

Commissioner on Interception of Communications and Surveillance
Annual Report 2016

Summary

1. The Interception of Communications and Surveillance Ordinance (Cap. 589) ('the Ordinance' or 'ICSO') came into force on 9 August 2006 and was amended in June 2016. Pursuant to section 49 of the Ordinance, Mr. A. R. Suffiad, the Commissioner on Interception of Communications and Surveillance ('Commissioner'), submitted his second annual report, i.e. Annual Report 2016, to the Chief Executive on 30 June 2017. The report covers the period 1 January 2016 to 31 December 2016. The following is a summary of the report.

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

3. During the report period, a total of 1,446 prescribed authorizations (including fresh and renewed authorizations) were issued. Among them, 1,416 were judge's authorizations for interception, 23 were judge's authorizations for Type 1 surveillance, and seven were executive authorizations for Type 2 surveillance (one of which consequent on an oral application) issued by designated authorizing officers of the LEAs. These authorizations included 21 cases that had been renewed more than five times.

4. During the report period, one application for interception was refused. The reason for refusal is stated in paragraph 2.3 of Chapter 2 of the report. No application for Type 1 or Type 2 surveillance was refused.

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

6. A total of 213 persons were arrested in 2016 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. The Ordinance makes specific reference to legal professional privilege ('LPP') and journalistic material ('JM') for particular caution when interception or covert surveillance is to be authorized and carried out. The COP provides that the LEAs should notify the Commissioner of cases that are likely to involve LPP information/JM as well as other cases where LPP information/JM has been obtained.

8. 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, 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 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 concerned LEA is required to give the Commissioner a similar notification of each of such occurrences. During the year, the Commissioner reviewed the reporting arrangement regarding obtainment of LPP information or possible LPP information. To provide better protection of LPP information, the Commissioner recommended to

LEAs that they should detail the contents of such information in an annex to the REP-11/REP-13 report and place the annex in a separate sealed envelope to be opened by the relevant authority personally. Similar arrangement should be made when the relevant case is reported to the Commissioner.

9. For cases with assessment that there was likelihood of involving LPP information, the panel judges would impose additional conditions if they granted the authorization or allowed it to continue. These additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice.

10. In the report period, LEAs submitted notifications, in accordance with the COP, on 46 new LPP cases. In 32 of these cases, the LEAs submitted REP-11 or section 58 reports to the panel judges on the subsequent change in circumstances relating to LPP involvement or likelihood. These 32 cases included one case of obtaining of LPP information and 31 cases of heightened likelihood of obtaining LPP information. For the remaining 14 LPP cases, it was assessed at the time of application that the operations sought to be authorized would likely obtain LPP information and the panel judges had imposed additional conditions in the prescribed authorizations. As regards JM, in the report period, reports on seven new JM cases were received.

11. Having the express power to examine the protected products after the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016, the Commissioner and his delegated officers have examined the protected products of specific cases such as LPP and JM cases as well as cases selected on a random basis since October 2016.

12. The protected products of the LPP and JM cases reported in 2016 and the preserved records of 14 LPP cases that were reported before 2016 had been examined. Details of the Commissioner's reviews of the LPP and JM cases are given in Chapter 4 of the report. Besides, during the report period, a total of 60 authorizations had been selected at random for examination of the interception products and all the surveillance products that were obtained during the report period and preserved for the Commissioner's examination had been checked, and nothing untoward was found.

13. During the report period, 19 applications for examination were received. Of these applications, four applications were subsequently not pursued by the applicants. Of the remaining 15 applications, four alleged interception, one alleged covert surveillance and ten claimed a combination of interception and covert surveillance. After making all necessary enquiries, the Commissioner found all the 15 cases not in the applicants' favour and accordingly notified each of them in writing. Under the Ordinance, the Commissioner is not allowed to

provide reasons for his determination. The Commissioner has observed that there were occasions that the applicants felt that their purpose of applying for examination had not been achieved as the Commissioner could not disclose the reasons for his determinations. It is hoped that the public will understand that the statutory prohibition is designed to forbid the disclosure of any information which might prejudice the prevention or detection of crime or the protection of public security. There should not be any doubt that the Commissioner carries out his duties and functions under the Ordinance with utmost good faith and sincerity.

