Annual Report 2007 to the Chief Executive

by

The Commissioner on
Interception of Communications
and Surveillance

June 2008

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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30 June 2008

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

Confidential

Dear Chief Executive,

Annual Report for the Year 2007

I have the pleasure, pursuant to section 49(1) and (6) of the Interception of Communications and Surveillance Ordinance, in submitting to you the annual report for the year 2007, together with its Chinese translation.

Yours sincerely,

(K H Woo)
Commissioner on Interception of
Communications and Surveillance

Encl: Annual Report for 2007
and its Chinese translation

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ABBREVIATIONS

Unless the context otherwise requires:

affidavit / 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 executive authorization
C, ICAC	Commissioner, Independent Commission Against Corruption
Cap	chapter in the Laws of Hong Kong
Code, Code of Practice	the Code of Practice issued by the Secretary for Security under section 63 of the Ordinance
Commissioner	Commissioner on Interception of Communications and Surveillance
COP forms	specimen forms annexed to the Code of Practice
CSP(s)	communications services provider(s)
dedicated unit	a unit in an LEA dedicated to the handling of ICSO matters, separate from the investigative arm of the LEA
discontinuance report	report on discontinuance of interception or covert surveillance submitted pursuant to section 57 of the Ordinance
DoJ	Department of Justice
fresh application	application for the first issue of a prescribed authorization

ICAC	Independent Commission Against Corruption
ICSO	Interception of Communications and Surveillance Ordinance
ICSO device register	device register of devices withdrawn based on loan requests with a prescribed authorization in support and of such devices returned
interception	interception of communications
internal form, internal forms	one or more of the forms that were produced under the coordination of the Secretary for Security to facilitate LEA officers' tasks under the Ordinance
LEA, LEAs	law enforcement agency, law enforcement agencies
LPP	legal professional privilege
non-ICSO device register	device register of devices withdrawn based on loan requests for surveillance devices for purposes in respect of which no prescribed authorization is required and of such devices returned
Ordinance	Interception of Communications and Surveillance Ordinance
panel judge	one of the panel judges appointed under section 6 of the Ordinance
PJO	panel judges' office

Police	Hong Kong Police Force
renewal application	application for renewal of a prescribed authorization
REP-11 report	report on material change of circumstances or initial material inaccuracies under a prescribed authorization made on internal form REP-11
revised Code	the revised Code of Practice issued by the Secretary for Security on 29 October 2007
section	section of the Ordinance
statutory activities statutory activity	interception of communications and covert surveillance activities called collectively or one of those activities
surveillance	covert surveillance
the report period	the period from 1 January to 31 December 2007
the Team	the dedicated team comprising officers from the LEAs that operates independently of their investigative arms
weekly report forms	the forms designed for the LEAs and panel judges to provide information to the Commissioner

CHAPTER 1

INTRODUCTION

Enrichment from experience

1.1 It has been almost two years since the Interception of Communications and Surveillance Ordinance, Cap 589 ('the Ordinance' or 'the ICSO') came into force on 9 August 2006. While the operation of the scheme as designed by the Ordinance is still at its early stage, various factual situations have occurred, enriching the experience of all concerned, affording them a better understanding of the provisions of the Ordinance as well as how they are put to work. Consequently, defects and inadequacies of the statutory provisions and of the procedures adopted can be discerned and against which improvements have been made or suggested.

Follow up from the last report

1.2 In my report last year, I pointed out certain provisions of the Ordinance, impregnated with ambiguities or causing differences in interpretation, that may cause difficulty when put to work. Notwithstanding that no amendment to the Ordinance has yet been made, most of the vexing situations have fortunately not surfaced.

1.3 I also made recommendations and suggestions in my last report on improvements of various procedural matters. I am happy to see

that most of them have been given effect to by the Security Bureau and the law enforcement agencies ('LEAs') under the Ordinance[Note 1] and serious steps have been taken in considering other ways and means to minimize the adverse effect of the defects or deficiencies intended to be addressed by such recommendations and suggestions that they have decided not to adopt.

New situations arising in 2007

1.4 A number of new factual situations arose during this report period, ie the year of 2007, as a result of which I have enhanced the reporting requirements of the LEAs, by amending the weekly report forms and the format of the device registers. I have also made recommendations and suggestions to the Security Bureau and the LEAs as regards various procedural matters.

1.5 While the difficulties that may be encountered as described in my last report regarding the ambiguities of certain provisions of the Ordinance as well as differences in interpretation remain the same, I have identified some added problems in this regard that are set out in this report.

Note 1 There are four LEAs under the Ordinance, namely Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption.

CHAPTER 2

INTERCEPTION

Prescribed authorizations

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.

2.2 What requires specific mention is the last category where the authorization allows interception of a telecommunications facility (such as a telephone line) that the targeted person is 'reasonably expected to use'. The LEAs apply for this clause to be included in the authorization sought in circumstances where the identifying details of the facility (such as the telephone number) that is used or will be used by the subject are not yet known. The authorization granted with this clause gives the LEA concerned the discretion to intercept any communication facilities that the targeted subject is later found to be using without the necessity of going back to the panel judge to obtain specific authorization regarding it. The facility newly added was not the one that had been made known to the panel judge in his granting of the prescribed authorization.

2.3 In the course of my inspection visits to the LEAs, I noted that the panel judges were particularly careful and stringent in granting such an authorization. For instance, they issued the authorizations for interception without granting the 'reasonably expected to use' clause sought where they considered that there were insufficient grounds in support. In such a case, if the LEA concerned intended to intercept any other communication facilities being used by the targeted subject besides the one allowed under the prescribed authorization, they must go back to the panel judges to apply afresh for another prescribed authorization. I was also told that the panel judge had informed an LEA that if the 'reasonably expected to use' clause

was rejected in a previous authorization, the LEA concerned should not apply for the 'reasonably expected to use' clause in subsequent renewals unless there were new grounds to support it.

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

Written applications

2.5 Applications for authorizations for interception are normally made in writing. During the report period, there were a total of 1,556 written applications for interception made by the LEAs, of which 1,525 were granted and 31 were refused by the panel judges. Among the successful applications, 798 were for authorizations for the first time ('fresh applications') and 727 were for renewals of authorizations that had been granted earlier ('renewal applications').

2.6 Of the refused applications, 16 were fresh applications and the rest were renewal applications. The refusals were mainly due to the following reasons:

(a) the conditions of necessity and proportionality were not met;

(b) further conditions to safeguard the subject's legal professional privilege ('LPP') were not included in the application;

(c) inadequate/insufficient materials to support the allegations put forth;

(d) no useful/relevant information had been obtained pursuant to the preceding authorization; and

(e) premature/late application for renewal.

Oral applications

2.7 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 the application in accordance with the relevant written application provisions under the Ordinance. This practicability condition must be satisfied for the grant of authorization upon an oral application [section 25(2)]. The Code of Practice ('the Code') issued by the Secretary for Security advises LEA officers that 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. 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/authorization. The officer concerned should also apply for confirmation of the prescribed authorization within 48 hours beginning

with the time when the authorization is granted, failing which the prescribed authorization is to be regarded as revoked upon the expiration of the 48 hours. See sections 25 to 27 of the Ordinance.

