

Annual Report 2014 to the Chief Executive

by

The Commissioner on
Interception of Communications
and Surveillance

June 2015

截取通訊及監察事務專員辦公室

Office of the Commissioner on Interception of Communications and Surveillance

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The Honourable C Y Leung, GBM, GBS, JP
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Tamar
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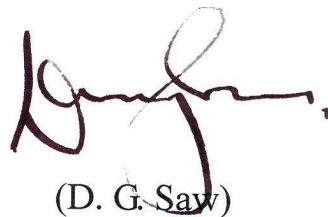
CONFIDENTIAL

Dear Sir,

Annual Report for the Year 2014

I have the pleasure, pursuant to section 49 of the Interception of Communications and Surveillance Ordinance, in submitting to you the annual report for the year 2014, together with its Chinese translation.

Yours sincerely,



(D. G. Saw)
Commissioner on Interception of
Communications and Surveillance

Encl: Annual Report for 2014

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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
capable device	device capable of being used for covert surveillance
Code of Practice, COP	the Code of Practice issued by the Secretary for Security under section 63 of the Ordinance
Commissioner	Commissioner on Interception of Communications and Surveillance
COP 121 report	report submitted pursuant to paragraph 121 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
DMS	device management system
fresh application	application for a prescribed authorization which is not a renewal
ICSO, Ordinance	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, Hong Kong Police Force, Immigration Department or Independent Commission Against Corruption
LPP	legal professional privilege
LPP information	information protected by legal professional privilege
non-ICSO purpose	purpose which is not related to ICSO
panel judge	the panel judge appointed under section 6 of the Ordinance
PJO	Panel Judges' Office
QR Code	Quick Response Code
renewal application	application for renewal of a prescribed authorization
RSM	removable storage medium
REP-11 report/REP-13 report	report on material change of circumstances or initial material inaccuracies under a prescribed authorization made on form REP-11 or form REP-13
Reported LPP Call	a call with LPP likelihood, heightened LPP likelihood or LPP information and is reported to the panel judge by way of an REP-11 report on such
Secretariat	Secretariat, Commissioner on Interception of Communications and Surveillance

section	section of the Ordinance
statutory activity	interception of communications and/or covert surveillance activity described in the Ordinance
the report period	the period from 1 January to 31 December 2014
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

1.1 Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance, Cap 589 ('Ordinance' or 'ICSO'), the Commissioner on Interception of Communications and Surveillance ('Commissioner') is required to submit an annual report to the Chief Executive ending on 31 December in each year. This report covers the period 1 January to 31 December 2014.

1.2 The Ordinance is to regulate the conduct of interception of communications and the use of surveillance devices by public officers and to provide for related matters. The statutory framework regulates the activities of the four law enforcement agencies ('LEAs') 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') so as to ensure that these activities can be lawfully and properly carried out if the relevant requirements stipulated in the Ordinance are satisfied.

1.3 The first and foremost of the relevant requirements is that any statutory activity can only be lawfully and properly conducted by an officer of an LEA pursuant to a prescribed authorization granted by a relevant authority. The relevant authority includes a panel judge who is empowered to issue a prescribed authorization for interception or for Type 1 surveillance and an authorizing officer of the LEA concerned who can issue a prescribed authorization for Type 2 surveillance. After obtaining a prescribed authorization, the LEA and its officers are required to comply with its terms in carrying out the statutory activity

so authorized. They are also required to observe the provisions of the Code of Practice ('COP') issued by the Secretary for Security.

1.4 Whether a prescribed authorization should be granted is expressly based on the necessity and proportionality principles, and the premise that the well-being of Hong Kong can be achieved by striking a fair and proper balance between the need for the prevention and detection of serious 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.

1.5 An important function of the Commissioner is to oversee the compliance by the LEAs and their officers with the relevant requirements of the scheme of the ICSO. The objects and spirit of the Ordinance must be at the forefront of that oversight when this function is engaged. A review of the performance of the LEAs and their officers in undertaking their interception or covert surveillance operations in 2014 is detailed in Chapter 9.

1.6 Part of the function of the Commissioner is to be involved in advising the LEAs in designing ways to resolve hitherto unexpected problems and taking the opportunity to anticipate others. This engagement is ongoing and operates in the best interest of all the LEAs and also for the benefit of the society in which we live because improvements can be made continuously.

1.7 Over eight years have elapsed since the coming into operation of the Ordinance. During the years, the Commissioner has, in discharging his oversight function, made a number of recommendations to enhance the effectiveness of the ICSO regime and some of these recommendations require legislative amendments. I am pleased that an amendment bill which seeks to amend the

Ordinance to give effect to the Commissioner's recommendations has been introduced into the Legislative Council. I hope that the Bill would be enacted as soon as possible.

1.8 In this annual report, I have continued the practice of providing the utmost transparency of my work as the Commissioner, save to take care not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security. It is important that I do not reveal information that might have helped individuals who may wish to cause harm to Hong Kong. In this regard, I have included as much information as possible insofar as its publication does not amount to contravention of the non-prejudice principle.

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CHAPTER 2

INTERCEPTION

Prescribed authorizations for interception

2.1 Under section 29(1) of the Ordinance, a prescribed authorization for interception may –

- (a) in the case of a postal interception, authorize one or both of the following –
 - (i) the interception of communications made to or from any premises or address specified in the prescribed authorization;
 - (ii) the interception of communications made to or by any person specified in the prescribed authorization (whether by name or by description); or
- (b) in the case of a telecommunications interception, authorize one or both of the following –
 - (i) the interception of communications made to or from any telecommunications service specified in the prescribed authorization;
 - (ii) the interception of communications made to or from any telecommunications service that any person specified in the prescribed authorization (whether by name or by description) is using, or is reasonably expected to use.

Written applications

2.2 Applications for the issue or renewal of a prescribed authorization should normally be made in writing to a panel judge unless it is not reasonably practicable to do so. During the report period, there were a total of 1,522 written applications for interception made by the LEAs, of which 1,518 were granted and four were refused by the panel judges. Among the successful applications, 699 were for authorizations for the first time ('fresh applications') and 819 were for renewals of authorizations that had been granted earlier ('renewal applications').

Reasons for refusal

2.3 All the four refused applications were fresh applications, which were refused because the materials provided to support the allegations put forth were inadequate/insufficient.

Emergency authorizations

2.4 An officer of an LEA may apply to the head of his department for the issue of an emergency authorization for any interception if he considers that there is immediate need for the 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 of the case that it is not reasonably practicable to apply to a panel judge for the issue of a judge's authorization. An emergency authorization shall not last for more than 48 hours and may not be renewed. As soon as reasonably practicable and in any event within the period of 48 hours from the issue of the emergency

authorization, the head of the department shall cause an officer of the department to apply to a panel judge for confirmation of the emergency authorization where any interception is carried out pursuant to the emergency authorization.

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

Oral applications

2.6 An application for the issue or renewal of a prescribed authorization may be made orally if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written application in accordance with the relevant written application provisions under the Ordinance. The relevant authority may orally deliver his determination to issue the prescribed authorization or give the reasons for refusing the application. Paragraph 92 of the COP issued by the Secretary for Security provides that the oral application procedures should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedures cannot be followed. An oral application and the authorization granted as a result of such an application are regarded as having the same effect as a written application and authorization. Similar to emergency authorizations, the head of the department shall cause an officer of the department to apply in writing to the relevant authority for confirmation of the orally granted prescribed authorization as soon as reasonably practicable and in any event within 48 hours from the issue of the authorization, failing which the prescribed authorization is to be regarded as revoked upon the expiration of the 48 hours.

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

Duration of authorizations

2.8 For over 71% 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. While the longest approved duration was about 42 days, the shortest one was for several days only. Overall, the average duration of all the authorizations was about 30 days. This indicates that the panel judges handled the applications carefully and applied a stringent control over the duration of the authorizations.

Offences

2.9 Table 2(a) in Chapter 8 gives a list of the major categories of offences for the investigation of which prescribed authorizations for interception had been issued or renewed during the report period.

Revocation of authorizations

2.10 Under section 57(1) of the Ordinance, an officer of an LEA, who conducts any regular review pursuant to the arrangements made under section 56 by his head of department, 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. The officer concerned shall then

report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned.

2.11 The number of authorizations for interception revoked 'fully' under section 57 during the report period was 566. Another 113 cases involved the cessation of interception in respect of some, but not all, of the telecommunications facilities approved under a prescribed authorization, so that while the prescribed authorization is 'partially' revoked, interception of the remaining approved facilities continued to be in force.

2.12 The grounds for discontinuance were mainly that the interception operation was not or no longer productive, the subject had stopped using the telecommunications facility concerned for his criminal activities, or the subject was arrested.

2.13 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 legal professional privilege ('LPP') information will be obtained by continuing the interception, he shall revoke the prescribed authorization if he considers that the conditions under the Ordinance for the continuance of the prescribed authorization are not met. The arrest of the subject may or may not relate to the offence(s) for which the interception is authorized to investigate, 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, the LEAs were aware of a total

of 127 arrests but only two section 58 reports were made to the panel judge. The panel judge allowed the LEA to continue with the interception related to one section 58 report with additional conditions already imposed on the prescribed authorization concerned to safeguard LPP information continued to apply, whereas the prescribed authorization of the remaining section 58 report was revoked. As regards the other arrest cases, decisions were made by the LEAs concerned to discontinue the interception operations pursuant to section 57 instead of resorting to the section 58 procedure. This reflects the fact that the LEAs were appreciative of the risk of obtaining LPP information after an arrest.

Authorizations with five or more previous renewals

2.14 There were 47 authorizations for interception with five or more previous renewals within the report period. As these cases had lasted for quite a long period of time, particular attention was paid 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 inspection visits to the LEAs.

Effectiveness of interception

2.15 It is and continues to be the common view of the LEAs that interception is a very effective and valuable investigation tool in the prevention and detection of serious 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 99 persons, who were subjects of prescribed authorizations, were arrested as a result of or further to interception

operations. In addition, 107 non-subjects were also arrested consequent upon the interception operations.

Procedure of oversight for interception

2.16 There were three different ways by 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

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

weekly report forms on the applications they received from all the LEAs, approved or refused, and the revocations of prescribed authorizations. A weekly report covers the statutory activities with related authorizations and refused applications in the entire week before the week of its submission to the Secretariat.

2.18 The weekly report forms only contain general information relating to cases of the related week such as whether the application was successful or rejected, the duration of the authorization, the offences involved, the assessment on the likelihood of obtaining LPP information and journalistic material 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.

2.19 Upon receipt of the weekly report forms from the LEAs, the Secretariat would study the details of each weekly report form and, except those relating to Type 2 surveillance, counter-check against the PJO's returns. In case of discrepancies or doubts, clarifications and explanations were sought from the LEAs and/or the PJO as and when necessary.

2.20 An LEA brought to my attention in a weekly report form that in considering an application for renewal of a prescribed authorization, the panel judge noted that the name of the subscriber of one of the facilities sought to be intercepted set out in the affidavit in support of the application was different from the one stated in the previous applications. An oral hearing was then called by the panel judge during which the applicant was asked to explain the circumstances of the change of the subscriber. Having satisfied with the explanation,

the panel judge remarked that any change in a subscriber's details should be regarded as a material change of circumstances and a relevant report should, in future, be submitted in addition to mentioning it in the affirmation/affidavit. In view of the information stated in the weekly report form, I examined the relevant documents of the case during an inspection visit to the LEA. Save for the matter reported, no irregularity was found.