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

15. In 2016, the Commissioner received from LEAs reports of irregularities/incidents relating to 11 ICSO cases. All these reports were submitted not under section 54 of the Ordinance. Moreover, there was an outstanding case brought forward from the Annual Report 2015 and the reporting of which will be made after the relevant court proceedings have concluded. These are set out in Chapter 6 of the report. Two other cases relating to surveillance devices for non-ICSO purposes are covered in Chapter 3 of the report.

16. During the report period, 11 disciplinary actions in the form of verbal advice, verbal warning or written warning were taken for cases mentioned in Chapters 4 and 6 of the Annual Report 2015 and Chapter 6 of the report. Table 12 in Chapter 8 of the report sets out the details.

17. To better carry out the objects of the Ordinance, a number of recommendations were made to the LEAs under section 52 of the Ordinance in the report period. Details of the recommendations are given in Chapter 7 of the report.

18. The Commissioner has set out in Chapter 9 of the report an assessment of the overall performance of the LEAs in their compliance with the relevant requirements of the ICSO during the report period. In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. There was no case of wrong or unauthorized

interception revealed by the various forms of checking in 2016. In respect of covert surveillance, cases checked during the year were found to be generally in order although improvements were required in the drafting of application documents and the reporting mechanism on operations conducted. There was no sign of abuse of surveillance devices for any unauthorized purposes. With the implementation of examination of protected products since October 2016, for LPP/JM cases, the Commissioner was able to check the veracity of the gist of communications or information as stated in the REP-11/REP-13 reports and whether there were any communications or information subject to LPP or with JM that had been accessed by the LEA officers. Apart from those specifically mentioned in Chapter 4 and Chapter 6 of the report, nothing untoward was found for the LPP and JM cases reported in 2016. In the handling of LPP and JM cases, the LEAs continued to adopt a very cautious approach, save for a few occasions where more vigilance from the LEA officers was expected.

19. The examination of protected products of 14 past LPP cases, three of which required explanations from relevant LEAs, did not reveal anything to justify any deviation from the assessments given by the Commissioner or his predecessors on the handling of LPP cases reported in the past years.

20. Overall, the Commissioner is satisfied with the performance of the LEAs and their officers in their compliance with the requirements of the ICSO in 2016. There is no finding that any of the cases of irregularities/incidents was due to deliberate disregard of the statutory provisions, the COP or the control of surveillance devices. Nonetheless, there were still occasions where officers were not careful in dealing with documents relating to ICSO operations nor vigilant enough in discharging ICSO-related duties. The Commissioner stresses again that the officers of the LEAs should stay alert and exercise care in different stages of the operations conducted under the ICSO.

21. The Commissioner is pleased to see that in the report period, LEAs were positive to his recommendations in regard to review of existing procedures or new arrangements for better operation of the ICSO regime and they were also active in implementing measures to facilitate his oversight work.

22. The Commissioner will keep under review the relevant working arrangements to enhance the effectiveness of the examination of protected products with a view to achieving the objective of the checking power and exerting effective deterrence against the non-compliance of the LEAs with the Ordinance. The Commissioner will make recommendations to the relevant parties whenever improvements in the procedures or practices are discerned to be necessary for or conducive to the better operation of the ICSO regime.

23. In the report, the Commissioner expresses his gratitude to the panel judges, the Security Bureau, the LEAs and the communications services providers as he would not be able to perform his functions as the Commissioner without their assistance and co-operation. In particular, the Commissioner is grateful that relevant parties have rendered prompt and effective support without which the implementation of his new checking power would not have been effected smoothly.

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