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

Emergency authorizations

2.9 An officer of an LEA may apply to the head of the 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 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 that it is not reasonably practicable to apply for the issue of a judge's authorization, having regard to all the circumstances of the case [section 20(1)]. An emergency authorization shall not last for more than 48 hours and may not be renewed [section 22(1)(b) and (2)]. Where any interception is carried out pursuant to the emergency authorization, the officer should also apply to a panel judge for confirmation of the emergency authorization within 48 hours, beginning with the time when the emergency authorization is issued [section 23(1)].

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

Offences

2.11 A list of the major categories of offences for the investigation of which prescribed authorizations for interception had been issued or renewed during the report period is shown in Table 2(a) in Chapter 11.

Duration of authorizations

2.12 For the majority (over 84%) 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, a duration that was relatively short as compared to the maximum of three months allowed by the Ordinance [sections 10 and 13]. The longest approved duration was 54 days while the shortest one was for a few days only. This illustrates that the panel judges were acting cautiously and applying a rather stringent control over the use of interception activity by the LEAs. Overall, the average duration for each authorization was about 30 days.

Revocation of authorizations

2.13 Under section 57(1), an officer of an LEA, who conducts any regular review pursuant to the arrangements made under section 56 by his head of department, should cause an interception (and also surveillance) to be discontinued if he is of the opinion that the ground for discontinuance of the prescribed authorization exists. A similar obligation also attaches to

the officer who is for the time being in charge of the operation after he becomes aware that such a ground exists [section 57(2)]. The officer concerned shall then report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned [section 57(3) and (4)].

2.14 The number of authorizations for interception revoked 'fully' pursuant to section 57 during the report period was 573. In addition, another 103 cases involved the cessation of interception in respect of some but not all of the communications facilities approved under a prescribed authorization, so that interception of the other facilities remained in force. The normal grounds for discontinuance were mainly situations where the subject had stopped using the telephone number concerned for his criminal activities, the subject was arrested, or the interception operation was not productive. This shows that the LEAs discontinued the interception in a responsible manner and complied closely with the requirements and spirit of the Ordinance to ensure that the intrusion into privacy of the subject of the prescribed authorization, albeit a suspected offender, will not be continued unless it is necessary and reasonable.

2.15 During an inspection visit to an LEA, I noted that the reason 'intelligence of value had been obtained' was also used as the ground for discontinuance for a number of cases. I considered such description ambiguous and confusing. It was not clear why the operation was not continued even when useful information had been obtained and could

presumably continue to be obtained from it. The LEA explained that in some cases intelligence obtained was already sufficient for the investigation. In some other cases, further information was available from other sources and was adequate for the investigation. The relevant operation was therefore no longer necessary.

2.16 Under section 57(4), the panel judge shall revoke the authorization concerned upon receipt of a report on discontinuance. It is the spirit of the Ordinance to minimize unnecessary intrusion. However, ambiguous description for the ground for discontinuance would cause unnecessary misunderstanding. The panel judge should be apprised of the entirety of the reasons. I advised the LEA concerned that a more specific and clearer description should be given for the ground for discontinuance. Taking the expression of 'intelligence of value had been obtained' as an example, it would be much better if it read as 'intelligence of value had been obtained, further intelligence/information was unnecessary'.

2.17 Revocation of authorizations is also expressly provided for in section 58 of the Ordinance. Where the relevant authority receives a report from an LEA that the subject of an interception has been arrested, with an assessment of the effect of the arrest on the likelihood that any information which may be subject to LPP will be obtained by continuing the interception, he shall revoke the prescribed authorization if he considers that the conditions for the continuance of the prescribed authorization under the Ordinance are not met. The number of revocations under

section 58 during this report period was two.

2.18 As pointed out in paragraphs 13.34 to 13.44 of Chapter 13 of my last report, where the relevant authority to whom a section 58 arrest report is made decides to revoke the prescribed authorization, there would be an interim period during which the interception (or surveillance) would remain in operation after the prescribed authorization (which is sought to be continued) is revoked but before the revocation (with immediate effect) is conveyed to officers carrying out the operation. The interception (or surveillance) carried out during the interim period would in the circumstances become in theory an unauthorized activity.

2.19 To address the issue, the Security Bureau had, after consulting the LEAs and the Department of Justice ('DoJ'), worked out enhanced arrangements (eg, taking immediate steps to discontinue the operation as soon as reasonably practicable, and not listening to, observing or using any information obtained by the operation after revocation of the prescribed authorization by the relevant authority) to minimize the possible intrusion into the privacy of the individuals concerned in these cases. Notwithstanding the above, I am still unpersuaded that any on-going operation after the revocation of the prescribed authorization by the panel judge was not unauthorized and did not amount to an irregularity. Details on issues related to revocations under section 58 can be found in paragraphs 7.82 to 7.90 of Chapter 7.

Authorizations with five or more previous renewals

2.20 There were 23 authorizations for interception with five or more previous renewals within the report period. As the cases had lasted for quite a long period of time, particular attention had been paid to see whether the renewals were granted properly and whether useful information had been obtained through the interceptions. All the cases were checked and found in order during my inspection visits to the LEAs.

Legal professional privilege

2.21 During the report period, there were four cases in which information that might be subject to LPP had been obtained in consequence of interception carried out pursuant to a prescribed authorization. Details of these cases can be found in Chapter 5.

2.22 Besides, of the applications for interception which were assessed to have the likelihood of LPP information being obtained, only a handful were refused by the panel judges. I have checked the relevant files of a great majority of these cases assessed to involve LPP during my inspection visits at the LEAs' premises. It appears to me that the panel judges had approached the cases with care and had reasonably assessed the likelihood of LPP information being obtained, amongst other factors concerned in respect of the case, in reaching the decision that the interception applied for should or should not be authorized. If an

authorization which was assessed to have the likelihood of LPP information being obtained was issued or renewed, further conditions would normally be imposed by the panel judges to limit the powers of the LEA and to protect the right of the subject in the event of LPP information likely to be involved.

Effectiveness of interception

2.23 The LEAs maintain their common view that interception is and continues to be effective and valuable in investigations carried out by them. Information gathered from interception can lead to a fruitful and successful conclusion in the prevention and detection of serious crimes and the protection of public security. During the report period, a total of 121 persons, who were subjects of authorized interception operations, were arrested as a result of or further to interceptions carried out pursuant to prescribed authorizations. In addition to the arrests of subjects in the interceptions, a total of 396 non-subjects were arrested as a result of or further to interceptions carried out pursuant to prescribed authorizations. The relevant arrest figures are shown in Table 3(a) in Chapter 11. The benefit of interception as an investigation tool can therefore be appreciated.

Cases of irregularities

2.24 During the report period, there were two reports of irregularities concerning five cases of interception operations. In addition,

two incidents were reported to me by the LEAs, one on the reactivation of interception after discontinuance and the other on an initial material inaccuracy under a prescribed authorization for interception, which were not treated as irregularities. Details of these cases can be found in paragraphs 7.63 to 7.64, 7.82 to 7.84 and 7.94 to 7.95 of Chapter 7.