Checking of cases during inspection visits

2.21 Should the Commissioner perceive a need, clarification and explanation on the weekly report forms would also be sought in the inspection visits to the offices of the LEAs. In the visits, the Commissioner would also select, on a random basis, some other cases for examination apart from those requiring clarification. Documents to be scrutinised by the Commissioner would include the original of the applications, reports on discontinuance, reports on material change of circumstances, reports on initial material inaccuracies, case files and internal review documents, etc. Such inspection visits were carried out so that secret or sensitive information contained in case files and documents that would otherwise be required to be sent to the Secretariat for checking would always remain in the safety of the LEAs' offices to avoid any possible leakage.

2.22 If questions or doubts still could not be resolved after the examination of such documents, the Commissioner would require the LEA to answer the queries or to explain the cases in greater detail.

2.23 In addition to matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 842 applications for interception, including granted authorizations and refused

applications, and 333 related documents/matters had been checked during the Commissioner's inspection visits to the LEAs in the report period.

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

2.24 Apart from examining the weekly returns from the LEAs against those from the PJO, and conducting periodical checks of the relevant files and documents at the LEAs' offices, other measures have also been made available to and adopted by the Secretariat for further checking the interceptions conducted by the LEAs.

2.25 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. While the CSPs are required to furnish the Commissioner with a four-weekly return to ensure that the facilities intercepted tally with those as reported by the respective LEAs and to notify the Commissioner at once upon discovery of any unauthorized interception, the Team has also archived in a confidential electronic record the status of all interceptions whenever they are effected, cancelled or discontinued. Arrangements have also been made for the archiving of the status of all interceptions being conducted at particular intervals as designated by the Commissioner from time to time. All these records are available to the Secretariat but only the Commissioner and his designated staff can access the confidentially archived information for the purpose of checking the intercepted facilities for their status of interception at various points of time and as at any reference point of time so designated by the

Commissioner, ensuring that no unauthorized interception has taken place.

Results of various forms of checking

2.26 Apart from the cases referred to in Chapter 6, there was no other case of wrong or unauthorized interception revealed by the various forms of checking.

2.27 The checking of the archived material referred to in paragraph 2.25 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 Report 3 and Report 4 of Chapter 6 were found to have been recorded.

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CHAPTER 3

COVERT SURVEILLANCE

Covert surveillance

3.1 Pursuant to section 2 of the ICSO, covert surveillance means any surveillance carried out with the use of any surveillance device if the surveillance is carried out in circumstances where the subject of the surveillance is entitled to a reasonable expectation of privacy, that it is carried out in a manner calculated to ensure that the subject is unaware that the surveillance is or may be taking place, and that it is likely to result in the obtaining of any private information about the subject. Surveillance device means a data surveillance device, a listening device, an optical surveillance device or a tracking device or a device that is a combination of any two or more of such devices. Any surveillance which does not satisfy the above criteria is not covert surveillance under the Ordinance.

Two types of covert surveillance

3.2 There are two types of covert surveillance: Type 1 and Type 2. Type 1 surveillance has a higher degree of intrusiveness into the privacy of the subject and requires a panel judge's authorization whereas an authorization for Type 2 surveillance, termed an executive authorization, can be issued by an authorizing officer of the department to which the applicant belongs. An authorizing officer is an officer not below the rank equivalent to that of Senior Superintendent of Police designated by the head of department.

Written applications

3.3 During this report period, there were a total of

- (a) 37 written applications for Type 1 surveillance, of which 36 were granted and one was refused by the panel judge. Among these successful applications, 21 were fresh applications and 15 were renewal applications; and
- (b) five written applications for Type 2 surveillance. All were fresh applications and were granted by the authorizing officer.

3.4 The refused Type 1 surveillance application was a fresh application. The ground for refusal was insufficient information to justify the issue of an authorization.

Emergency authorizations

3.5 An officer of an LEA may apply in writing to the head of the department for the issue of an emergency authorization for any Type 1 surveillance, if he considers that there is 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. An emergency authorization shall not last longer than 48 hours and may not be renewed. Where any Type 1 surveillance is carried out pursuant to an emergency authorization, the head of the department shall cause an officer of the department to apply to a panel judge for confirmation of the emergency authorization as soon as reasonably practicable after,

and in any event within the period of 48 hours beginning with, the time when the emergency authorization is issued. During the report period, no application for emergency authorization for Type 1 surveillance was made by the LEAs.

3.6 On the other hand, there is no provision in the Ordinance for application for emergency authorization for Type 2 surveillance.

Oral applications

3.7 Applications for Type 1 and Type 2 surveillance, including those for emergency authorization, should be made in writing. Nonetheless, an application for the issue or renewal of a prescribed authorization may be made orally if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written application. The relevant authority may orally deliver his determination to issue the prescribed authorization or to refuse the application.

3.8 The COP stipulates that the oral application procedure should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedure cannot be followed. For a prescribed authorization orally granted for Type 1 surveillance, the head of the department shall cause an officer of the department to apply in writing to the panel judge, and for such an authorization for Type 2 surveillance, the applicant shall apply in writing to the authorizing officer, for confirmation of the orally granted prescribed authorization as soon as reasonably practicable and in any event within 48 hours from the issue of the authorization. Failing to do so will cause that orally granted prescribed authorization to be regarded as revoked upon the expiration of the 48 hours.

3.9 During this report period, there were two oral applications for Type 2 surveillance, both of which were granted. No oral application for Type 1 surveillance was made by the LEAs.

Duration of authorizations

3.10 The maximum duration authorized for both Type 1 and Type 2 surveillance allowed under the Ordinance is three months. The longest approved duration of Type 1 surveillance granted in this report period was about 29 days whereas the shortest one was less than a day. Overall, the average duration for such authorizations was about 16 days. In this report period, the longest approved duration of Type 2 surveillance granted was about 21 days while the shortest one was about a day. The overall average duration of Type 2 surveillance executive authorizations was about eight days.

Authorizations with five or more previous renewals

3.11 During the report period, no authorization for Type 1 or Type 2 surveillance had been renewed for more than five times.

Offences

3.12 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 are set out in Table 2(b) in Chapter 8.

Revocation of authorizations

3.13 During the report period, 17 Type 1 surveillance operations were discontinued under section 57 before the natural expiration of the

prescribed authorizations. The grounds for discontinuance were mainly that the anticipated event to be monitored did not materialize, the surveillance had been carried out or the subject was arrested. Section 57(3) requires the LEA to report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned upon receipt of the report on discontinuance. Of these 17 discontinuance cases, nine prescribed authorizations concerned were subsequently revoked by the panel judge. For the remaining eight cases, the prescribed authorizations had already expired by the time the panel judge received the discontinuance reports. Thus, the panel judge could only note the discontinuance reported instead of revoking the prescribed authorization.

3.14 As regards Type 2 surveillance cases, during this report period, seven Type 2 surveillance operations were discontinued under section 57 before their natural expiration. The grounds for discontinuance were mainly that the subject was arrested or the surveillance had been carried out. All the prescribed authorizations concerned were subsequently revoked by the authorizing officer.

3.15 Revocation of authorizations is expressly provided for in section 58 of the ICSO for covert surveillance when the subject(s) of the covert surveillance has been arrested. During this report period, the LEAs were aware of the arrest of a total of seven subjects under Type 1 surveillance but only two reports were made to the panel judge under section 58 seeking continuation of prescribed authorizations. In both cases, the panel judge allowed the surveillance operations to continue subject to an additional condition imposed to guard against the risk of obtaining LPP information. As regards Type 2 surveillance, during this report period, no report was made to the authorizing officer under

section 58 seeking continuation of prescribed authorizations in spite of the arrest of the subject. Instead, those prescribed authorizations were discontinued pursuant to section 57.

3.16 The LEAs' voluntary selection of the section 57 procedure to discontinue the covert surveillance operation as soon as reasonably practicable instead of resorting to the section 58 process of reporting an arrest with a wish to continue with the operation, similar to the situation for interception, demonstrates that they were appreciative of the risk of obtaining LPP information after an arrest.

Application for device retrieval warrant

3.17 During the report period, there was no application for any device retrieval warrant for retrieving the devices used for Type 1 or Type 2 surveillance, the reported reason being that the devices were removed upon the completion of the surveillance operation, successful or otherwise.

Effectiveness of covert surveillance

3.18 As a result of or further to surveillance operations, be it Type 1 or Type 2, a total of 19 persons who were subjects of the prescribed authorizations were arrested. In addition, 19 non-subjects were also arrested in consequence of such operations.

Procedure of oversight for covert surveillance

3.19 The compliance with the requirements of the Ordinance in respect of covert 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 above reviews are set out in the ensuing paragraphs.

Checking of weekly reports

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

Checking of cases during inspection visits

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

3.22 During the year, 30 applications for Type 1 surveillance and 26 related documents/matters had been checked.

3.23 Pursuant to the Ordinance, an application for Type 2 surveillance is submitted to and determined by a designated authorizing officer of the department concerned. Special attention has all along been paid to examine each and every application for Type 2 surveillance to ensure that all such applications correctly fall within the category of Type 2 surveillance and all executive authorizations are granted properly. During the inspection visits to the LEAs in this report

period, apart from the clarification of matters relating to minor discrepancies in the weekly reports, a total of nine applications for Type 2 surveillance and ten related documents/matters had been checked.

3.24 Generally speaking, the cases checked were found to be in order while there were some areas for improvement as set out below:

- (a) Section 57(4) of the Ordinance provides that the relevant authority shall, as soon as reasonably practicable after receiving a discontinuance report, revoke the prescribed authorization concerned. During an inspection visit to an LEA, I noticed that a prescribed authorization for Type 2 surveillance was revoked by the authorizing officer five days after discontinuance of the surveillance operation concerned. In response to my enquiry, the LEA explained that the authorizing officer was on vacation leave and outside Hong Kong at the material time. The authorizing officer revoked the authorization immediately after his resumption of duty. I considered that this arrangement was unsatisfactory and that the absence of the authorizing officer had resulted in the late revocation of the prescribed authorization. I advised that improvement measures should be taken by the LEA to ensure timely revocation of a prescribed authorization. The LEA has taken heed of my advice and put in place a new arrangement to prevent late revocation of a prescribed authorization arising from the absence of an authorizing officer.
- (b) During an inspection visit to an LEA, I noted that an REP-11 report was submitted to the panel judge in respect of a Type 1 surveillance operation in view of the heightened LPP

likelihood through interception on one of the subjects. The panel judge subsequently approved the continuation of the prescribed authorization. However, I noticed that there was no reference to this in the Review Form. The LEA officer concerned explained that he had already included a copy of the REP-11 report in the review folder for the examination of the Reviewing Officer. I considered that there was room for improvement and advised the LEA that all relevant information should be included in the Review Form to facilitate review by the Reviewing Officer. The LEA has taken improvement measures to address the issue accordingly.

3.25 In examining the weekly reports, there may be some cases where surveillance devices have been withdrawn under a prescribed authorization but no surveillance operation is carried out. The Commissioner would consider the following matters required further 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 the inspection visits, at which the relevant case documents were checked and the LEA concerned was requested to answer queries. The explanations given by the LEA for all these cases were satisfactory and there was no sign of use of surveillance devices for any unauthorized purposes.

Checking of surveillance devices

3.26 Having regard to the fact that covert surveillance, as defined by the Ordinance, is surveillance carried out with the use of one or more surveillance devices, the LEAs had been required to develop a comprehensive recording system of surveillance devices, so as to keep a close watch and control over the devices with a view to restricting their use only for authorized and lawful purposes. Not only is it necessary to keep track of surveillance devices used for ICSO purposes, but it is also necessary to keep track of devices capable of being used for covert surveillance ('capable devices') albeit they may allegedly only be used for non-ICSO purposes. Capable devices should be kept under close scrutiny and control because of the possibility that they might be used without authorization or unlawfully. The LEAs have to maintain a register of devices withdrawn based on loan requests supported by a prescribed authorization and a separate 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 checking purposes.

