported, using a separate letter, to the Commissioner under COP 120. The LEA should preserve the records referred to in (iii) above covering the period from the start of the prescribed authorization up to 24 hours after the disconnection of the facilities. Other requirements mentioned above also apply where appropriate; and</p> <p>(viii) the formatting or presentation of the ATR should be improved to put in the reference of the prescribed authorization and the facility number, the total number of pages with each page paginated, the word 'End' after the last entry, the date and time of publishing the ATR record, and the name, post and signature of the publishing officer of the ATR printout.</p> <p>(See paragraph 8.16 of Chapter 8.)</p> <p>(7) Recommendations made upon review of cases of non-compliance, irregularities and incidents:</p> <p>(i) revising paragraph 9 of the Code of Practice to make its</p>

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			<p>meaning less cryptic;</p> <ul style="list-style-type: none"> (ii) expanding paragraph 160 of the Code of Practice to make it clear that if there has been any unauthorized interception / covert surveillance or any irregularity leading or contributing to the discontinuance, this should be clearly stated in the discontinuance report; (iii) taking disciplinary actions against any offending officer only after an LEA is first apprised of the Commissioner's view at the conclusion of his review, whether the LEA agrees with that view or not; (iv) using singular or plural form for devices authorized in the prescribed authorization, as the case may be, in accordance with the need required; (v) advising officers not to request devices excessively and should base the quantity on the operational need; (vi) qualifying the normal procedure and command structure with a rule that in case of any possible conflict of interest, the unit tasked with investigating non-compliance under the ICSO of the department should report the incident and conduct and report the ensuing investigation directly under and to the head of department or at least to the deputy head of department; and

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			<p>(vii) conducting a test immediately after installation of ATR settings in listening workstations so that mistakes, if any, can be detected at an early stage.</p> <p>(See paragraph 8.17 of Chapter 8.)</p>

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)]

Table 11(a)

	Number of cases
Interception	1

Table 11(b)

	Number of cases
Surveillance	0

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 12

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
<p><u>Case 1</u> Surveillance</p>	<p><u>Case 1</u></p> <p>(i) An LEA officer, who was the officer-in-charge of the investigation concerned, committed the following mistakes:</p> <p>(a) asking a junior officer to withdraw surveillance devices in excess of the quantity authorized in the executive authorization for Type 2 surveillance;</p> <p>(b) wrongly stating in the device request memo that the executive authorization was an ‘Oral Authorization’; and</p> <p>(c) mistakenly stating in the device return memo that the device was returned without accessories but the device was in fact returned with accessories.</p> <p>This officer was warned for the need to withdraw surveillance devices strictly in accordance with the executive authorization and to be more careful in future when preparing memo for the withdrawal and return of surveillance devices.</p> <p>(ii) An LEA officer, who was a device storekeeper, made careless mistakes when entering records for withdrawal of surveillance devices in the device register. This officer was advised, with a record on file, for the need to be more careful in future in handling the withdrawal of surveillance devices and making entries in device register.</p> <p>(iii) An LEA officer, who was a device storekeeper, made illegible entries in the device register and failed to detect the mistake in the device return memo referred to</p>	<p><u>Case 1</u></p> <p>(i) A warning was given on 11.2.2010.</p> <p>(ii) An advice was given on 26.1.2010.</p> <p>(iii) An advice was given on 26.1.2010.</p>

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	<p>in (i)(c) above. This officer was advised, with a record on file, for the need to be more careful in future in handling the return of surveillance devices.</p> <p>(iv) An LEA officer did not prepare the weekly report forms in connection with the executive authorization in question properly. This officer was advised, with a record on file, for the need to be more careful in completing weekly report forms.</p> <p>(See paragraphs 7.94 – 7.107 of Chapter 7 of Annual Report 2009.)</p>	<p>(iv) An advice was given on 10.2.2010.</p>
<p><u>Case 2</u> Interception</p>	<p><u>Case 2</u></p> <p>(i) A technical staff made a cable misconnection, resulting in the erroneous distribution of intercept product to another section of the same LEA which was not involved in the investigations concerned. This officer was warned for the need to exercise care and vigilance in future system maintenance work.</p> <p>(ii) The supervisor of the technical staff mentioned in (i) above was warned for not exercising proper supervision over the technical staff resulting in the erroneous distribution of intercept product.</p> <p>(See paragraphs 7.8 – 7.12 of Chapter 7.)</p>	<p><u>Case 2</u></p> <p>(i) A warning was given on 21.4.2010.</p> <p>(ii) A warning was given on 29.3.2010.</p>
<p><u>Case 3</u> Surveillance</p>	<p><u>Case 3</u></p> <p>(i) An LEA officer, who was the Acting Authorizing Officer of Type 2 surveillance, unduly authorized the use of optical surveillance device(s) by the participating agent which was not sought in the application, and such authorization was</p>	<p><u>Case 3</u></p> <p>(i) A written warning of dismissal was given on 7.9.2010.</p>