Procedure of oversight for interception

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

(a) checking of the weekly reports submitted by the LEAs and the panel judges' office ('PJO');

(b) periodical examination of the contents of the LEA files and documents during inspection visits to the LEAs; and

(c) counter-checking the facilities intercepted with non-LEA parties such as communications services providers ('CSPs').

Details of the reviews are set out below.

Checking of weekly reports

2.26 LEAs were required to submit weekly reports to me on applications, successful or otherwise, and other relevant reports made to the panel judges/departmental authorizing officers by way of filling in forms

designed for the purpose ('weekly report forms'). Such weekly reports deal with all statutory activities, ie interception and covert surveillance. At the same time, the PJO was also requested to submit weekly report forms to me on the applications, approved or rejected, and the revocations of prescribed authorizations. A weekly report covers the statutory activities with related authorizations and refused applications in the entire week that has elapsed a week prior to the week of its submission to my Secretariat.

2.27 One should note that the information to be provided in the weekly report forms is only general information relating to cases of that particular week such as whether the application was successful or rejected, the offences involved, the duration approved for the authorization concerned, whether the 'reasonably expected to use' clause (referred to in paragraph 2.2 above) has been granted, the assessment on the likelihood of obtaining LPP information and journalistic material from the proposed operation, etc. Sensitive information such as the case background, progress of the investigation, identity and address of the subject and particulars of the complainant, informant or undercover agent, etc is not required, so that such information will always be kept confidential with minimal risk of leakage.

2.28 Upon receipt of the weekly report forms from the LEAs, my Secretariat would study the details of each weekly report form and, except those relating to Type 2 surveillance, counter-check against the PJO's

returns. In case of discrepancies or doubts, clarifications and explanations were sought from the LEAs and/or the PJO as and when necessary. Should I perceive a need, I would seek clarification and explanation regarding any discrepancies or doubts as identified from weekly reports in my periodical inspection visits at premises of the LEAs. Such inspection visits were carried out so as to avoid any possible leakage of secret or sensitive information contained in documents or copies that would otherwise be required to be sent to my Secretariat for my checking.

Checking of cases during inspection visits

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

2.30 If my questions or doubts still could not be resolved after the examination of such documents, I would request the LEAs to answer my queries or to explain the cases in greater detail. Whenever necessary, relevant case officers would be interviewed to answer my questions.

2.31 In addition to matters relating to minor discrepancies in the weekly reports as returned by the LEAs and the PJO having been clarified, a total of 388 applications for interception, including the granted authorizations and refused applications, and 149 related documents/matters had been checked during my periodical inspection visits to the LEAs in this report period.

Counter-checking with non-LEA parties

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

2.33 Wherever necessary, counter-checks were conducted with non-LEA parties such as CSPs who have played a part in the interception process but are independent from the LEAs. The interception of telecommunications facilities by an LEA is made through a dedicated team ('the Team') that, whilst being part of the LEAs, operates independently of their investigative arms. Apart from requiring the CSPs to furnish me with a four-weekly return to ensure that the facilities intercepted tally with those as reported by the respective LEAs and to notify me at once upon discovery of any unauthorized interception, I have also asked the Team to archive the status of all interceptions in a confidential electronic record whenever any interception is effected, cancelled or discontinued. These records can, after necessary arrangements are made for the purpose, be

used for checking the status of interceptions at various points of time so as to ensure that no unauthorized interception has taken place. Only the designated staff of my office and myself can access the confidentially archived information for the purpose of checking the intercepted facilities as at any reference point of time, ensuring that no unauthorized interception had taken place.

2.34 I also asked the Team to introduce a measure (which was effected) so that there would be archiving of the status of all interceptions being conducted at a particular moment as designated by me, so as to further help expose any unauthorized interception should it occur.

Results of the various forms of checking

2.35 Apart from the cases of irregularity and incidents referred to in paragraphs 7.63 to 7.64 and 7.82 to 7.84 and 7.94 of Chapter 7, there was no other case of wrong or unauthorized interception revealed by the various forms of checking described in this chapter.

2.36 The checking of the archived material referred to in paragraphs 2.33 and 2.34 above was effective, as not only the numbers of the facilities subject to duly authorized interception but also each of the numbers of the wrongly intercepted facilities mentioned in paragraphs 7.63 to 7.64 and 7.94 of Chapter 7 were found to have been recorded.

CHAPTER 3

TYPE 1 SURVEILLANCE

Covert surveillance

3.1 Covert surveillance is classified into two types by the Ordinance: Type 1 surveillance and Type 2 surveillance. Their respective scopes are defined in section 2 of the Ordinance and can be found dealt with in Chapters 6 and 7 of my 2006 Annual Report. The common feature between the two types of covert surveillance is that the operation is carried out with the use of a surveillance device. Since Type 1 surveillance is more intrusive than Type 2 surveillance, it requires a panel judge's authorization whereas Type 2 surveillance requires only an executive authorization issued by an authorizing officer of the department to which the applicant belongs.

Written applications

3.2 Applications for prescribed authorizations are normally made in writing. In the report period, there were a total of 136 written applications for Type 1 surveillance made by the LEAs, of which 134 were granted and two were refused by the panel judge. Among the successful applications, 123 were fresh applications and 11 were renewal applications.

3.3 Of the refused applications, one was a fresh application and the other one was a renewal application. Both applications provided insufficient details in support of the application and were hence refused by the panel judge.

Duration of authorizations

3.4 Under the Ordinance, the maximum duration authorized for Type 1 surveillance, whether on fresh or renewal application, is in any case not to be longer than the period of three months [section 10(b) & 13(b)]. With respect to authorizations granted for Type 1 surveillance during the report period, the longest approved duration was about 28 days while the shortest one was less than a day. The overall average duration for an authorization was about 4 days.

3.5 The average duration approved for authorizations for Type 1 surveillance was short as compared with authorizations for interception of communications and Type 2 surveillance.

3.6 The specially short duration sought or granted for Type 1 surveillance is probably caused by the nature of such operations. For instance, a Type 1 surveillance operation may be aimed at observing and recording a particular meeting among the target(s) and/or associate(s). Moreover, the panel judges have applied the requirements of the Ordinance in a stringent manner in their consideration of the applications made by the

LEAs. The duration sought by the applicants would be shortened by the panel judges if information provided in affirmations did not sufficiently justify the surveillance to last that long. An example can be given to illustrate this. In an application for Type 1 surveillance, the applicant sought approval from the panel judge to allow the authorization to last for a short period of time for the purpose of monitoring an expected meeting between two targeted subjects. However, although the panel judge issued an authorization, he shortened the duration substantially by one half. In order to see why the panel judge did so, I examined the case during my inspection visit to the LEA concerned. In the affirmation in support of the application, the applicant stated that information revealed that the targeted subjects would arrange to meet each other at a certain time on a particular day. The applicant added that it might be possible that the targeted subjects would change the time, date and place of the meeting. In view of such uncertainty in relation to the expected meeting, the applicant applied for an authorization with some buffer after the expected meeting. However, the panel judge substantially cut short the duration of the buffer. The reasoning seemed to be that even if the meeting was not held at the expected time, another application could then be made with supporting details including the changed date and time of the meeting as any further information might unfold.