3.27 The LEAs have established 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 updated inventory list and device registers are submitted to the Commissioner regularly. Where necessary, the LEAs are also required to provide copies of the device request forms for examination. In case of discrepancies or doubts identified as a result of checking the contents of these copies and comparing with the information provided in the weekly report forms and other relevant documents, the LEA concerned will be asked to provide clarification and explanation.

Visits to device stores

3.28 Apart from the checking of inventory lists and device registers of surveillance devices managed by the LEAs, the Commissioner would also make inspection visits to the device stores of the LEAs for the following purposes, namely:

- (a) to check the entries in the original registers against the entries in the copy of registers submitted to the Commissioner, 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 the Commissioner periodically;
- (e) to check the items of device shown in the copy registers to have been recently returned to ensure that they are being kept in the stores;
- (f) to make stock-check of items 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 the knowledge of the Commissioner or his staff and seek explanation as to how they might be used for conducting covert surveillance operations.

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

Removable storage media

3.30 To better control the issue and return of surveillance devices, the majority of the LEAs have adopted the computerised device management system ('DMS') in their device stores. I previously advised the LEAs that the removable storage media ('RSM') for surveillance devices should be handled in a secure and strictly regulated manner akin to the withdrawal and return of surveillance devices so as to avoid any possibility of these RSM (e.g. memory cards,

discs and tapes) being substituted, or in any way tampered with. As a consequence of my recommendation, the LEAs have adopted or are making arrangements for the use of tamper-proof labels to seal the RSM inside the devices at the time of issue and the use of QR Code to facilitate the issue and return of the RSM through DMS.

Devices for non-ICSO purposes

3.31 As a matter of practice, an authorized covert surveillance is always supported by a prescribed authorization issued by a relevant authority but a non-ICSO operation requiring issue of devices will not have that support. Hence, in keeping track of issue of surveillance devices for non-ICSO purposes, the LEAs have accepted the requirements that a two-level approval by way of an endorsement of an officer and an approval of a senior officer is required. Both officers will sign with date on a device request memo to signify their endorsement and approval respectively. Each device request memo should have a unique memo reference. The withdrawing officer will bring along the device request memo to the device registry where the storekeeper on duty will issue the surveillance devices requested.

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

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CHAPTER 4

LEGAL PROFESSIONAL PRIVILEGE AND JOURNALISTIC MATERIAL

Obligations of LEAs regarding LPP cases

4.1 The Ordinance requires that when making an application for a prescribed authorization, the applicant should state in the affidavit or statement the likelihood that any information which may be subject to legal professional privilege ('LPP') will be obtained by carrying out the interception or covert surveillance.

4.2 Paragraph 121 of the COP provides that the LEA should notify the Commissioner of interception/covert surveillance operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. On the basis of the LEA's notification ('the COP 121 report'), the Commissioner may review the information passed on to the investigators to check that it does not contain any information subject to LPP that should have been screened out.

4.3 Regarding each of these cases, there are procedures to be followed at different stages of the operation. When making an application for a prescribed authorization, the LEA applicant is obligated to state his assessment of the likelihood of obtaining LPP information. If subsequently there is anything that transpires which may affect the assessment, which is considered as a material change of circumstances, the officer concerned has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, to notify the authorizing

officer by way of an REP-13 report. If the subject of the interception or covert surveillance has been arrested and the officer concerned considers that the operation should continue, the officer should also submit a section 58 report to the relevant authority assessing the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the interception or covert surveillance. The officer has to provide the details of all relevant circumstances, including as to why the assessment has altered, how it has come about to consider that LPP information has been obtained or may likely be obtained, the details of the likely LPP information that has been obtained, and what steps have been taken or are proposed to take to prevent infringement of the right to communications that are protected by LPP. In order to apprise the Commissioner promptly with timely information on this important matter, the concerned LEA is required to give the Commissioner a similar notification of each of such occurrences.

4.4 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 and if they granted the authorization or allowed it to continue, they would impose additional conditions. These additional conditions obliged 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. These additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice.

The Commissioner's requirements to the LEAs

4.5 There is a set of reporting and preservation requirements. For interception operations, when an LEA encounters a call with LPP

likelihood, heightened LPP likelihood or LPP information, the LEA is required to submit an REP-11 report to the panel judge in respect of this call. This is named a 'Reported LPP Call' irrespective of whether LPP information has indeed been obtained. The reporting officer has to disclose in the report the number of times the Reported LPP Call has been listened or re-listened to, the respective date and time and duration of each such listening or re-listening and the identity of each of the listeners. In addition, the reporting officer should also state whether there are any other calls between the telephone number involved in the Reported LPP Call and the subject's telephone number under interception, irrespective of whether such calls are intercepted before or after the Reported LPP Call. If there are such 'other calls', the reporting officer is also required to state whether they have been listened to and if so, for how long and the identity of the listeners. In order to provide such information, the reporting officer should consult the relevant audit trail report ('ATR') that records accesses to the intercepted calls together with the corresponding call data when preparing the REP-11 report. The LEA should preserve the interception products of all intercepted calls when such products are still available at the time of discovery of the Reported LPP Call, the transcripts, summaries, notes, ATRs, etc. The preserved records should not be destroyed without the prior consent of the Commissioner. Similar arrangements should also be made in respect of cases where journalistic material ('JM') is involved or likely to be involved.

4.6 In the event that LPP information has been inadvertently obtained in covert surveillance operations, paragraph 121 of the COP also provides that investigators monitoring the operations will be required to hand over the recording to a dedicated unit who will screen out any information subject to LPP before passing it to the investigators for their retention. The Commissioner should be notified. On the

basis of the department's notification, the Commissioner may review the information passed on by the dedicated unit to the investigators to check that it does not contain any information subject to LPP that should have been screened out.

LPP reports received in 2014

4.7 In the report period, COP 121 reports were submitted on 31 LPP cases. In 24 of these cases, the LEAs submitted REP-11, REP-13 or section 58 reports to the relevant authorities on the subsequent change of circumstances relating to LPP involvement or likelihood. These 24 cases included:

- (a) two cases of obtaining of LPP information; and
- (b) 22 cases of heightened likelihood of obtaining LPP information:
 - (i) one case where the prescribed authorization was revoked by the panel judge which resulted in inadvertent unauthorized interception of 31 and 36 minutes on concerned facilities. Details of the case have been set out in Report 3 of Chapter 6;
 - (ii) 19 cases where the panel judge allowed the continuation of the prescribed authorization subject to additional conditions imposed to guard against the risk of obtaining LPP information; and
 - (iii) two cases where the concerned LEAs discontinued the operations of their own accord.

For the remaining seven LPP cases, it was assessed at the time of application that the operations sought to be authorized would likely obtain information which might be subject to LPP and the panel judges had imposed additional conditions in the prescribed authorizations.

Two cases of obtaining of LPP information

4.8 In the first case, LPP information was inadvertently obtained in a Type 2 surveillance operation. Please see Report 2 of Chapter 6 for details.

4.9 As for the second case, an LEA applied for interception of a facility used by the subject and the interception operation was assessed to have a likelihood of obtaining LPP information as the subject was on bail in connection with an offence unrelated to the crime under investigation. The panel judge approved the application and imposed additional conditions to guard against the risk of obtaining LPP information. Subsequently, another prescribed authorization was issued by the panel judge for interception of another facility used by the same subject, which was also subject to the same additional conditions.

4.10 As the interception progressed, one day, after listening to a call, the listener formed the view that there was a heightened likelihood of obtaining LPP information. The LEA then submitted REP-11 reports to the panel judge and sought approval to continue with the prescribed authorizations. After considering the REP-11 reports, the panel judge allowed the prescribed authorizations to continue. About ten days later, another listener listened to a call which contained LPP information. He immediately reported the matter to his supervisor. Subsequently, REP-11 reports and discontinuance reports were submitted to the panel judge who duly revoked the prescribed authorizations.

4.11 I conducted a review of the case. On the basis of the information provided by the LEA, I considered that LPP information had been obtained from the interception operations. However, as I had not listened to the interception products, no finding could be made as to the veracity of the contents of the conversations of the relevant calls as stated in the REP-11 reports and whether there were any other communications subject to LPP in the interception products listened to by the LEA officers.

4.12 Subject to these qualifications, no irregularity was found.

***22 cases of heightened LPP likelihood
and seven cases of assessed LPP likelihood***

4.13 In the review of these LPP cases, I together with my staff have checked all the relevant documents and records including the prescribed authorization, the REP-11 report, section 58 report, the determination by the panel judge, the listener's notes, the written summaries, the call data, the ATRs, etc. For cases where the panel judge allowed the prescribed authorizations to continue subject to additional conditions, we have 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 but had not been reported to the panel judge, and whether there was any listening or re-listening to the interception product after the discontinuance or revocation of the prescribed authorizations.

4.14 Pending the legislative amendment as proposed by the Government authorizing the Commissioner and his staff to listen to the

recording of interception products, there was no recording of intercepted calls listened to in my review of LPP cases. Hence, no finding could be made as to the veracity of the contents of the conversations in the Reported LPP Call as stated in the REP-11 reports. Similarly, no finding could be made as to whether the calls preceding the Reported LPP Call 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.

4.15 In one of these cases, at the grant of the prescribed authorization, the interception operation was assessed to have a likelihood of obtaining LPP information because the subject was on bail in connection with an offence unrelated to the crime under investigation. The panel judge imposed additional conditions on the prescribed authorization. Subsequently, a listener listened to a call which indicated heightened likelihood of obtaining LPP information. The LEA submitted an REP-11 report to the panel judge to report the matter. The applicant requested the panel judge to allow the prescribed authorization to continue and proposed further additional conditions. The panel judge allowed the continuation of the prescribed authorization subject to the further additional conditions proposed.

4.16 One day later, the LEA reported to the panel judge that the further additional conditions proposed in the REP-11 report were not an up-to-date version adopted by the LEA in similar LPP cases. The panel judge noted the matter and changed the additional conditions accordingly.

4.17 The LEA submitted a COP 121 report to me reporting this LPP case and proposed that the applicant who used the outdated further additional conditions should be given a verbal advice (disciplinary in

nature) to pay special attention to the handling of LPP cases involving additional conditions and to familiarize himself with the relevant guidelines and procedures. To prevent recurrence, the LEA reminded the relevant officers responsible for interception of the up-to-date version of the additional conditions and proper procedures for the handling of LPP cases. I considered that the mistake made by the LEA officer did not affect the validity of the prescribed authorization and there was no non-compliance in this case. The proposed disciplinary action against the applicant was appropriate.

4.18 In another case, during an inspection visit to an LEA, it was noted that the LEA had submitted an REP-11 report to the panel judge reporting on the (i) confirmation of identity of an unidentified subject; and (ii) heightened LPP likelihood because the subject had been arrested by another LEA two months ago. The LEA was enquired as to why the identity of the subject could not have been confirmed sooner. The LEA reported that attempts had been made but the subject had not been fully identified in his/her full name when the renewal application of the interception operation was submitted. During investigation, it was revealed that some information relevant in identifying the subject had not been included in the affidavit for the renewal application. Also, the REP-11 report was not clear enough as certain information relating to the subject was missing.

4.19 I have reviewed the case. As in all cases, officers engaged in ICSO-related duties should always stay alert, particularly when they handle possible LPP-related matters. When there was relevant information in identifying the subject and a possibility that an arrested person might be involved, the officers concerned should be more vigilant, make a realistic assessment on the risk of obtaining LPP information; and include all relevant information in the application

documents/reports. The LEA recommended that the three officers concerned should each be advised by a senior officer on the need to be more vigilant in handling ICSO-related documents. I had no objection to the LEA's recommendation. The LEA has been advised accordingly.