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	<p>unrestricted as to the proper places at which the use was to be made, but omitted to authorize the use of listening and optical surveillance devices by the LEA officers which was sought in the application. This officer was given a written warning of dismissal for negligence of duty and lack of care and due diligence in scrutinizing the relevant application documents and in granting the application.</p> <p>(ii) An LEA officer, who was the supervisor of the surveillance operation, did not comply with the departmental requirement of checking the accuracy of the draft application documentation before giving his endorsement to submit the application for the grant of the executive authorization. This officer was given a written warning for lack of due diligence and vigilance in endorsing the relevant application for an executive authorization, in ensuring compliance by his subordinating officers with the terms of the executive authorization, and in the scrutiny of the relevant documents pertaining to the implementation of the executive authorization and its review by the Reviewing Officer.</p> <p>(iii) An LEA officer, who was the officer-in-charge of the device registry, advised that the optical surveillance device be issued as a non-ICSO item while knowing that the executive authorization did not authorize the use of optical surveillance device(s) by the LEA officers. This officer was given a verbal warning for lack of due diligence and vigilance in controlling the issue of surveillance devices for Type 2 surveillance operation.</p> <p>(See paragraphs 7.33 – 7.83 of Chapter 7 of Annual Report 2009.)</p>	<p>(ii) A written warning was given on 14.10.2010.</p> <p>(iii) A verbal warning was given on 7.9.2010.</p>

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
<p><u>Case 4</u> Interception</p>	<p><u>Case 4</u> An LEA officer, after the lifting of the additional conditions, listened to 51 outstanding calls intercepted before the lifting of the additional conditions. It was a breach of the condition of the prescribed authorization imposed by the panel judge which restricted the listening to officers not below a specified rank and the officer concerned was below that specified rank. This officer was advised, with a record on file, for the need to exercise care and vigilance when handling interception operations with LPP likelihood and to seek advice from his supervisory officers whenever in doubt.</p> <p>(See paragraphs 7.99 – 7.135 of Chapter 7.)</p>	<p><u>Case 4</u> An advice was given on 6.12.2010.</p>

10.2 In accordance with section 49(2)(e), I am 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 11.

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CHAPTER 11

REVIEW OF COMPLIANCE BY **LAW ENFORCEMENT AGENCIES**

Introduction

11.1 The head of each of the LEAs under the Ordinance is obliged to report to me cases of non-compliance with the requirements of the Ordinance pursuant to section 54 handled by his own department. The non-compliance with requirements include non-compliance with any provisions of the ICSO, or of the Code of Practice ('the Code') or with any terms of the prescribed authorizations granted by the panel judges for interception or covert surveillance or of the prescribed authorizations granted by the authorizing officer of his own department for Type 2 surveillance.

11.2 The cases described in Chapter 7 include those reported to me by the heads of the LEAs under section 54 or alternatively as irregularities or incidents pursuant to the practice that has been established between them and me. My requirement to the LEAs to report irregularities or incidents is to ensure that these matters, albeit arguably not non-compliance, must also be reported for my consideration and scrutiny so that any possible non-compliance will not escape my attention.

11.3 Moreover, cases that involved LPP were reported to me by the heads of the LEAs pursuant to paragraph 120 of the Code, the relevant provisions of which have been adopted by me to oblige LEAs also to report to me cases involving JM. I also obtained knowledge of cases involving

LPP and JM through the examination of the weekly reports submitted to me by the LEAs as part of the procedural arrangements established by me, with sanitized copies of the relevant REP-11 reports reporting on material change of circumstances after the issue of a prescribed authorization including changed LPP and JM risks provided together with such weekly reports. The Code's requirement to report LPP cases to me underlines the importance that is attached to the protection of the right to confidential legal advice guaranteed by the Basic Law^{Note 15}. Such cases are sensitive and delicate, need handling with particular care and are susceptible to errors being made by LEAs^{Note 16}. My requirement for these and JM cases to be reported promptly to me ensured that they were brought to my attention for examination and review without any delay.