Authorizations with five or more previous renewals

3.7 With respect to Type 1 surveillance, there was no case of any

authorization with five or more previous renewals during the report period.

Emergency authorizations

3.8 If an LEA officer considers that there is immediate need for Type 1 surveillance due to an imminent risk of death or serious bodily harm, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances that it is not reasonably practicable to apply to a panel judge, he may apply in writing to the head of his department for issue of an emergency authorization [section 20(1)]. An emergency authorization shall not last for more than 48 hours and may not be renewed [section 22(1)(b) and (2)]. Within the period of 48 hours from the issue of the emergency authorization, the officer is required to apply to a panel judge for its confirmation where any Type 1 surveillance is carried out pursuant to the emergency authorization [section 23(1)].

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

Oral applications

3.10 Notwithstanding the relevant written application provision, an application for the issue or renewal of a prescribed authorization may be made orally, if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written

application [section 25]. The relevant authority (a panel judge for Type 1 surveillance) may deliver his determination orally to issue the prescribed authorization or to refuse the application.

3.11 The Code issued by the Secretary for Security advises LEA officers that oral application procedure should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedure cannot be followed. Similar to emergency authorizations, section 26(1) of the Ordinance requires officers to as soon as reasonably practicable apply in writing to the relevant authority within 48 hours from the issue of the authorization for confirmation of the orally-granted prescribed authorization. Failing to do so will cause that prescribed authorization to be regarded as revoked upon the expiration of the 48 hours.

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

Offences

3.13 Please refer to Table 2(b) in Chapter 11 for the major categories of offences for the investigation of which prescribed authorizations were issued or renewed for covert surveillance during the report period.

Revocation of authorizations

3.14 For this report period, a total of 26 authorizations were revoked under section 57 before their natural expiration. The grounds for discontinuance were mainly that the purpose of the surveillance had been achieved, the subject was arrested, or the expected meeting to be monitored was postponed or cancelled.

3.15 There was, however, no report made to the relevant authority under section 58 of the Ordinance for Type 1 surveillance.

Legal professional privilege

3.16 There were two fresh applications for Type 1 surveillance assessed by the LEAs of having the likelihood of obtaining LPP information whereas the panel judges assessed otherwise after considering the applications. The panel judge approved each of the applications but required the applicant to report to him if there was possibility that the subject would seek legal advice.

3.17 In addition, the LEAs and their officers are required under the Code to notify me of any case where LPP information was inadvertently obtained pursuant to a prescribed authorization. With respect to Type 1 surveillance operations carried out during the report period, I had not received any such report from the LEAs.

Application for device retrieval warrant

3.18 Throughout the entirety of 2007, there was no application for any device retrieval warrant for retrieving the devices used for Type 1 surveillance. The reason given by the LEAs upon my inquiry was invariably that the devices were removed upon the completion of the surveillance, successful or otherwise.

Effectiveness of surveillance

3.19 As a result of or further to surveillance operations, be it Type 1 or Type 2, a total of 127 persons who were subjects of the prescribed authorizations were arrested. A further 110 non-subjects were also arrested in consequence of such operations. The relevant figures can also be found in Table 3(b) in Chapter 11.

Procedure of oversight for surveillance

3.20 The compliance in respect of Type 1 surveillance by the LEAs was reviewed in three different ways –

(a) checking of the weekly reports submitted by the LEAs and the PJO;

(b) periodical examination of the contents of the LEA files and documents during inspection visits to the LEAs; and

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

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

Checking of weekly reports

3.21 Weekly reports submitted to me by the LEAs and PJO cover all statutory activities, including Type 1 surveillance. This way of checking has been described in paragraphs 2.26 to 2.28 of Chapter 2 and will not be repeated here.

Checking of cases during inspection visits

3.22 The mechanism of checking cases during inspection visits to LEAs is described in paragraphs 2.29 and 2.30 of Chapter 2.

3.23 In addition to matters relating to minor discrepancies in the weekly reports having been clarified, a total of 90 applications for Type 1 surveillance, including granted authorizations and refused applications, and 21 related documents/matters had been checked during my periodical inspection visits to the LEAs in this report period. Some examples are given below to show how the examination was conducted.

3.24 It was noted from the weekly reports that there were some cases in which surveillance devices were withdrawn under a prescribed authorization but no surveillance operation was carried out by the LEAs. This caused my query as to whether the prescribed authorization should have been sought in the first place. These cases were included for examination in inspection visits to see why the LEAs did not carry out any surveillance operation pursuant to the authorizations concerned. Moreover, questions were also asked to verify whether the devices drawn were used during the period and how they were kept by officers before they were returned to the device stores/registries. This was to ensure that surveillance devices withdrawn would not be used for any purpose other than that specified in the prescribed authorizations. Having examined the relevant case documents and heard the explanations from the LEAs concerned, I considered the explanations given for all such cases acceptable and saw no sign of abuse of surveillance devices from these cases for purposes other than those specified in the relevant prescribed authorizations.

3.25 The Ordinance requires that when the ground for discontinuance of a prescribed authorization exists, officers shall as soon as reasonably practicable cause the operation concerned to be discontinued [section 57]. Covert surveillance operations require the use of surveillance devices for the purpose of investigation and therefore the return of all relevant surveillance devices could mean that the ground for discontinuance exists. There were, however, some cases in which

surveillance devices were returned to the device registries and no further withdrawal was made right up to the expiration of the authorization concerned. I requested the LEA concerned to explain why discontinuance was not called for in such cases as soon as reasonably practicable after the return of surveillance devices. Particular attention was paid to those cases where there was sufficient time for officers to do so before the expiry of the relevant prescribed authorizations.

3.26 The LEA explained that, in those cases concerned, regardless of whether the surveillance operations that had already been carried out were successful or otherwise, there was information that the target(s) and/or their associates might meet with each other again for further discussion of their criminal activities within the authorized period, and if that happened, there would still be a need to carry out surveillance again. In such cases, the relevant prescribed authorizations were then allowed to remain in force to wait for an opportune moment to come. However, the anticipated meetings might be postponed or did not materialize at all in some of the cases. In view of such uncertainty, the LEA advised officers to return the relevant surveillance devices during the interim period before the targets' next meetings were confirmed. Such arrangement aimed to minimize the chance of possible abuse of the devices by frontline officers for unauthorized purposes. Only in justified circumstances officers would be allowed to keep the surveillance devices in hand. For the cases referred to in the preceding paragraph, the anticipated meetings among the targets and/or their associates did not materialize upon the expiry of the

authorizations concerned. As a result, such prescribed authorizations lapsed upon natural expiration without any further surveillance operation being carried out. After examining these cases and hearing the explanations, I found the cases in question in order and was satisfied with such control mechanism on the use of surveillance devices adopted by the LEA.