4.20 To sum up, save for one LPP heightened likelihood case of which the crime investigation is still in progress, I have completed the review of all the other 30 LPP cases in 2014. Nothing untoward was found except the inadvertent unauthorized interception case in Report 3 of Chapter 6 and the two cases mentioned in paragraphs 4.15 to 4.19 above.

Obligations of LEAs regarding JM cases

4.21 The Ordinance requires the LEA applicant to set out, at the time of applying for a prescribed authorization, the likelihood that any information which may be the contents of any JM will be obtained by carrying out the interception or covert surveillance sought to be authorized. The COP provides that the LEAs should notify the Commissioner of cases where information which may be the contents of any JM has been obtained or will likely be obtained through interception or covert surveillance operations.

JM reports received in 2014

4.22 In 2014, I received two reports on heightened likelihood of obtaining JM.

4.23 In the first case, the prescribed authorization was revoked by the panel judge which resulted in an inadvertent unauthorized interception of 11 minutes. Please see Report 4 of Chapter 6 for details.

4.24 For the second case, it was not envisaged that the interception operation would likely involve JM at the time of applying for the authorization. During the operation, a listener listened to a call that indicated heightened likelihood of obtaining JM. An REP-11 report was subsequently submitted to the panel judge to report the heightened likelihood of obtaining JM. The panel judge allowed the continuation of the prescribed authorization subject to additional conditions imposed to guard against the risk of obtaining JM. About ten days later, the interception operation was discontinued because it was expected to be not productive after an overt operation had been conducted. The prescribed authorization was duly revoked by the panel judge upon receipt of a discontinuance report.

4.25 I conducted a review of this case. No irregularity was found. However, as I had not listened to the interception product, no finding could be made as to the veracity of the contents of the call as stated in the REP-11 report and whether apart from this call, there were any other communications which might have contained JM in the interception product listened to by the LEA officers.

CHAPTER 5

APPLICATION FOR EXAMINATION AND NOTIFICATION TO RELEVANT PERSON

Application for examination

5.1 Pursuant to section 43 of the Ordinance, a person may apply in writing to the Commissioner for an examination if he suspects that he is the subject of any interception or covert surveillance activity carried out by officers of the departments. Upon receiving an application, the Commissioner shall carry out an examination to determine:

- (a) whether or not the suspected interception or covert surveillance has taken place; and
- (b) if so, whether or not such interception or covert surveillance has been carried out by an officer of an LEA without the authority of a prescribed authorization,

unless he refuses to carry out an examination by reason of section 45(1). After the examination, if the Commissioner finds the case in the applicant's favour, he shall notify the applicant and initiate the procedure for awarding payment of compensation to him by the Government.

5.2 The circumstances provided in section 45(1) that justify the Commissioner not carrying out an examination are that, in the opinion of the Commissioner, the application is received by him more than one year after the last occasion on which the suspected interception or covert surveillance is alleged to have taken place, that the application is

made anonymously, that the applicant cannot be identified or traced after the use of reasonable efforts, and that the application is frivolous or vexatious or is not made in good faith. Section 45(2) mandates the Commissioner not to carry out an examination or proceed with the examination where, before or in the course of the examination, he is satisfied that any relevant criminal proceedings are pending or are likely to be instituted, until the criminal proceedings have been finally determined or finally disposed of or until they are no longer likely to be instituted. Section 45(3) defines relevant criminal proceedings as those where the interception or covert surveillance alleged in the application for examination is or may be relevant to the determination of any question concerning any evidence which has been or may be adduced in those proceedings.

The procedure

5.3 The procedure involved in an examination can be briefly described below. Enquiries will be made with the particular LEA which, the applicant alleges, has carried out either interception or covert surveillance or a combination of both against him as to whether any such statutory activity has taken place, and if so the reason why. Enquiries will also be made with the PJO as to whether any authorization had been granted by any panel judge for the particular LEA to carry out any such activity, and if so the grounds for so doing. Enquiries with other parties will be pursued if that may help obtain evidence regarding the existence or otherwise of any such alleged statutory activity. The results obtained from the various channels will be compared and counter-checked to ensure correctness. Apart from the information given above, it is considered undesirable to disclose more details about the methods used for the examination of applications or about the examinations undertaken, because that would

possibly divulge information that may prejudice the prevention or detection of crime or the protection of public security.

5.4 The applications for examination will have to satisfy the following requirements, namely:

- (a) there is suspicion of interception of communications or covert surveillance that has been carried out against the applicant; and
- (b) the suspected interception or covert surveillance is suspected to have been carried out by one or more of the officers of the LEAs under the Ordinance, namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption.

5.5 Some applicants alleged that they had been surreptitiously or openly followed or stalked by officers of an LEA. This normally would not satisfy the proper basis for an application for examination because there was no suspicion of any surveillance device being used. There have been cases previously where the applicants said devices were implanted in their bodies that could directly read their minds. These again did not form a proper basis for an application to initiate an examination, the reason being that the devices suspected to be used do not fall within the kind or type of devices under the Ordinance the use of which would constitute a covert surveillance.

5.6 Some applicants described how a particular person, as opposed to an LEA officer, carried out the suspected interception or covert surveillance. This failed to satisfy the second requirement to entertain an application or to engage in an examination.

5.7 The above information concerning the relevant provisions of the Ordinance, application requirements and procedure as well as the consent form on the use of personal data have been provided on the website of the Secretariat. In addition, there are leaflets available to prospective applicants which contain the necessary information for making an application.

Applications received in 2014

5.8 During the report period, there were 15 applications for examination. Three applications were subsequently not pursued by the applicants. Of the remaining 12 applications, one alleged interception, one alleged covert surveillance and 10 claimed a combination of interception and covert surveillance. Since none of the 12 applications came within the ambit of the exceptions covered by section 45(1) or section 45(2), I carried out an examination provided for in section 44 in respect of each case.

5.9 After making all necessary enquiries, I found all these 12 cases not in the applicants' favour and accordingly notified each of the applicants in writing of my findings, with five of such notices issued during the report period and seven thereafter. By virtue of section 46(4) of the Ordinance, the Commissioner is not allowed to provide reasons for his determination or to inform the applicants whether or not the alleged or suspected interception or covert surveillance had indeed taken place.

Notification to relevant person

5.10 Section 48 obliges the Commissioner to give notice to the relevant person whenever, during the performance of the functions

under the Ordinance, the Commissioner discovers any interception or covert surveillance carried out by an officer of any one of the four LEAs covered by the Ordinance without a prescribed authorization. However, section 48(3) provides that the Commissioner shall only give a notice when he considers that doing so would not be prejudicial to the prevention or detection of crime or the protection of public security. Section 48(6) also exempts the Commissioner from his obligation if the relevant person cannot, after the use of reasonable efforts, be identified or traced, or where he considers that the intrusiveness of the interception or covert surveillance on the relevant person is negligible.

5.11 Consideration of the application of section 48 may arise under a number of situations. For example, the interception of telephone communications 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 an unauthorized interception. It gives rise to the necessity of considering whether the Commissioner should, as obliged by section 48 of the Ordinance, give a notice to the relevant person of the wrong interception and indicate in the notice, among others, the duration of the unauthorized interception. He will be invited to make written submissions in relation to the assessment of reasonable compensation to be paid to him by the Government.

5.12 There were cases where interception continued after revocation of the prescribed authorizations. Details of these cases have been included in Chapter 6. Technically speaking, such unauthorized operations resulting from the time gap between the revocation of a prescribed authorization and the actual discontinuance of the operation by the LEA are unavoidable. I considered that, pursuant to sections 48(3) and (6) of the Ordinance, no notification

should be given to the relevant persons affected under such circumstances.

5.13 During the report period, no notice pursuant to section 48 of the Ordinance was issued.

Prohibition against disclosure of reasons for determination

5.14 Section 46(4) expressly provides that in relation to an application for examination, the Commissioner is not allowed to provide reasons for his determination, or give details of any interception or covert surveillance concerned, or in a case where he has not found in the applicant's favour, indicate whether or not the suspected interception or covert surveillance has taken place.

5.15 During the year, I have observed that there were occasions that the applicants felt that their purpose of applying for examination had not been achieved as I could not disclose the reasons for my determinations. It is hoped that the public will understand that this statutory prohibition is designed to forbid the disclosure of any information which might prejudice the prevention or detection of crime or the protection of public security, preventing any advantage from being obtained by 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 the Commissioner carries out his duties and functions under the Ordinance with the utmost good faith and sincerity.

CHAPTER 6

REPORTS OF NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS

Reporting of non-compliance, irregularities and incidents

6.1 By virtue of section 54, where the head of any department 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 is obliged to 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 the ICSO, the COP, or any prescribed authorization or device retrieval warrant concerned.

6.2 The section 54 obligation only applies where the head of the LEA considers that there may have been a case of non-compliance. The LEAs are also required to report cases of irregularities or even simply incidents to the Commissioner for his consideration and scrutiny so that any possible non-compliance will not escape his attention. Such reports are *not* made under section 54 of the Ordinance.

6.3 For cases of non-compliance, irregularity or incident discovered upon examination of the documents and information provided during inspection visits, the LEA concerned is required to investigate the matter and submit a report to the Commissioner.

6.4 When reporting, normally the LEAs would adopt a two-step approach. They would first submit an initial report upon discovery of

the event, to be followed by a full investigation report after an in-depth investigation into the case.

Cases occurring in 2014

6.5 In 2014, the Commissioner received from LEAs reports of non-compliance/irregularities/incidents relating to 12 ICSO cases. Except one case which was reported under section 54 of the Ordinance, the other 11 were submitted *not* under section 54 of the Ordinance. They are dealt with in the ensuing paragraphs.

Report 1: Interception of a wrong facility

6.6 An LEA reported on an incident where two facilities which had been intercepted under a prescribed authorization were not used by the same person. Upon my request, the LEA submitted an investigation report under section 54 of the ICSO in June 2014 and provided additional information/clarifications in three further reports.

Facts of the case

6.7 The LEA submitted to the panel judge an interception application on two facilities (Facility 1 and Facility 2) stating that these facilities were solely used by the subject 'A'. According to the affirmation in support of the application ('affirmation'), the subject of the interception was 'A' (an alias) and was believed to be 'B' ('Statement 1'). Before submission of the application, two physical surveillance operations had been conducted on (i) a dinner ('Dinner') and (ii) a meeting ('Meeting'), which 'A' was expected to attend. It transpired that 'B' was not at the Dinner and the Meeting. Instead, another Chinese male attended on both occasions. Despite this, it was stated in the affirmation that for the Dinner, the related subjects and a

Chinese male (probably 'A') dined at a restaurant ('Statement 2'). Four days after commencement of the interception, the listener on duty suspected that the two facilities were not used by the same person. The case was reviewed and later on the same day, the interception operation on Facility 1 was discontinued.

LEA's investigation and findings

6.8 The LEA's investigation revealed that the Chinese male who attended the Dinner and the Meeting was the subject 'A' and Facility 1 was used by 'B' and he was not the intended subject 'A'. The LEA considered that the incident originated from the wrong assessment of an officer ('Officer') on the available intelligence in the investigation.

6.9 Both the officer-in-charge of the operations ('OC'), who was responsible for drafting the affirmation, and his supervisor ('Supervisor'), gave explanations regarding the two Statements in the affirmation including the possibility of 'B' sending someone to attend the Dinner on his behalf. They accepted that given the uncertainty over the identity of 'A', they should have put on hold the application pending further verification. The applicant of the interception application ('Applicant') and the Assistant Head of Department ('Assistant HoD') also explained that had the affirmation stated the fact that 'B' was not at the Dinner, it would likely have caused them to follow up the matter by making further efforts to verify/clarify the identity of 'B'.