LEAs' compliance

11.4 Although there were cases of non-compliance and irregularity as described in Chapter 7, I am satisfied with the overall performance of the LEAs and their officers in their compliance with the requirements of the ICSO. I have not made any finding that any of the cases of non-compliance or irregularity was due to deliberate flouting or disregard of the statutory provisions or the law, nor could I find any of the officers committing the mistakes being actuated by ulterior motive or ill will. Even regarding the junior supervisor who did not follow his department's normal practice in the case under Report 3 in Chapter 7, there was no evidence that his misdeeds were actuated by bad faith or ulterior motive. Indeed, from the analysis of the cases referred to in Chapter 7, it is obvious that apart

Note 15 Article 35 of the Basic Law.

Note 16 See for instance, *HKSAR v WONG Hung Ki and Anr*, CACC 424 of 2008 (11 May 2010).

from the defects caused by technical problems, the incidents, be they irregularities or more serious non-compliance, were mainly consequences of inadvertent or careless mistakes or unfamiliarity on the part of certain officers with the rules and procedures of the ICSO scheme.

11.5 Hereunder I summarize the cases of non-compliance and irregularity mentioned in the whole of Chapter 7 and their main causes to demonstrate my point:

- The irregularities in Outstanding Case (i) ‘reactivation of discontinued interceptions’ and Outstanding Case (v) ‘wrong interception of a call’ were caused by technical problems and not the fault of any of the LEAs.
- Outstanding Case (ii) ‘duplicated distribution of audio products of telecommunications interception’ was caused by a cable misconnection by a technical staff during relocation of equipment: a momentary lack of concentration and care.
- Outstanding Case (iii) ‘Type 2 surveillance conducted on telephone conversation between a participating agent and a person unrelated to the investigation’ indicated that the officer who committed mistakes was not cautious enough or rather being overzealous and had insufficient understanding of the provisions of the Code. The failure on the part of the Supervisor to make a full disclosure of the ground for discontinuance could not be a deliberate concealment.
- Outstanding Case (iv) ‘Type 2 surveillance on seven phone calls conducted on the representative of the subject’, was a

consequence of insufficient heed being paid by the officers concerned to the terms of the prescribed authorization.

- The cause of the ‘failure to declare previous applications in the affidavit supporting an application for Type 1 surveillance’ in Report 1 was that the applicant had no personal knowledge of the previous applications and was excluded from the departmental knowledge because of the compartmentalisation practice. This case was unearthed by us when checking documents during an inspection visit.
- Report 2 ‘Type 2 surveillance on an incoming call whose caller was not the subject’, on which no conclusion could be made as to whether there was any non-compliance.
- Report 3 ‘listening to intercept product by an officer below the rank specified in the prescribed authorization’, was caused by the junior supervisor’s misunderstanding of the effective period of the additional condition after it was lifted and his not following his department’s normal practice covering such a situation.
- Report 4 ‘Type 1 surveillance carried out on persons in a meeting not allowed by the terms of the prescribed authorization’, was caused by insufficient heed being paid to the terms of the prescribed authorization, and failing to exercise vigilance and care in the departmental review of the matter resulting in the failure to detect the non-compliance. The conflict of interest issue discovered by me during the

review of the case resulted from the lack of alertness, sensitivity and professionalism of two of the officers concerned.

- Report 5 ‘old ATR setting used’ was caused by technical problems the exact cause of which could not be ascertained.
- The cause of ‘listening to a call made to a prohibited number’ in Report 6 is still under investigation. This was discovered by our checking of records during an inspection visit.
- The cause of ‘listening to two prohibited calls’ in Report 7 is also under investigation.

11.6 My above comments and observations on the compliance by the LEAs and their officers also apply to the cases that involved LPP risks and connected irregularities discussed in Chapter 5:

- LPP Cases 1 to 4 concerned the revocation of prescribed authorizations by the panel judges, resulting in unauthorized interception ranging from four to 22 minutes (nine minutes in Case 1, 10 to 22 minutes on the four facilities involved in Case 2, 16 minutes in Case 3 and four minutes in Case 4). Only Case 1 involved the probable obtaining of LPP information, which was caused by the inadvertence of the listener. These cases of unauthorized interception were the consequence of the insufficiency of the provisions of the Ordinance to allow the revocation of the prescribed authorizations to be deferred.