3.27 Late return of devices as shown on the device registers would also be queried. The LEAs concerned gave me answers that had allayed my fear or suspicion that something untoward might have occurred.

Checking of surveillance devices

3.28 Covert surveillance, including Type 1 and Type 2 surveillance, is defined by the Ordinance as any surveillance carried out with the use of any surveillance device for the purposes of a specific investigation or operation. Surveillance device means a data surveillance device, a listening device, an optical surveillance device or a tracking device or a combination of any two or more of them. Based on this fact, as I already mentioned in my first annual report last year, I required the LEAs to develop a comprehensive recording system of surveillance devices, including maintaining a device register of devices withdrawn based on loan requests with a prescribed authorization in support ('ICSO device register') and a separate device register of devices withdrawn based on loan requests for surveillance devices in respect of which no prescribed authorization is

required, for administrative or other purposes ('non-ICSO device register'), such as using a digital camera to take photos of a crime scene, etc. Both types of register will also record the return of the devices so withdrawn.

3.29 I also requested the LEAs to maintain an inventory list of surveillance devices for each device registry. A unique serial number should be assigned to each single surveillance device item for identification as well as for my checking purpose. The inventory list should be updated after any addition of new items or deletion of existing items.

3.30 In addition, the LEAs should establish a control mechanism for issuing and collecting surveillance devices. All surveillance devices are to be stored and managed by a registry, at headquarters/sectional/district office level as may be appropriate. All records of issue and return of surveillance devices should be properly documented in the device register. Copies of both the inventory list and device registers should be submitted to me on a regular periodical basis for my checking purpose, and the information contained in them would be verified with the originals kept by the LEAs. In case of discrepancies or doubts identified as a result of checking the contents of these copies and comparing with the information provided in the weekly report forms and other relevant documents, the LEA concerned would be asked to provide clarification and explanation.

3.31 The following are some major observations after checking the inventory lists and device registers submitted by the LEAs:

(a) The descriptions of the 'capability' of some surveillance devices were found to be too general and simple, without mentioning their actual capabilities. The LEA concerned was advised to make improvement to provide clearer and detailed descriptions in the inventory list as far as possible.

(b) A device register named 'General Surveillance Device Register for Prescribed Authorization' was found being used by a particular device registry. The title was confusing and the reader could hardly understand what this register referred to. After clarification with the LEA concerned, it was noted that the registry concerned had simply used a wrong title. The device register was in fact used for recording movements of simple devices which were deployed for general surveillance purposes other than those covered by the Ordinance. The LEA concerned undertook to make the necessary correction.

(c) I observed from some non-ICSO device registers of a particular LEA that devices were withdrawn for general surveillance purposes and were kept in officers' hand for a period of time. In response to my query on this issue, the LEA explained that it was due to operational need where officers might need to keep such equipment for a certain period for carrying out continuous general surveillance of criminal activities. I advised that if that was the case, the

purpose or usage and the expected loan period should be clearly stated in the device register, eg 'equipment lent to xx team for investigation of possible crime scene for xx days/weeks/month(s)'.

(d) I observed that some relatively sophisticated surveillance devices were used for general observation tasks of which no prescribed authorizations were required. This attracted my attention to see what these observation tasks were and whether prescribed authorizations should be sought for these tasks. The LEA explained to me that in some cases general surveillance was required to monitor suspected illegal activities at a particular location. However, due to the geographical situation around that location, officers could not stay at the monitor post for long as they might be easily discovered by the suspects or other persons. In the circumstances, officers would have to hide the relevant surveillance device somewhere targeting at the suspects or suspected crime scenes. Accordingly, the device concerned had to be under disguise or might appear sophisticated.

(e) In some non-ICSO device registers, the purposes of usage stated by the officers were quite difficult to understand, such as 'general', 'preparation of court trial', 'case processing', 'for playing cassette', just to name a few. Such descriptions rendered it difficult for me to know what they were exactly

used for. I requested the LEA to explain what these descriptions referred to, and more importantly, their exact usage. I was told by the LEA concerned that 'general' meant 'surveillance duties conducted at public area', 'preparation of court trial' denoted 'playing back of the recordings in the court during the trial period', 'case processing' referred to 'photo taking of exhibits of a case' and 'for playing cassette' was 'for retrieving the recorded images/sound recordings in the office for compilation of progress report'. I commented that the use of terms too general was not desirable and advised the LEA concerned to improve by giving clearer and more specific descriptions.

(f) There were also some descriptions of general surveillance usage, such as 'observation' or 'surveillance', arousing the query as to the difference between such an act and the covert surveillance under the Ordinance. Similar to (e) above, the LEA concerned was advised to make improvement to facilitate my checking.

(g) It was noted that, possibly due to lack of space in the inventory list/device register or simply for the sake of convenience, abbreviated terms were used by officers of a particular LEA. Such terms were difficult to decipher but easy to explain by the LEA during my inspection visit. The LEA concerned was requested to and did provide me with a

list of actual meaning of frequently used abbreviated terms to facilitate my checking.

(h) I found that different LEAs had prepared their inventory lists and device registers differently. I perceived a need to standardize the format and presentation. Accordingly, my Secretariat had assisted to design one set of standard forms consisting the inventory list, the ICSO device register and the non-ICSO device register for application by all LEAs.

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

(a) to check the entries in the original register(s) against the entries in the copy of register(s) submitted to me, with the aim to ensure that no alteration had been made to the copy sent to me;

(b) to check the procedures for the issue and return of surveillance devices for purposes under the Ordinance and for non-ICSO related usage;

(c) to check whether any issue of device was appropriately supported by a request form;

(d) to check the physical existence of items on the copy inventory entries provided to me periodically;

(e) to check the items of device shown in the copy registers to have been recently returned if they were being kept in the stores;

(f) to make stock-check of items evidenced by the copy registers to be in the stores;

(g) for the above purposes, to compare the unique number on each item as shown on the copy registers against the number assigned to the item as marked on it or attached to it; and

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

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

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CHAPTER 4

TYPE 2 SURVEILLANCE

Executive authorizations

4.1 An application for the issue of fresh or renewed prescribed authorization to carry out Type 2 surveillance may be made to an authorizing officer of the department concerned. The authorizing officer is an officer not below the rank equivalent to that of senior superintendent of police designated by the head of department [section 7]. Such an authorization when granted is called an 'executive authorization' [section 2 and 14]. Same as applications for judge's authorization for interception or Type 1 surveillance, applications for executive authorization should normally be made in writing [section 14]. Upon consideration of all relevant supporting grounds for the application, the authorizing officer may decide to issue the executive authorization (with or without variations) or to refuse the application with stated reasons [section 15].

Written applications

4.2 There were a total of 124 written applications for Type 2 surveillance made by the LEAs throughout the report period. All these applications were granted, including 107 fresh applications and 17 renewal applications. There was no refused application for Type 2 surveillance in this report period.

Duration of authorizations

4.3 The maximum authorized duration for Type 2 surveillance, whether on fresh or renewal application, is in any case not to be longer than the period of three months [sections 16(b) & 19(b)].