6.10 The LEA's findings were:

- (a) the verification process of Facility 1 was ineffectual;
- (b) Statement 2 in the affirmation could not be reconciled with

the explanations given by the OC and the Supervisor that they believed 'A' to be 'B' at the time; and both officers should have put in abeyance the application pending further verification;

- (c) the affirmation fell short of the standard expected by the LEA and that the OC's failure to take a prudent approach to seek further clarification on the identity of the subject was "totally unacceptable"; and
- (d) despite the unsatisfactory performance of both the OC and the Supervisor and that they should be held accountable for the cause of the non-compliance, there was no evidence revealed to show that they had any intention to mislead the panel judge by providing factually incorrect information in the affirmation.

6.11 The LEA recommended that:

- (a) a written warning be given to the Officer for her lack of vigilance in analyzing the intelligence obtained;
- (b) an advice be given to the Officer's supervisor for his ineffective action taken in the verification process;
- (c) a verbal warning be given to the OC for his inadequate vigilance in failing to respond appropriately to the available intelligence; and
- (d) a verbal warning be given to the Supervisor for his lack of adequate vigilance to take appropriate action.

The LEA held the view that the Applicant and the Assistant HoD should not be held accountable for the cause of the incident.

Review by the Commissioner

6.12 In the review, I examined the verification procedures adopted by the LEA in confirming the user of Facility 1, the role and responsibilities of each officer involved in the verification and application process, the statements made by the officers concerned and other relevant documents and preserved materials.

6.13 Notwithstanding the purported issue of a prescribed authorization, I determined under section 48(5) of the ICSO that the interception of Facility 1 had been carried out without the authority of a prescribed authorization and this was a case of non-compliance. The period of the unauthorized interception lasted about four days.

6.14 This was a serious case. Apart from the unauthorized interception, the affirmation contained misleading information which would make one mistakenly believe that 'B' attended the Dinner but this was factually incorrect. There was also no mention of the physical surveillance operation on the Meeting in the affirmation. The explanations given by the OC and the Supervisor regarding the statements in the affirmation were unsupported by any evidence.

6.15 The LEA officers did not provide all information known to them to be relevant to the determination of the application in the affirmation, including the important fact that 'B' was not at both the Dinner and the Meeting. I considered it a non-compliance with the relevant requirements under paragraph 45 of the COP which states that *"all information known to the applicant to be relevant to the determination of an application should be provided in the affirmation for*

the relevant authority to make a balanced decision; ... and in no case should they (i.e. LEA officers) ... provide information which is misleading in a material particular (i.e. of a kind which might affect the decision)".

6.16 Based on the information provided to me by the LEA, I did not accept its finding that the officers had no intention to mislead the panel judge by providing factually incorrect information. Pursuant to section 53(1) of ICSO, I required the LEA to conduct a further investigation to ascertain clearly whether the non-compliance was the consequence of inadvertent/careless mistakes or otherwise. I also requested the LEA to review its proposed actions to be taken against all officers concerned. Of the verbal warning suggested to be given to the OC and the Supervisor, I considered it too lenient as it could not reflect the gravity of the serious consequence of this non-compliance case. The LEA also needed to re-examine the conclusion that the Applicant and the Assistant HoD should not be held accountable for the cause of the incident.

6.17 In the review of this case, I had expressed my concern to the LEA as to how the investigation had been conducted on this incident. While the co-operation of the LEA in furnishing the necessary information and materials I requested was appreciated, its investigation should have been conducted in a more thorough and critical manner. For example, the investigation did not cover the reason why the Meeting and its result were not included in the affirmation; and the assessment of the serious consequence of the accuracy of statements in the affirmation, which had not been examined during the initial stage of the investigation.

6.18 The LEA should remind its officers of the importance of taking a prudent approach in handling ICSO duties because any failure to do so could have serious consequences and lead to unauthorized

interception as happened in the instant case. The LEA had recommended improvement measures in the verification procedures, handling of intelligence and listening duties. Nonetheless, I considered that it should critically review and further improve these aspects of work particularly on exchange of information among officers at different levels.

6.19 In May 2015, the LEA reported its further findings. My review on these has not been completed at the time of compiling this annual report.

Report 2: Failure to detect the inadvertent obtaining of LPP information

6.20 An LEA submitted a COP 121 report to me on a case of inadvertent obtaining of LPP information in a Type 2 surveillance operation which involved a participating agent.

6.21 At the grant of the prescribed authorization, the surveillance operation was not assessed to have a likelihood of obtaining LPP information. Subsequent to the commencement of the operation, the LEA formed the view that there was a heightened likelihood of obtaining LPP information through a monitored meeting. An REP-13 report and a discontinuance report were subsequently submitted to the authorizing officer who duly revoked the prescribed authorization.

6.22 The surveillance operation was carried out on a meeting between the participating agent and the subject of the operation. During the surveillance operation, the investigator in charge formed the view that there was a heightened likelihood of obtaining LPP information. The operation was subsequently discontinued and in

compliance with provisions laid down in paragraph 121 of the COP, the recording of the operation was handed over to a dedicated unit ('the unit') of the LEA which was responsible for screening out any information subject to LPP before passing it back to the investigators. During the screening, the unit found that apart from the information indicating heightened LPP likelihood as reported, LPP information had been inadvertently obtained in the surveillance operation as revealed in the earlier part of the recording. An edited copy of the audio recording in which the conversation that contained LPP information ('the LPP conversation') had been screened out was passed to the relevant investigators. The LEA then conducted an investigation into the incident in order to ascertain the reason as to why the inadvertent obtaining of LPP information in the earlier part of the recording was not detected by the investigators monitoring the meeting.

6.23 The investigation report gave a detailed account of the whole operation including the time when the LPP conversation was conducted. The report revealed that the surveillance operation had been affected by unexpected circumstances and technical issues. Due to these factors, certain part of the discussion between the participating agent and the subject during the meeting, including the LPP conversation which lasted for 51 seconds, was inaudible to the investigators monitoring the meeting. Nevertheless, the conversation was recorded by a surveillance device deployed in the operation. The investigator in charge was able to pick up the contents of the discussion in a latter part of the meeting. At a time when he heard something which made him form the view that there was a heightened LPP likelihood, he immediately took the required actions to report to the authorizing officer. The LEA concluded that the officers concerned had taken appropriate steps in conducting the surveillance operation in compliance with the terms and conditions of the prescribed

authorization and there was no non-compliance in the incident.

6.24 Having reviewed the case, I noted that the operation had been affected by unexpected circumstances and technical issues. I agreed to the findings of the LEA that LPP information had been inadvertently obtained and the LPP conversation was inaudible to the officers concerned during the surveillance operation. There was no evidence of improper conduct on the part of the officers concerned and there was no non-compliance in the incident. However, as I had not examined the contents of the surveillance product, no finding could be made as to:

- (a) the veracity of the record of the conversations of the relevant meeting as stated in the report on screening of the surveillance product prepared by the LEA; and
- (b) whether there were any other communications subject to LPP in the surveillance product listened to by the LEA officers.

6.25 Subject to these qualifications, no irregularity was found save for the incident reported.

Report 3: Unauthorized interception of 31 and 36 minutes after revocation of prescribed authorization by the panel judge

6.26 An LEA reported to me an incident where interception continued for 31 and 36 minutes on concerned facilities after a panel judge revoked the prescribed authorization upon considering the information provided by the LEA.

6.27 At the grant of the prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. In the course of the operation, the LEA considered that there was a heightened likelihood of obtaining LPP information through continued interception as a result of the subject's arrest by another LEA. The LEA then submitted a section 58 report to the panel judge, requesting to continue with the interception. On the basis of the information provided by the LEA, the panel judge considered that the conditions for the continuance of the prescribed authorization were not met and revoked the prescribed authorization. The facilities were disconnected 31 and 36 minutes after revocation of the prescribed authorization.

6.28 I have asked the LEA to explain the time taken to disconnect the facilities after revocation of the prescribed authorization on this occasion as it was comparatively longer than similar cases. The LEA explained that a number of cases were submitted together to the panel judge for consideration on the same occasion. After the LEA was notified of the panel judge's decision on this batch of cases, the time taken to disconnect the concerned facilities was within a reasonable range. I considered the explanation acceptable.

6.29 In the review of the case, I together with my staff have checked all the relevant documents and records including the prescribed authorization, the section 58 report, the determination by the panel judge, the listener's notes, the written summaries, the call data, the ATR, etc. I made the following findings:

- (a) the interception after revocation of the prescribed authorization and before the disconnection of the facilities was conducted without the authority of a prescribed authorization, amounting to non-compliance with the

requirement of the ICSO. The unauthorized interception lasted 31 and 36 minutes on concerned facilities; and

- (b) four calls were intercepted during the period of unauthorized interception but they were not listened to by the LEA.

6.30 As I had not listened to the interception product, no finding could be made as to whether there were any communications subject to LPP in the interception product listened to by the LEA officers.

Report 4: Unauthorized interception of 11 minutes after revocation of prescribed authorization by the panel judge

6.31 An LEA reported to me an incident where interception continued for 11 minutes after a panel judge revoked the prescribed authorization upon considering the information provided by the LEA.

6.32 At the time of the application for authorization, the interception operation was assessed to have a likelihood of obtaining LPP information. However, it was not envisaged that the interception operation would likely involve JM. When granting the prescribed authorization, the panel judge imposed a set of additional conditions to guard against the risk of obtaining LPP information.

6.33 On one occasion, a listener listened to part of an intercepted call and formed the view that there was a heightened likelihood of obtaining JM through continued interception. She immediately reported the matter to her supervisor. The LEA then submitted an REP-11 report to the panel judge, requesting to continue with the prescribed authorization. On the basis of the information provided by the LEA, the panel judge considered that the conditions for

the continuance of the prescribed authorization were not met and revoked the prescribed authorization. The facility was disconnected 11 minutes after revocation of the prescribed authorization.

6.34 In the review of the case, I together with my staff have 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 ATR, etc. 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, amounting to non-compliance with the requirement of the ICSO. The unauthorized interception lasted 11 minutes; and
- (b) no call was intercepted during the period of unauthorized interception.

6.35 As I had not listened to the interception product, no finding could be made as to the veracity of the record of the conversations of the relevant call as stated in the REP-11 report and whether there were any communications subject to LPP/JM in the interception product listened to by the LEA officers.

6.36 Technically speaking, the unauthorized operations, as set out in Report 3 and Report 4 above, resulting from the time gap between the revocation of a prescribed authorization and the actual discontinuance of an operation under similar circumstances are unavoidable. In this regard, a proposal has been made to amend the ICSO to the effect that if a prescribed authorization has been revoked

by the relevant authority in similar cases, the LEA shall take immediate steps to discontinue the operation in question as soon as reasonably practicable. Any interception or surveillance products obtained after the revocation but before the actual discontinuance of the operation would be deemed to have been obtained pursuant to a prescribed authorization. The COP would also be updated to stipulate a timeframe within which discontinuation should normally be effected. Any LEA which fails to discontinue the operation within the stipulated benchmark timeframe would be required to make a report to the Commissioner to explain the reasons for the delay.

Report 5: Incorrect time of return of surveillance devices recorded in the device register

6.37 An LEA reported in November 2014 a mistake made in the device register regarding the time of return of surveillance devices issued for a Type 2 surveillance operation.

6.38 The background to this incident was that in November 2014, a prescribed authorization was issued upon oral application for a Type 2 surveillance operation and surveillance devices were issued for the operation. In the small hours of the third day of the operation, several suspects were arrested and a decision was made to discontinue the surveillance operation as the purpose of the surveillance operation was achieved. When the devices were taken back to the LEA's premises at 0240 hours, the device store was closed. In accordance with the established procedures of the LEA, the devices were locked in a safe place before the device store was open. Immediately after the device store opened, all the devices were returned to the device store at 0830 hours. The device storekeeper made a post-entry record of the return of the devices and recorded "0240 hours" in the device register as the time of return. The LEA discovered the abnormality and

reported it to me.