- LPP Case 5 related to a listener's listening to two calls concerning the subject's relative who was involved in foreign legal proceedings. No irregularity was noted, save that there was delay in preserving the records, due to misunderstanding of my preservation requirements and the purpose of the preservation of records before the discovery of LPP risk. [paragraph 5.67 of Chapter 5]
- LPP Case 6 is the same as Report 6 in Chapter 7. During my review, it was discovered that the listener had listened to a call made to one of the prohibited numbers, which was non-compliant with an additional condition. A full investigation report from the LEA is awaited. [paragraph 5.69 of Chapter 5]
- In LPP Case 7 (same as Report 7 in Chapter 7), the listening to two calls between the subject and a prohibited number by two listeners in breach of an additional condition, a full investigation report is still awaited and no review has yet been made by me. [paragraph 5.71 of Chapter 5]
- During review by me in March 2011 of LPP Case 8, it was discovered that there were five occasions on which a listener listened to three of the prohibited numbers, breaching the additional conditions. Again, I am awaiting a full investigation report. [paragraph 5.72 of Chapter 5]
- In LPP Case 9, during my review also in early 2011, it was discovered from the ATR that the listener had accessed an

unreported call (for 15 seconds) when monitoring was supposed to have been suspended [paragraph 5.74 of Chapter 5]. The listener alleged that it was ‘accidental access’ but this ‘accidental access’ was not reported in the REP-11 report which the reporting officer was supposed to check against the ATR before submission of the REP-11 report to the panel judge. An investigation report and the listener’s statement from the department are awaited. [paragraph 5.75 of Chapter 5]

- LPP Case 10 involved the listening to a call between the subject and an unknown male discussing on a minor unrelated offence. The unknown male was suspected to be a legal professional, although according to the listener, he did not identify himself as a lawyer. A call preceding the Reported LPP Call was also listened to. The listener could not recall the content but was sure that it did not involve LPP information. There was no evidence to contradict the listener’s claim. [paragraphs 5.77 and 5.78 of Chapter 5]
- In LPP Case 11, a prescribed authorization was granted without additional conditions. After listening to an incoming call from a solicitor to the subject, the LEA decided to discontinue the operation because of heightened LPP risk and it was unproductive since the last renewal. There were three calls preceding the Reported LPP Call that had been listened to partially about a week before by another listener who claimed that she could not remember the callers and contents.

She maintained that they did not contain any LPP information or risk. I had no evidence to disbelieve her claim. [paragraphs 5.81 and 5.82 of Chapter 5]

- No irregularity was found in LPP Cases 12 to 21.

11.7 In the course of my examination and review of the cases, I continue to make recommendations and give advice to the LEAs so as to enhance the procedural rules, not only for **strengthening my checking capability** but also to draw the attention of the LEAs to **ways and means of how better to comply with the ICSO requirements**. A great majority, if not all, of my advice and recommendations have been accepted and adopted for use by the LEAs.

Limitation in ensuring compliance

11.8 From what is stated in paragraphs 11.1 and 11.2 above, it is abundantly clear that the report or revelation of most cases of non-compliance or irregularity was done by the LEAs on a voluntary basis, albeit for complying with the statutory provision or the Code or the established practice. Without such voluntary assistance from the LEAs, it would be difficult, if not impossible, for me and my staff to discover or unearth any contravention by the LEAs, although as shown in the cases in Report 1 and Report 6 in Chapter 7 and in LPP Case 8 and LPP Case 9 described in Chapter 5, we were able to discover instances of non-compliance in the course of my examination of the cases and investigation into them.

11.9 As I have stated in my last annual report, my capability and that of my staff in my small Secretariat is very limited, which may not act

as a sufficient deterrence to any possible contravention or its concealment if such were unfortunately committed by any of the LEAs or any of their officers. The knowledge or realisation of this limited capability by the LEAs would, if employed dishonestly, further weaken my role as the overseer of their compliance with the requirements of the Ordinance.

11.10 The new initiative that I have proposed, as detailed under the second heading in Chapter 9 of my Annual Report 2008, to check the audio intercept products, which is now recommended to extend to examination of surveillance products (see paragraphs 9.1 to 9.3 of Chapter 9 of this Annual Report) may be a step in the right direction in providing the necessary deterrence against any contravention or abuse of the Ordinance or prescribed authorizations or its concealment.