4.4 With respect to authorizations granted for Type 2 surveillance for this report period, including both fresh and renewal applications, the longest approved duration was 89 days while the shortest one was less than a day. The overall average duration for each authorization, both written and oral applications counted, was about 12 days.

Authorizations with five or more previous renewals

4.5 With respect to Type 2 surveillance, there was no case of any authorization with five or more previous renewals during the report period.

Emergency authorization

4.6 There is no provision under the Ordinance for application for emergency authorization for Type 2 surveillance.

Oral applications

4.7 An application can be made orally to the authorizing officer if the applicant considers that, having regard to all the circumstances of the

case, it is not reasonably practicable to make the application in accordance with the relevant written application provisions of the Ordinance [section 25]. In the report period, two prescribed authorizations for Type 2 surveillance were granted pursuant to oral application. No oral application was refused.

Offences

4.8 Please refer to Table 2(b) in Chapter 11 for the major categories of offences for the investigation of which prescribed authorizations were issued or renewed for surveillance during the report period.

Legal professional privilege

4.9 During the report period, a weekly report submitted by an LEA reported that it was assessed in one Type 2 surveillance application with an executive authorization granted that LPP information might possibly be involved. I checked the case file of this case during a subsequent inspection visit to the LEA. It transpired that in the statement in writing in support of the application, the applicant 'assessed that the likelihood of obtaining information which may be subject to LPP is minimal'. Having considered all the relevant materials in and the circumstances of the case, I came to the conclusion that no information which might be subject to LPP would likely be obtained, and the

authorizing officer had acted properly in granting the authorization.

4.10 There was no report from the LEAs of any case where LPP information was obtained in consequence of Type 2 surveillance carried out pursuant to prescribed authorizations during this report period.

Application for device retrieval warrant

4.11 There was no application for any device retrieval warrant for retrieving the devices used for Type 2 surveillance pursuant to prescribed authorization in this report period.

Revocation of authorizations

4.12 For this report period, a total of 78 authorizations were revoked under section 57. The grounds for discontinuance were mainly that the purpose of the surveillance had been achieved, the subject was arrested, and the relevant surveillance was considered not productive.

4.13 For this report period, there was no report made to the authorizing officer under section 58 in respect of Type 2 surveillance.

Effectiveness of surveillance

4.14 As a result of or further to surveillance operations, including both Type 1 and Type 2, a total of 127 persons who were subjects of the

prescribed authorizations were arrested. A further 110 non-subjects were also arrested in consequence of such operations. The relevant figures can also be found in Table 3(b) in Chapter 11.

Report of irregularity

4.15 In this report period, there were five reports of irregularity made by the LEAs on Type 2 surveillance, including one report not made under section 54. Details of these cases are set out in Chapter 7.

Procedure of oversight for surveillance

4.16 Regarding the procedure of oversight of compliance by the LEAs in respect of surveillance, what has already been mentioned in paragraph 3.20 of Chapter 3 equally applies to Type 2 surveillance.

Checking of surveillance devices

4.17 Please refer to paragraphs 3.28 to 3.33 of Chapter 3 regarding the checking of surveillance devices.

Checking of cases during inspection visits

4.18 Please refer to paragraphs 2.29 to 2.30 of Chapter 2 for details of how my checking of cases was carried out during inspection visits to LEAs.

4.19 Since I took office, I have been paying much attention to examine each and every application file in relation to Type 2 surveillance, including granted fresh and renewed authorizations as well as refused applications, if any. The reason is that an application for Type 2 surveillance is submitted to and determined by a designated authorizing officer of the department concerned. The entirety of the application procedure for Type 2 surveillance is completed internally within the department. Without the scrutiny of a panel judge, there is a need to ensure that all such applications correctly fall within the category of Type 2 surveillance and all prescribed authorizations granted are sufficiently justified.

4.20 A total of 140 applications in relation to Type 2 surveillance and 27 related documents/matters were checked during my periodical inspection visits to the LEAs in this report period. On the whole, I found most of the cases to be in order, though with some areas for improvement. The following sets out the highlights of my observations arising from the inspection visits:

(a) *Long approved duration for executive authorizations*

I observed that a number of executive authorizations were granted with a comparatively long duration as compared with authorizations for Type 1 surveillance granted by the panel judges. These cases were examined to see why the surveillance needed to last so long. After examining these

cases, although they correctly fell within the category of Type 2 surveillance, I noted in a number of cases that sufficient explanation or material was not provided in the applicant's statement in writing in support of the application to justify the requested duration. Despite this, the authorizing officer granted the application without taking any action to seek explanation in this respect from the applicant. I commented that this was not satisfactory and advised that improvement be made. I reminded the LEAs that applicants had the duty to provide sufficient grounds in their written statements in support to justify the requested duration. At the same time, the authorizing officer should take a critical approach when considering each application, including whether the application was fully justified and whether the requested duration was reasonable. When necessary, he should seek clarification and explanation from the applicant before he comes to any determination. In response to my above comment, the LEAs took steps to remind the authorizing officers of their responsibility of taking a critical approach when considering applications and also to require all applicants to provide sufficient material and explanation in their written statement to support the requested duration.

(b) *Description of ambit for 'premises-based' surveillance*

I noted that in a number of applications for Type 2 surveillance

of a particular LEA, the form of surveillance was categorized as both premises-based and subject-based. I found that the descriptions for the premises-based ambit of the surveillance appeared to be too wide. The descriptions in question were:

(i) listening device(s) at specified premises or any other premises or place;

(ii) listening device(s) at premises or place operationally suitable; and

(iii) listening device(s) at premises or place as arranged.

I sought clarification from the LEA concerned during an inspection visit on what such descriptions referred to. The LEA explained that for the cases in question, listening devices were carried by a participating agent to be used for recording the conversations between him and the target over the telephone or at meetings. Regarding meetings especially, very often the participating agent could only play a rather passive role in his course of dealing with the target. He could seldom set the place and time of the meeting for discussing criminal dealings as that would easily invite the target's suspicion. Accordingly, he could only await the target to inform him of the time and place of meeting, sometimes at very short notice. In this connection, the descriptions of the ambit of surveillance in question were

aimed to offer a certain degree of operational flexibility to the agent. Operational effectiveness might be affected if a more restrictive ambit was set for the surveillance. After examining these cases, I noted that the ambit though sounded wide was in fact not entirely unjustified in view of the operational need in the circumstances. While I understood the limitations which LEAs might encounter in the course of carrying out surveillance, the wording used must, however, not be too wide and without limit. For example, if the target were to discuss the alleged criminal activities with the agent on an aeroplane not registered in Hong Kong or overseas beyond the intended operational jurisdiction of the authorization, it would still fall within any one of the above descriptions. The LEA was advised to tighten the wording so as not to unwittingly expand the ambit of the authorization.

(c) *Late return of surveillance devices*

There was one case in which I found that surveillance devices were returned around a week after the revocation of an authorization. I queried the LEA concerned on this case. The LEA explained that it was caused by oversight on the part of the case officer. Although I accepted the explanation, I advised the LEA that officers of the device registry did not seem to realize that they also had the obligation to retrieve relevant devices after expiration or revocation of an

authorization. The mistake in the case could have been avoided if officers of the device registry had taken the initiative on retrieval of devices from case officers.