6.39 The investigation by the LEA concluded that the device return time should be 0830 hours instead of 0240 hours and the mistake was due to the device storekeeper's misunderstanding of the meaning of the time of return, which should be the time when the devices were actually returned to the device store rather than the time when they were brought back to the LEA's premises when the store was closed. The officer had just taken up the role of the device storekeeper a few months before and this was the first time for him to handle the issue and return of surveillance devices. The LEA proposed to issue a verbal advice (disciplinary in nature) to the device storekeeper to remind him of the need to familiarize himself with the control and record of surveillance devices and the need to be vigilant in the making of records in the device registers.

6.40 Having reviewed the case, I considered that the proposed disciplinary action against the device storekeeper was appropriate. As regards the storage of devices when they could not be returned during the close of device stores, the LEA's existing procedures did not enable me to verify whether the devices were safely and properly kept in the LEA's premises. In response to my concern, the LEA revised the procedures. I considered the revised procedures in order.

Report 6: An incident report relating to section 61 of the ICSO

6.41 In late 2014, an LEA submitted to me an incident report relating to section 61 of the ICSO. At the time of writing this annual report, the court proceedings that were relevant to the incident were still ongoing. To avoid the risk of prejudicing the administration of justice, I consider it more appropriate to report on the review of the

case in the next annual report after conclusion of the relevant court proceedings.

Other reports

6.42 Of the other six reports submitted by the LEAs, five were incidents of technical problems of the computerised systems; and one case which related to a clerical mistake made in the application document. These cases have been reviewed and nothing untoward was found. For those relating to technical problems of computerised systems, appropriate follow up actions have been taken by the LEAs to fix the problems.

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CHAPTER 7

RECOMMENDATIONS TO HEADS OF LAW ENFORCEMENT AGENCIES

7.1 Section 52(1) provides that if the Commissioner considers that any arrangements made by any department should be changed to better carry out the objects of the Ordinance, the Commissioner may make such recommendations to the head of the department as he thinks fit.

7.2 Through discussions with the LEAs during the 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. The recommendations made during the report period are set out below:

(a) Information included in a discontinuance report

In preparing discontinuance reports for interception, departments should aim to give the panel judge a full picture of all the interception operations on the same subject.

(b) Written guidelines on the arrangements for safeguards against protected products

An LEA should put in place written guidelines on the existing arrangements which ensured compliance with the requirements for safeguards against protected products.

(c) *Automatic notification system for the arrest of the subject*

The interception units should, as soon as reasonably practicable, be notified of the arrest of the subject of an interception. To this end, there was a need to improve the current manual checking system and an LEA should develop an automatic notification system for the arrest of subjects.

(d) *Storage of surveillance devices pending disposal*

Surveillance devices should be suitably labelled and properly stored in a secured place pending disposal.

(e) *Evidence of destruction of surveillance devices*

Evidence should be provided for the Commissioner to verify whether a surveillance device had been destroyed properly.

(f) *Uniform practices for preparing Review Form for review by the Reviewing Officer of the LEA*

Uniform practices should be adopted within an LEA for preparing the Review Form.

(g) *Information included in the Review Form for review by the Reviewing Officer of the LEA*

All relevant matters, including late return of surveillance devices to device stores and suspension of monitoring of surveillance operations, should be mentioned and explained in the Review Form for the attention of the Reviewing Officer so that he could assess whether there were any irregularities or areas for improvement.

(h) *Timely revocation of a prescribed authorization*

An LEA should put in place a new arrangement to prevent late revocation of a prescribed authorization arising from the absence of an authorizing officer.

(i) *Comprehensive information in application for Type 2 surveillance*

In applying for Type 2 authorizations, applicants should provide sufficient and comprehensive information for consideration of the authorizing officer.

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CHAPTER 8

STATUTORY TABLES

8.1 In accordance with section 49(2), this chapter provides separate statistical information in relation to the statutory activities in the report period. The information is set out in table form and comprises the following tables:

- (a) Table 1(a) – interception – number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];
- (b) Table 1(b) – surveillance – number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];
- (c) Table 2(a) – interception – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];
- (d) Table 2(b) – surveillance – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];
- (e) Table 3(a) – interception – number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)];

- (f) Table 3(b) – surveillance – number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)];
- (g) Table 4 – interception and surveillance – number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) and (ii)];
- (h) Table 5 – summary of reviews conducted by the Commissioner under section 41 [section 49(2)(d)(i)];
- (i) Table 6 – number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)];
- (j) Table 7 – number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)];
- (k) Table 8 – respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)];
- (l) Table 9 – number of cases in which a notice has been given by the Commissioner under section 48 [section 49(2)(d)(v)];
- (m) Table 10 – broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)];

- (n) Table 11 – number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]; and
- (o) Table 12 – number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such action [section 49(2)(d)(viii)].

Table 1(a)

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

		Judge's Authorization	Emergency Authorization
(i)	Number of authorizations issued	699	0
	Average duration	29 days	-
(ii)	Number of authorizations renewed	819	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	47	Not applicable
(vi)	Number of applications for the issue of authorizations refused	4	0
(vii)	Number of applications for the renewal of authorizations refused	0	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	Not applicable

Table 1(b)

Surveillance – Number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]

		Judge's Authorization	Executive Authorization	Emergency Authorization
(i)	Number of authorizations issued	21	5	0
	Average duration	12 days	11 days	-
(ii)	Number of authorizations renewed	15	0	Not applicable
	Average duration of renewals	21 days	-	-
(iii)	Number of authorizations issued as a result of an oral application	0	2	0
	Average duration	-	3 days	-
(iv)	Number of authorizations renewed as a result of an oral application	0	0	Not applicable
	Average duration of renewals	-	-	-
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	0	0	Not applicable
(vi)	Number of applications for the issue of authorizations refused	1	0	0
(vii)	Number of applications for the renewal of authorizations refused	0	0	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	0	Not applicable

Table 2(a)

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

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Manufacture of dangerous drugs	Cap. 134	Section 6, 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
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
Burglary	Cap. 210	Section 11, Theft Ordinance
Conspiracy to inflict grievous bodily harm/shooting with intent/wounding with intent	Cap. 212	Section 17, Offences Against the Person Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance
Perverting the course of public justice	—	Common Law

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)]**

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs 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
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
Misconduct in public office	—	Common Law
Perverting the course of public justice	—	Common Law

Table 3(a)

Interception – Number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]

	Number of persons arrested ^{Note 1}		
	Subject	Non-subject	Total
Interception	99	107	206

Table 3(b)

Surveillance – Number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]

	Number of persons arrested ^{Note 2}		
	Subject	Non-subject	Total
Surveillance	19	19	38

Note 1 Of the 206 persons arrested, 22 were attributable to both interception and surveillance operations that had been carried out.

Note 2 Of the 38 persons arrested, 22 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 222.

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) & (ii)]