Identification of non-compliance

11.11 Of the total of nine cases of non-compliance, as opposed to mere irregularity, referred to in this report that occurred or unearthed in 2010 (excluding those discovered in 2011 in LPP Cases 8 and 9), six were reported to me by the LEAs of their own volition (ie non-compliance Report 3 and Report 7 as well as LPP Cases 1 to 4) and two were discovered by my staff and me through the careful inspection and examination of the documents and materials requested from the LEAs (ie non-compliance Report 1 and Report 6). The remaining one was discovered in the course of my further probing into the use of surveillance devices (ie non-compliance Report 4). While it can be said that without the voluntary assistance from the LEAs it would be almost impossible for the non-compliance cases to be discovered, the stringency of the requirements imposed by me and the unrelenting probes that I conducted helped reveal a

few of those cases. The significance is not limited to the fact of the exposure of those few cases, but more so in the idea of the effectiveness of the procedural requirements imposed by me and the stringency and seriousness with which they were carried out that I believe has been impressed upon the LEAs that despite the little resources and manpower that can be wielded by my office and staff, we were capable of identifying non-compliance or irregularity. The idea would encourage voluntary disclosure or at least discourage concealment. This idea, together with the new initiative of checking the contents of the intercept and surveillance products, if implemented, would go hand in hand to pose as a powerful deterrence against possible abuse on the part of the LEAs or against concealment of such abuse.

CHAPTER 12

ACKNOWLEDGEMENT AND WAY FORWARD

Acknowledgement

12.1 Once again it is for me to take this annual opportunity to thank all those who have given me great assistance in the performance of my functions prescribed by the Ordinance. In respect of my oversight and review functions over the LEAs under the ICSO, they are the panel judges, the LEAs and the Security Bureau. Regarding these and my other functions, such as conducting examinations in respect of applications from those who suspect being subjected to interception and covert surveillance carried out by the LEAs, they include other parties like the CSPs from whom I request information on a frequent or occasional basis. While these persons and organizations could be perceived as merely submitting to my power to seek information under section 53 of the Ordinance, nonetheless they were most helpful and accommodating, despite the fact that the preparation of their response must have cost them considerable effort and expenditure on manpower and resources. My task as the Commissioner would have been made impossible without all their unstinting support and cooperation. I am grateful to each and every one of them.

12.2 The interest and concern of members of the public, notably the media and Legislative Council Members, pose as a constant reminder to me of my hefty responsibility as the overseer of the LEAs' compliance with the requirements of the law and behove me to search in earnest for ways and means whereby such compliance can be enhanced, if not ensured.

Their views and even criticisms have given me the encouragement and challenge that I should spare no effort to safeguard the rights of people in Hong Kong even where the LEAs are lawfully carrying out interception and covert surveillance operations for the purposes of preventing and detecting serious crimes and protecting public security. Although no name is mentioned, my thanks are due to everyone concerned.

My Wishes

12.3 I have two wishes as the Commissioner. First and foremost, I wish that all the LEAs under the Ordinance would carry out their interception and covert surveillance operations in total compliance with the law, and this is done of their own volition. In this respect, I wish that the law and procedure for regulating and reviewing their statutory activities would be such that LEA officers will never carry out these activities without complying with the law. Here the deterrence that I suggest by empowering me and my staff to examine and listen to products of interception and covert surveillance by the LEAs will play a significant role, without which I am not sure if this wish of mine will ever come true.

12.4 My second wish is that the annual report that I have to submit to the Chief Executive would reduce in size year after year so that eventually what is contained in it will barely satisfy the requirement to provide the statutory tables, ie those set out in Chapter 10 above. There would be no need to explain anything done by the LEAs because they had done nothing wrong. There would be no need to explore the circumstances and reasons involving any of the LEAs' activities because every of the steps they had taken was carried out in full compliance with the law and the requirements of the Ordinance. There would be nothing that should raise

any concern of the public regarding their rights to privacy, communication, LPP and JM. They would only read the annual report for the figures of the number of prescribed authorizations obtained by the LEAs to prevent or detect serious crimes and the number of criminals caught. Although not an intended purpose, this wish will generate a by-product of reducing my work.

Way forward

12.5 As usual, the experience gathering exercise has continued. I have made suggestions and recommendations to confront new situations that transpired, so as to plug any loopholes that might otherwise render non-compliance with the statutory requirements to be unnoticed and to introduce further and better control mechanisms for detecting or deterring non-compliance. All these improvement measures will enhance the review procedure which, I am confident, will work in elevating compliance and reducing irregularities, stepping closer towards safeguarding the rights to privacy and communication of people in Hong Kong.

12.6 In the year covered by this report, from what the LEAs have done, I am sure that they have endeavoured to reduce non-compliance and irregularities, although some of these could not be avoided due to the insufficiencies of the provisions of the Ordinance. Moreover, my checking abilities to unearth improprieties, if any, are not as comprehensive and effective as I would like, which is again resultant from the insufficiency of the Ordinance. I am therefore eagerly awaiting the amendments to the Ordinance as I have suggested in these past years to be effected, and I hope that when these necessary improvements are implemented my two wishes mentioned above will be accomplished.