(d) *Surveillance to be carried out by the same participating agent under two authorizations*

There were two executive authorizations which were related to the same investigation case. While these two authorizations were for surveillance on two different targets, the relevant surveillance was to be carried out by the same participating agent. As shown in the relevant device register, two separate sets of surveillance devices were issued. In principle and according to the wording of the two authorizations, the first set of devices ('set A') should be restricted for surveillance over the target specified in the first authorization ('target A') whereas another set of devices ('set B') was for the target specified in the second authorization ('target B'). I perceived that there would be high risk of non-compliance and possible abuse of surveillance devices in the circumstances because there could be a chance for the participating agent to carry both sets of surveillance devices at the same time. As each set of surveillance devices was only authorized to be used in respect of a particular target, irregularity would occur if the participating agent used the wrong set. In case a meeting was originally confirmed with target A, the participating agent

should only use set A devices. If, however, target A did not turn up but target B turned up instead, the agent might not have time or opportunity to switch to the other set of devices. It would amount to non-compliance if set A devices was used. Moreover, if two similar or equal sets of devices were kept by the participating agent who would only need to use one set, the other set could be subject to abuse for an unauthorized purpose.

I asked the LEA concerned to explain the case to me in greater detail to see whether there was any unauthorized use of surveillance devices throughout the operation. After clarification, my worry was eased and I was satisfied that there was no unauthorized use of the surveillance devices. In spite of this, I advised the LEA that the authorizing officer should be more careful when considering applications in order to avoid risks of non-compliance described above.

(e) *Application with marginally justified grounds*

During my inspection visit to an LEA in December 2007, I examined the application file of an executive authorization which was approved to last about one and a half days. The subject in question was suspected of having committed three offences, A, B and C. Having gone through the relevant documents, I gathered that the purpose or the chief purpose of

the surveillance was to investigate and gather evidence regarding the involvement of the subject and his supervisor in relation to the alleged offence A. However, I saw from the written statement in support of the application that the allegation of offence A was based merely on the suspicion of the complainant. Nowhere in the statement could I find anything further to support the allegation of offence A. I came to a preliminary view that the allegation (ie offence A) made by the complainant might not reasonably amount to sufficient ground to justify an investigation by covert surveillance. I felt the need to look into this case in greater depth and therefore requested written explanations from related officers. From the written explanations given by the applicant and the endorsing officer of the case, I found that their judgement regarding the possible involvement of the subject and his supervisor in offence A based on the complainant's mere assertion or suspicion hinged simply on their previous experience. There was, however, no explanation nor any further facts to lay the ground that offence A was suspected to have been committed. Further, the authorizing officer approved the application without raising any query. The authorizing officer did not provide any further facts in his written explanation to explain on what basis he accepted the applicant's suspicion of the involvement of the subject's supervisor in offence A. From all the documentary

evidence furnished to me, it appeared that the chief purpose of the Type 2 surveillance authorization was to use listening devices against the subject in order to fish for evidence to prove that he and his supervisor were involved in offence A. In relation to the other two alleged offences B and C as specified in the written statement in support of the application, indeed, I was of the view that it would not be difficult for sufficient and strong evidence to be obtained by other means without using the Type 2 surveillance. In this connection, if the proposed covert surveillance was for the purpose of offence A alone, it seemed that the application was not sufficiently justified. Nonetheless, as the Type 2 surveillance could also have the purpose of obtaining concrete evidence of the subject's commission (eg by way of recording a confession or admission from the subject) of the two other offences, I concluded that this authorization just passed the threshold for investigation by Type 2 surveillance.

I advised the LEA to remind its officers to ensure all applications should be sufficiently justified when submitted. The applicant and the endorsing officer should also be reminded that they should not base their judgement on the complainant's mere suspicion, nor should they base their judgement on their personal experience/knowledge unless specifically mentioned with full particulars in the statement in

support of the application (which could also facilitate my audit). At the same time, the LEA was required to advise the authorizing officer of the case that he should take a more critical approach when considering applications for executive authorizations. The LEA responded by letter dated 27 June 2008, informing me that it had accepted and adopted all my recommendations and setting out the details of the follow-up actions that they had taken to put them into effect.

(f) *Overly long period granted for an authorization*

There was an executive authorization granted to last two months. The long duration was noted by me during my inspection visit to an LEA in December 2007. After examining the relevant documents of the case concerned, I did not see any information or explanation provided in the written statement in support of the application as to why the period of two months was required and granted. I then requested further written explanation from relevant officers concerned on why such a long duration was required and why a shorter duration could not have been granted. Having examined the justification provided by the LEA and other relevant materials, I considered that only one of the reasons provided by the LEA, ie that the operation would require several periods of observation, is sound. However, this alone did not amount to justification for the duration of two months to be granted.

Dependent on the information gathered from the initial covert surveillance operation, if further time was needed, a renewal for a further period could always be applied for and granted. Having reviewed the case, while I considered that the duration of two months granted by the authorizing officer was wrong, it might be considered as amounting to little more than an error of judgement or it might have been caused by the inadequate appreciation of the stringent standards of the Ordinance. I informed the head of the LEA concerned of my findings and observations and asked him to convey them to the officers concerned.

(g) *Checking of oral applications*

I had examined the two oral applications made in this report period and found them to be in order.

Further observations

4.21 In performing my review function, whenever there is a need to examine a particular case in greater depth, I may request copy documents and/or further clarification or explanation from LEAs or any of their officers, either verbally in form of interview or in writing.

4.22 My attention to the case mentioned in paragraph 4.20(e) above was first aroused during an inspection visit to the LEA concerned. I

raised my doubts and requested the officers of the LEA who were present in the conference room to assist me in my task to make available the application file for my inspection. Having read through the statement in writing in support of the application for the authorization for Type 2 surveillance and other relevant documents in the file, I expressed to the officers my tentative doubt over the propriety of the authorization. I requested the officers to provide me with a sanitized copy of the statement for me to bring back for closer and more careful examination and consideration. The sanitization was required, as all concerned would understand, so that any sensitive information such as the name and address of the subject of the investigation and the particulars of the complainant, informant or undercover agent (as well as the identity of the facilities being intercepted in an interception case) would be obliterated from the content and would not be leaked. Not less than two hours after my request was made, and when I had already left the conference room for the day, that the sanitized copy was handed to my staff on their way out of the conference room. When I arrived back at my office and checked the sanitized copy, it was discovered that a large part of its content had been obliterated, leaving little information on the issue for which I needed the copy document for my close examination and consideration.