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

Table 5

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

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	<p>Interception & Surveillance</p> <p>LEAs are required to submit weekly reports to the Secretariat providing relevant information on authorizations obtained, applications refused and operations discontinued in the preceding week, for checking and review purposes. During the report period, a total of 208 weekly reports were submitted by the LEAs.</p>
(b) Periodical inspection visits to LEAs	27	<p>Interception & Surveillance</p> <p>In addition to the checking of weekly reports, the Commissioner had paid 27 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 881 applications and 369 related documents/matters had been checked.</p> <p>(See paragraphs 2.23, 3.22, 3.23 and 3.29 of this report.)</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
(c) LPP cases reviewed by the Commissioner	30	<p>Surveillance</p> <p>Interception</p>	<p><u>First case of obtaining of LPP information</u> This is Report 2 of Chapter 6. LPP information was inadvertently obtained in the operation.</p> <p>(See paragraph 4.8 of Chapter 4.)</p> <p><u>Second case of obtaining of LPP information</u> An LEA applied for interception of a facility used by the subject and the interception operation was assessed to have a likelihood of obtaining LPP information. The panel judge approved the application and imposed additional conditions to guard against the risk of obtaining LPP information. Subsequently, another prescribed authorization was issued by the panel judge for interception of another facility used by the same subject, which was also subject to the same additional conditions.</p> <p>One day, after listening to a call, the listener formed the view that there was a heightened likelihood of obtaining LPP information. The LEA then submitted REP-11 reports to the panel judge and sought approval to continue with the prescribed authorizations. After considering the REP-11 reports, the panel judge allowed the prescribed authorizations to continue. About ten days later, another listener listened to a call which contained LPP</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception	<p>information. He immediately reported the matter to his supervisor. Subsequently, REP-11 reports and discontinuance reports were submitted to the panel judge who duly revoked the prescribed authorizations.</p> <p>On the basis of the information provided by the LEA, the Commissioner considered that LPP information had been obtained from the interception operations. As the Commissioner had not listened to the interception products, no finding could be made as to the veracity of the contents of the conversations of the relevant calls as stated in the REP-11 reports and whether there were any other communications subject to LPP in the interception products listened to by the LEA officers. Subject to these qualifications, no irregularity was found.</p> <p>(See paragraphs 4.9 – 4.12 of Chapter 4.)</p> <p><u>First case of heightened LPP likelihood</u></p> <p>At the grant of the prescribed authorization, the interception operation was assessed to have a likelihood of obtaining LPP information. The panel judge imposed additional conditions on the prescribed authorization. Subsequently, a listener listened to a call which indicated heightened likelihood of obtaining LPP information. The</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>LEA submitted an REP-11 report to the panel judge to report the matter. The applicant requested the panel judge to allow the prescribed authorization to continue and proposed further additional conditions. The panel judge allowed the continuation of the prescribed authorization subject to the further additional conditions proposed. One day later, the LEA reported to the panel judge that the further additional conditions proposed in the REP-11 report were not an up-to-date version adopted by the LEA in similar LPP cases. The panel judge noted the matter and changed the additional conditions accordingly.</p> <p>The LEA proposed that the applicant who used the outdated further additional conditions should be given a verbal advice (disciplinary in nature) to pay special attention to the handling of LPP cases involving additional conditions and to familiarize himself with the relevant guidelines and procedures. To prevent recurrence, the LEA reminded the relevant officers responsible for interception of the up-to-date version of the additional conditions and proper procedures for the handling of LPP cases. The Commissioner considered that the mistake made by the LEA officer did not affect the validity of the prescribed authorization and there was no non-compliance in</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception	<p>this case. The proposed disciplinary action against the applicant was appropriate.</p> <p>(See paragraphs 4.15 – 4.17 of Chapter 4.)</p> <p><u>Second case of heightened LPP likelihood</u></p> <p>An LEA submitted an REP-11 report to the panel judge reporting on the (i) confirmation of identity of an unidentified subject; and (ii) heightened LPP likelihood because the subject had been arrested by another LEA two months ago. Upon enquiry, the LEA reported that the subject had not been fully identified in his/her full name when the renewal application of the interception operation was submitted. During investigation, it was revealed that some information relevant in identifying the subject had not been included in the affidavit for the renewal application. Also, the REP-11 report was not clear enough as certain information relating to the subject was missing.</p> <p>The Commissioner considered that officers engaged in ICSO-related duties should always stay alert, particularly when they handle possible LPP-related matters. When there was relevant information in identifying the subject and a possibility that an arrested person might be involved, the officers concerned should be more vigilant, make a realistic assessment on the risk of</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>indicated heightened likelihood of obtaining JM. An REP-11 report was subsequently submitted to the panel judge to report the heightened likelihood of obtaining JM. The panel judge allowed the continuation of the prescribed authorization subject to additional conditions imposed to guard against the risk of obtaining JM. About ten days later, the interception operation was discontinued because it was expected to be not productive after an overt operation had been conducted. The prescribed authorization was duly revoked by the panel judge upon receipt of a discontinuance report.</p> <p>The Commissioner conducted a review of the case and found no irregularity. As the Commissioner had not listened to the interception product, no finding could be made as to the veracity of the contents of the call as stated in the REP-11 report and whether apart from this call, there were any other communications which might have contained JM in the interception product listened to by the LEA officers.</p> <p>(See paragraphs 4.24 and 4.25 of Chapter 4.)</p>
(e) Incidents/ irregularities reviewed by the Commissioner	11	Surveillance	<p><u>Report 2</u></p> <p>At the grant of the prescribed authorization for Type 2 surveillance, the operation was not assessed to have a likelihood of obtaining LPP information. Subsequent to</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>the commencement of the operation, the LEA formed the view that there was a heightened likelihood of obtaining LPP information through a monitored meeting. An REP-13 report and a discontinuance report were subsequently submitted to the authorizing officer who duly revoked the prescribed authorization.</p> <p>The surveillance operation was carried out on a meeting between a participating agent and the subject. During the surveillance operation, the investigator in charge formed the view that there was a heightened likelihood of obtaining LPP information. The operation was subsequently discontinued and the recording of the operation was handed over to a dedicated unit ('the unit') of the LEA which was responsible for screening out any information subject to LPP before passing it back to the investigators. During the screening, the unit found that apart from the information indicating heightened LPP likelihood as reported, LPP information had been inadvertently obtained in the surveillance operation as revealed in the earlier part of the recording. The LEA then conducted an investigation into the incident in order to ascertain the reason as to why the inadvertent obtaining of LPP information in the earlier part of the recording was not detected</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>by the investigators monitoring the meeting.</p> <p>The investigation report revealed that the surveillance operation had been affected by unexpected circumstances and technical issues. Due to these factors, the conversation that contained LPP information ('the LPP conversation') was inaudible to the investigators monitoring the meeting. Nevertheless, the conversation was recorded by a surveillance device deployed in the operation. The investigator in charge was able to pick up the contents of the discussion in a latter part of the meeting. At a time when he heard something which made him form the view that there was a heightened LPP likelihood, he immediately took the required actions to report to the authorizing officer. The LEA concluded that the officers concerned had taken appropriate steps in conducting the surveillance operation in compliance with the terms and conditions of the prescribed authorization and there was no non-compliance in the incident.</p> <p>Having reviewed the case, the Commissioner noted that the operation had been affected by unexpected circumstances and technical issues. The Commissioner agreed to the findings of the LEA that LPP information had been inadvertently obtained and the LPP conversation was inaudible</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception	<p>to the officers concerned during the surveillance operation. There was no evidence of improper conduct on the part of the officers concerned and there was no non-compliance in the incident. However, as the Commissioner had not examined the contents of the surveillance product, no finding could be made as to:</p> <p>(a) the veracity of the record of the conversations of the relevant meeting as stated in the report on screening of the surveillance product prepared by the LEA; and</p> <p>(b) whether there were any other communications subject to LPP in the surveillance product listened to by the LEA officers.</p> <p>Subject to these qualifications, no irregularity was found save for the incident reported.</p> <p>(See paragraphs 6.20 – 6.25 of Chapter 6.)</p> <p><u>Report 3</u></p> <p>At the grant of the prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. In the course of the operation, the LEA considered that there was a heightened likelihood of obtaining LPP information through continued interception as a result of the subject's arrest by another LEA. The</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>LEA then submitted a section 58 report to the panel judge, requesting to continue with the interception. The panel judge considered that the conditions for the continuance of the prescribed authorization were not met and revoked the prescribed authorization. The facilities were disconnected 31 and 36 minutes after revocation of the prescribed authorization.</p> <p>The Commissioner has asked the LEA to explain the time taken to disconnect the facilities after revocation as it was comparatively longer than similar cases. The LEA explained that a number of cases were submitted together to the panel judge for consideration on the same occasion. After the LEA was notified of the panel judge's decision on this batch of cases, the time taken to disconnect the concerned facilities was within a reasonable range. The Commissioner considered the explanation acceptable.</p> <p>Having conducted a review, the Commissioner made the following findings:</p> <p>(a) the interception after revocation of the prescribed authorization and before the disconnection of the facilities was conducted without the authority of a prescribed authorization, amounting to non-compliance with the requirement of the</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception	<p>ICSO. The unauthorized interception lasted 31 and 36 minutes on concerned facilities; and</p> <p>(b) four calls were intercepted during the period of unauthorized interception but they were not listened to by the LEA.</p> <p>As the Commissioner had not listened to the interception product, no finding could be made as to whether there were any communications subject to LPP in the interception product listened to by the LEA officers.</p> <p>(See paragraphs 6.26 – 6.30 of Chapter 6.)</p> <p><u>Report 4</u></p> <p>At the time of the application for authorization, the interception operation was assessed to have a likelihood of obtaining LPP information. However, it was not envisaged that the interception operation would likely involve JM.</p> <p>On one occasion, a listener listened to part of an intercepted call and formed the view that there was a heightened likelihood of obtaining JM through continued interception. The LEA then submitted an REP-11 report to the panel judge, requesting to continue with the prescribed authorization. The panel judge considered that the conditions for the continuance of the prescribed authorization were</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>not met and revoked the prescribed authorization. The facility was disconnected 11 minutes after revocation of the prescribed authorization.</p> <p>Having conducted a review, the Commissioner made the following findings:</p> <p>(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, amounting to non-compliance with the requirement of the ICSO. The unauthorized interception lasted 11 minutes; and</p> <p>(b) no call was intercepted during the period of unauthorized interception.</p> <p>As the Commissioner had not listened to the interception product, no finding could be made as to the veracity of the record of the conversations of the relevant call as stated in the REP-11 report and whether there were any communications subject to LPP/JM in the interception product listened to by the LEA officers.</p> <p>The unauthorized operations resulting from the time gap between the revocation of a prescribed authorization and the actual discontinuance of an operation under similar circumstances are unavoidable.</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Surveillance	<p>In this regard, a proposal has been made to amend the ICSO to the effect that if a prescribed authorization has been revoked by the relevant authority in similar cases, the LEA shall take immediate steps to discontinue the operation in question as soon as reasonably practicable.</p> <p>(See paragraphs 6.31 – 6.36 of Chapter 6.)</p> <p><u>Report 5</u> A Type 2 surveillance operation was discontinued in the small hours. When the surveillance devices issued for the operation were taken back to the LEA's premises at 0240 hours of the same day, the device store was closed. In accordance with the established procedures of the LEA, the devices were locked in a safe place before the device store was open. Immediately after the device store opened, all the devices were returned to the device store at 0830 hours. The device storekeeper made a post-entry record of the return of the devices and recorded '0240 hours' in the device register as the time of return. The LEA discovered the abnormality and reported it to the Commissioner.</p> <p>The investigation by the LEA concluded that the device return time should be 0830 hours instead of 0240 hours and the mistake was due to the device storekeeper's misunderstanding of the meaning of the time of return, which should be the time</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception	<p>when the devices were actually returned to the device store rather than the time when they were brought back to the LEA's premises when the store was closed. The LEA proposed to issue a verbal advice (disciplinary in nature) to the device storekeeper to remind him of the need to familiarize himself with the control and record of surveillance devices and the need to be vigilant in the making of records in the device registers.</p> <p>Having reviewed the case, the Commissioner considered that the proposed disciplinary action against the device storekeeper was appropriate. As regards the storage of devices when they could not be returned during the close of device stores, the LEA's existing procedures did not enable the Commissioner to verify whether the devices were safely and properly kept in the LEA's premises. In response to the Commissioner's concern, the LEA revised the procedures. The Commissioner considered the revised procedures in order.</p> <p>(See paragraphs 6.37 – 6.40 of Chapter 6.)</p> <p><u>Report 6</u> In late 2014, an LEA submitted an incident report relating to section 61 of the ICSO. As the relevant court proceedings were still ongoing, the Commissioner considered it more appropriate to report on</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception & Surveillance (6 reviews)	<p>the review of the case in the next annual report after conclusion of the said proceedings.</p> <p>(See paragraph 6.41 of Chapter 6.)</p> <p><u>Other reports</u> The Commissioner has reviewed all these cases and found nothing untoward. For those relating to technical problems, appropriate follow up actions have been taken by the LEAs to fix the problems.</p> <p>(See paragraph 6.42 of Chapter 6.)</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews	
<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			
(a) Report submitted under section 23(3)(b) by the head of department on cases in default of application being made for confirmation of emergency authorization within 48 hours of issue	Nil	Not applicable	For the report period, there was no report submitted under this category.
(b) Report submitted under section 26(3)(b)(ii) by the head of department on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours of issue	Nil	Not applicable	For the report period, there was no report submitted under this category.

Number of reviews conducted under section 41(2)		Interception/ Surveillance	Summary of reviews
(c) Report submitted under section 54 by the head of department on any case of failure by the department or any of its officers to comply with any relevant requirement	1	Interception	<p><u>Report 1</u></p> <p>In an interception application on two facilities (Facility 1 and Facility 2), the LEA stated that these facilities were solely used by the subject 'A'. According to the affirmation concerned ('affirmation'), the subject was 'A' (an alias) and was believed to be 'B'. Despite the absence of 'B' at a dinner ('Dinner') and a meeting ('Meeting') on which physical surveillance operations had been conducted, it was stated in the affirmation that for the Dinner, the related subjects and a Chinese male (probably 'A') dined at a restaurant. Four days after commencement of the interception, the listener on duty suspected that the two facilities were not used by the same person. Later on the same day, the interception operation on Facility 1 was discontinued.</p> <p>The LEA's investigation revealed that the Chinese male who attended the Dinner and the Meeting was the subject 'A' and Facility 1 was used by 'B' and he was not the intended subject 'A'.</p> <p>The Commissioner examined the verification procedures adopted by the LEA in confirming the user of Facility 1, the role and responsibilities of each officer involved in the verification and application process, the statements made by the</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>officers concerned and other relevant documents and preserved materials. Notwithstanding the purported issue of a prescribed authorization, the Commissioner determined under section 48(5) of the ICSO that the interception of Facility 1 had been carried out without the authority of a prescribed authorization and this was a case of non-compliance. The period of the unauthorized interception lasted about four days. Apart from the unauthorized interception, the affirmation contained misleading information. There was also no mention of the physical surveillance operation on the Meeting in the affirmation.</p> <p>The LEA officers did not provide all information known to them to be relevant to the determination of the application in the affirmation. The Commissioner considered it a non-compliance with the relevant requirements under paragraph 45 of the COP.</p> <p>Based on the information provided by the LEA, the Commissioner did not accept its finding that the officers had no intention to mislead the panel judge by providing factually incorrect information and required the LEA to conduct a further investigation to ascertain clearly whether the non-compliance was the</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>consequence of inadvertent/ careless mistakes or otherwise. The Commissioner also requested the LEA to review its proposed actions to be taken against all officers concerned.</p> <p>The LEA had recommended improvement measures in the verification procedures, handling of intelligence and listening duties. Nonetheless, the Commissioner considered that it should critically review and further improve these aspects of work particularly on exchange of information among officers at different levels.</p> <p>In May 2015, the LEA reported its further findings. The Commissioner's review on these had not been completed at the time of compiling this annual report.</p> <p>(See paragraphs 6.6 – 6.19 of Chapter 6.)</p>

Table 6

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

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 121 of the Code of Practice	4	Surveillance	<u>First case of obtaining of LPP information</u> Failure to detect the inadvertent obtaining of LPP information. This is the Report 2 referred to in item (c) below.
		Interception	<u>First case of heightened LPP likelihood</u> Outdated further additional conditions were proposed in an REP-11 report on heightened LPP likelihood.
		Interception	<u>Second case of heightened LPP likelihood</u> Non-inclusion of certain information in the affidavit for renewal application and REP-11 report to the panel judge.
		Interception	<u>Third case of heightened LPP likelihood</u> Unauthorized interception of 31 and 36 minutes after revocation of the prescribed authorization by the panel judge. This is the Report 3 referred to in item (c) below. (For details, see item (c) under section 41(1) in Table 5 and Chapter 4.)

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
(b) Reviews of JM cases	1	Interception	<p><u>First JM case</u> Unauthorized interception of 11 minutes after revocation of the prescribed authorization by the panel judge. This is the Report 4 referred to in item (c) below.</p>
(c) Other reviews	10	<p>Surveillance</p> <p>Interception</p> <p>Interception</p> <p>Surveillance</p>	<p><u>Report 2</u> Failure to detect the inadvertent obtaining of LPP information. This is the first case of obtaining of LPP information referred to in item (a) above.</p> <p><u>Report 3</u> Unauthorized interception of 31 and 36 minutes after revocation of the prescribed authorization by the panel judge. This is the third case of heightened LPP likelihood referred to in item (a) above.</p> <p><u>Report 4</u> Unauthorized interception of 11 minutes after revocation of the prescribed authorization by the panel judge. This is the case referred to in item (b) above.</p> <p><u>Report 5</u> Incorrect time of return of surveillance devices recorded in the device register.</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 & Surveillance (6 cases)	<u>Other reports</u> These included five incidents of technical problems of the computerised systems and one case on clerical mistake made in the application document. (For details, see item (e) under section 41(1) in Table 5 and Chapter 6.)

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
(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
(c) Reviews on non-compliance cases as reported by the head of department under section 54	1	<p>Interception</p> <p><u>Report 1</u> Interception of a wrong facility for about four days.</p> <p>(For details, see item (c) under section 41(2) in Table 5 and Chapter 6.)</p>

Table 7

Number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)]

Number of applications received	Applications for examination in respect of			
	Interception	Surveillance	Both Interception and Surveillance	Cases that could not be processed
15	1	1	10	3

Table 8

Respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)]

Number of notices to applicants given by the Commissioner		Nature of applications for examination		
		Interception	Surveillance	Both Interception and Surveillance
Number of cases that the Commissioner had found in the applicant's favour [section 44(2)]	0	-	-	-
Number of cases that the Commissioner had not found in the applicant's favour [section 44(5)] ^{Note 3}	12	1	1	10

^{Note 3} Of the 12 notices, five were issued during the report period and seven thereafter.

Table 9

**Number of cases in which a notice has been given by
the Commissioner under section 48 [section 49(2)(d)(v)]**

	Number of cases in which a notice has been given in relation to	
	Interception	Surveillance
Notice to the relevant person by the Commissioner stating that he considers that there has been a case of interception or surveillance carried out by an officer of a department without the authority of a prescribed authorization and informing the relevant person of his right to apply for an examination [section 48(1)]	0	0

Table 10

**Broad nature of recommendations made by the Commissioner
under sections 50, 51 and 52 [section 49(2)(d)(vi)]**

Recommendations made by the Commissioner		Interception/ Surveillance	Broad nature of recommendations
Reports to the Chief Executive on any matter relating to the performance of the Commissioner's functions [section 50]	Nil	Not applicable	Not applicable
Recommendations to the Secretary for Security on the Code of Practice [section 51]	Nil	Not applicable	Not applicable
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the Code of Practice [section 52]	9	Interception & Surveillance	(a) Information included in a discontinuance report. (b) Written guidelines on the arrangements for safeguards against protected products. (c) Automatic notification system for the arrest of the subject. (d) Storage of surveillance devices pending disposal. (e) Evidence of destruction of surveillance devices. (f) Uniform practices for preparing Review Form for review by the Reviewing Officer of the LEA.

Recommendations made by the Commissioner		Interception/ Surveillance	Broad nature of recommendations
			<p>(g) Information included in the Review Form for review by the Reviewing Officer of the LEA.</p> <p>(h) Timely revocation of a prescribed authorization.</p> <p>(i) Comprehensive information in application for Type 2 surveillance.</p> <p>(See paragraph 7.2 of Chapter 7.)</p>

Table 11

Number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]

	Number of cases
Interception	1
Surveillance	1

Table 12

Number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such action [section 49(2)(d)(viii)]

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
<u>Case 1</u> Interception	<p>(i) Four officers involved in the drafting, checking and vetting of an application for interception were accountable for an omission of an assessment of likelihood of obtaining LPP/JM information in the affirmation in support of the application.</p> <p>(ii) Three officers involved in the processing of the application failed to detect the omission when checking and endorsing the application.</p> <p>(See paragraphs 6.27 – 6.29 of Chapter 6 of Annual Report 2013.)</p>	<p>Verbal warning</p> <p>Verbal advice</p>

8.2 In accordance with section 49(2)(e), the Commissioner is required to give an assessment on the overall compliance with the relevant requirements during the report period. Such assessment and the reasons in support can be found in Chapter 9.

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CHAPTER 9

REVIEW OF COMPLIANCE BY LAW ENFORCEMENT AGENCIES

Overall compliance

9.1 As set out in section 40 of the Ordinance, the functions of the Commissioner are to oversee the compliance by departments and their officers with the relevant requirements and to conduct reviews, etc. It is stipulated under section 49(2)(e) of the Ordinance that the Commissioner shall set out in the annual report an assessment on the overall compliance with the relevant requirements during the report period. My assessment of the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2014 is set out below.

Preparation of applications

9.2 The first and foremost of the requirements under the Ordinance is that any statutory activity can only be lawfully and properly conducted by an officer of an LEA pursuant to a prescribed authorization granted by a relevant authority. Whether a prescribed authorization should be granted is expressly based on the necessity and proportionality principles i.e. the interception or covert surveillance is necessary for, and proportionate to, the purpose sought to be furthered by carrying it out upon balancing the relevant factors against the intrusiveness of the interception or covert surveillance on any person who is to be the subject of or may be affected by the interception or covert surveillance; and considering whether the purpose sought to be

furthered by carrying out the interception or covert surveillance can reasonably be furthered by other less intrusive means.

9.3 During the report period, most of the applications for interception and covert surveillance were approved by the panel judges and the authorizing officers. A total of five applications were refused. These included four (out of 1,522) applications for interception and one (out of 44) application for covert surveillance. The major reason for refusal was inadequate materials to support allegations advanced.

9.4 In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations.

Reviews by the Commissioner

9.5 There were different ways by which compliance with the requirements of the Ordinance in respect of interception and covert surveillance by the LEAs was reviewed as set out in paragraph 2.16 of Chapter 2 and paragraph 3.19 of Chapter 3. These included checking of the weekly reports submitted by the LEAs and the PJO, periodical examination of the contents of the LEA files and documents during inspection visits to the LEAs. Where necessary, the LEA concerned would be requested to respond to queries. For interception operations, counter-checking the facilities intercepted with non-LEA parties such as CSPs and through other means would be done. For covert surveillance operations, there would be checking of the records kept by the surveillance device recording system of the LEAs.

9.6 Apart from the cases referred to in Chapter 6, there was no other case of wrong or unauthorized interception revealed by the various forms of checking during the year. In respect of covert

surveillance, cases checked during inspection visits were found to be generally in order and some areas for improvement were identified, namely, in the preparation of Type 2 applications; preparation of Review Forms; and storage of surveillance devices. There was no sign of abuse of surveillance devices for any unauthorized purposes during the report period.

Handling of LPP and JM cases

9.7 Paragraph 121 of the COP obliges the concerned LEA to notify the Commissioner of cases that are likely to involve LPP information or JM. I am also timeously alerted to cases involving or possibly involving LPP and JM through the examination of the weekly reports submitted by the LEAs, with sanitized copies of the relevant REP-11/REP-13 reports reporting on any material change of circumstances after the issue of a prescribed authorization including changed LPP and JM risks.

9.8 The LEAs did recognise the importance of protecting information which might be subject to LPP/JM. They continued to adopt a very cautious approach in handling these cases. A review of the LPP/JM cases revealed that nothing untoward was found except the inadvertent unauthorized interception cases in Report 3 and Report 4 in Chapter 6 and the two cases mentioned in paragraphs 4.15 to 4.19 in Chapter 4.

Reports of non-compliance/irregularities

9.9 Under section 54 of the Ordinance, the heads of LEAs are to submit reports to the Commissioner if they consider that there may have been any case of failure by the department or any of its officers to

comply with any relevant requirement of the Ordinance. They are also required to report to the Commissioner cases of irregularity or even simply incidents. Hence, I am able to have all cases of possible non-compliance brought to my attention for examination and review without any delay. In 2014, 12 reports of non-compliance/irregularities/incidents were received from LEAs.

9.10 While I am generally satisfied with the performance of the LEAs and their officers in their compliance with the requirements of the ICSO in 2014, I was disappointed by the LEA officers' performance in the non-compliance case as detailed in Report 1 of Chapter 6. The mistakes committed ranged from ineffectual verification of a facility before making the application for interception to inclusion of misleading information in the affirmation. Relevant information was also missing in the affirmation. These mistakes have resulted in unauthorized interception of an individual's facility for about four days. This is unacceptable. I consider it of utmost importance that all LEAs and their officers who are tasked to carry out duties under the ICSO regime must make every effort to ensure that similar mistakes would not be made again and the privacy of citizens must be better protected. I have specifically asked for a further investigation to ascertain clearly whether the non-compliance was the consequence of inadvertent/careless mistakes or otherwise. My review of the findings of this further investigation has not been completed at the time of compiling this annual report.

9.11 In the report period, there is no finding that any of the other cases of irregularities/incidents was due to deliberate disregard of the statutory provisions, the COP or the control of surveillance devices. Nonetheless, there were occasions when officers were careless for example using an outdated version of document templates in preparing

the REP-11 report to the panel judge. This and other careless conduct continue to concern me. There is a need for constant vigilance at all levels in the LEAs in the preparation and processing of ICSO regime materials so as to ensure strict compliance with the requirements of the legislation. A failure to adhere to these requirements is unacceptable.

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CHAPTER 10

ACKNOWLEDGEMENT AND WAY FORWARD

Acknowledgement

10.1 I would like to take the opportunity to express my heartfelt thanks to all parties who have assisted me in the performance of my functions as the Commissioner under the ICSO during the past year. My task could not be carried out satisfactorily without the help and co-operation of the panel judges, the Security Bureau, the LEAs as well as the CSPs. I am grateful to everyone concerned.

Way forward

10.2 I am delighted to note that the Government has introduced the Interception of Communications and Surveillance (Amendment) Bill 2015 into the Legislative Council. The Bill aims to make legislative amendments to the ICSO so as to strengthen the power of the panel judges and the Commissioner as well as to enhance the clarity of a number of provisions in the ICSO. The proposals mainly cover the following areas:

- (a) checking of protected products by the Commissioner;
- (b) power of panel judges and authorizing officers on (i) partial revocation of a prescribed authorization; (ii) revocation of prescribed authorization on grounds of material inaccuracies or material change in circumstances; (iii) revocation of device retrieval warrant; and (iv) variation of conditions in prescribed authorizations;

- (c) the proper construction of the terms 'relevant person' and 'duration';
- (d) time gap between the revocation of the prescribed authorization and the actual discontinuance of the operation;
- (e) reporting of non-compliance to the Commissioner; and
- (f) discrepancy in the English and Chinese versions of a provision in section 26 of the ICSO.

10.3 I look forward to the early implementation of the new proposals so as to enhance the effectiveness of the ICSO regime.