4.23 I was compelled to write to the head of the LEA notifying him of the incident and asked him to investigate. Eventually the head of the LEA agreed with my observation that there was no good reason for his officers to provide me with such an over-sanitized copy of the statement in

writing. The explanations from the officers concerned were that the junior staff making the copy did not understand the purpose of the sanitization by over-blotting the content and the more senior officers did not notice the over-sanitization when handing the copy to my staff on their way out of the conference room. I had doubts in and was critical of these officers' explanations. I conveyed my observations to the head of the LEA and advised him that despite my observations, I did not have sufficient evidence to justify a finding of wilful intent or deliberate obstruction on the part of the officers. I recommended that improvements were required from the officers concerned to ensure that they were fully aware of the proper way of sanitizing documents and they were to seek clarification from supervising officers if in doubt. The LEA accepted my recommendation.

4.24 This over-sanitization was itself not a matter of great consequence because eventually the LEA provided me with a properly sanitized copy. However, the incident somewhat distracted the focus on the main issue with which the case ought to be concerned and wasted time and effort in investigating the side issue.

4.25 Regarding the case mentioned in paragraph 4.20(f) above, in a written statement explaining the propriety of the case upon my request, an LEA officer seemed to consider that my course of action amounted to a situation where little trust was placed on him and his subordinates in handling ICSO matters, that their professionalism was slighted and their precious time in performing their duties had been wasted for providing

statements and information as required by me.

4.26 I fully understand the trouble through which the LEA officers have been put, but it is what is required of my duties under the Ordinance. The officer concerned had apparently allowed his frustration resulted from his team's action being queried and their being required to provide statements and information to me to overbear upon his duty to comply with the requirements, spirit and scheme of the Ordinance, which he apparently appreciated. The Ordinance provides a scheme whereby full compliance with its requirements is to be ensured through the checks and balances it provides for the otherwise intrusive investigation means to be employed only after passing stringent tests. The panel judges are the statutory authority for granting interception and Type 1 surveillance authorizations, and I as Commissioner am tasked to ensure full compliance by LEAs. I only conduct enquiries whenever circumstances demand, and it is neither the intention of the Ordinance nor mine to impede or discourage prevention and detection of serious crimes. The check and balance scheme is to prevent blind trust in any person or any organization. I hope LEAs and their officers will understand this and render their full cooperation to facilitate me to perform my functions as required by the Ordinance.

4.27 The head of the LEA accepted my findings and observations and advised the related officers accordingly, in particular the officer referred to in paragraph 4.25 above was advised of my duties and functions and the role of the LEA in facilitating the discharge of such duties and

functions. The LEA has also established a steering group that commenced operation in April 2008 to organize bi-monthly meetings with authorizing officers, for the purpose of, inter alia, strengthening quality control and compliance.

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CHAPTER 5

LEGAL PROFESSIONAL PRIVILEGE AND JOURNALISTIC MATERIAL

Protection of the right

5.1 Legal professional privilege ('LPP'), a well established common law right, is guaranteed by Article 35 of the Basic Law as a fundamental right. Article 35 provides that:

> 'Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.'

5.2 The ICSO operates in a number of ways to protect and deal with communications which are subject to LPP. First, it limits the interception of communications or surveillance targeted at premises where legal advice is likely to be given. Section 31 provides that save for exceptional circumstances, no interception or surveillance should be authorized by reference to the premises of a lawyer, including his office and residence, or to his communications. Exceptional circumstances exist if the lawyer concerned (or any other lawyer or person working in the office or residing in the residence) is a party to any activity which

constitutes or would constitute a serious crime or a threat to public security; or the relevant authority granting the authorization is satisfied that there are reasonable grounds to believe that any of the communications concerned is for the furtherance of a criminal purpose.

5.3 Second, the provisions of the ICSO ensure that where an application is made to the relevant authority for a prescribed authorization, the relevant authority (panel judge or authorizing officer or head of department) is made aware of the likelihood of obtaining information that might be subject to LPP by carrying out the statutory activity (Schedule 3 to the ICSO: Part 1 paragraph (b)(ix), Part 2 paragraph (b)(x) and Part 3 paragraph (b)(x)). This allows the relevant authority to take this factor into account when assessing whether the conditions for issue of the prescribed authorization set out in section 3 of the Ordinance are met. Even when the relevant authority decides to grant the authorization, he may also impose further conditions to guard against inadvertent obtaining of LPP information or require the LEA to report to him as a material change of circumstances so that the panel judge still retains the power to review the situation should the need arise. Section 2(3) of the Ordinance also elevates any Type 2 surveillance as Type 1 surveillance if it is likely that any information which may be subject to LPP will be obtained by carrying it out so that the authorization would not be granted internally by an authorizing officer within the LEA itself, but by a panel judge.

5.4 Third, section 58 requires that the officer in charge of an

interception or surveillance must report to the relevant authority the arrest of the subject of interception or surveillance as soon as reasonably practicable after he becomes aware of the arrest. The report must assess the effect of the arrest on the likelihood that any information which may be subject to LPP will be obtained by continuing the statutory activity. The relevant authority will then decide whether to revoke the authorization or allow it to continue and in the case of latter, whether further conditions should be imposed to safeguard against inadvertent obtaining of information which may be subject to LPP.

5.5 Fourth, in addition to the general requirement that telecommunications intercept product is not admissible in evidence in any proceedings before any court and is not to be made available to any party to any proceedings before any court, section 62 requires that any information that is subject to LPP is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization.

5.6 Fifth, besides the general safeguards under section 59(1) requiring the head of department to make arrangements for any protected product to be destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization, section 59(2) requires that where the protected product from a postal interception or surveillance contains any information subject to LPP, the head of department must make arrangements for it to be destroyed not later than one year after its retention ceases to be necessary for the purposes of any civil or criminal proceedings

before any court that are pending or are likely to be instituted. Where the protected product containing LPP information is obtained from telecommunications interception, the head of department is required to make arrangements to destroy it as soon as reasonably practicable.

5.7 The Code issued under section 63 of the ICSO also deals with protection of LPP information. Paragraph 120 of the Code (or paragraph 117 of the previous Code issued in August 2006) requires dedicated units separate from the investigation team to screen out information protected by LPP and to withhold such information from the investigators. It also requires LEAs to notify the Commissioner of 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 department's notification, the Commissioner may, inter alia, review the information passed on by the dedicated units to the investigators to check that it does not contain any information subject to LPP that should have been screened out.

5.8 The Commissioner is also required under section 49(2)(d)(vii) to set out a list showing the number of cases in which information subject to LPP has been obtained in consequence of any interception or covert surveillance.

5.9 Save for the above, the ICSO and the Code are silent on the details of some practical aspects of how to deal with a situation where LPP information might possibly be obtained such as the extent of listening to

the intercept product involving such information, the persons who should be allowed to listen to the product, and whether such information, if obtained, can be used for crime prevention or detection purposes. These will be dealt with in the latter part of this chapter.

5.10 LPP aside, the ICSO also makes specific reference to journalistic material for particular caution when statutory activities are to be authorized. The various provisions of Schedule 3 to the Ordinance mentioned in paragraph 5.3 above equally require the applicant to set out in the affidavit or statement in writing in support of an application for interception or surveillance the likelihood that any information which may be the contents of any journalistic material will be obtained by carrying out the interception or surveillance. This aims to draw the attention of the relevant authorizing authority to the likelihood when assessing whether the application should be granted so that such case would be scrutinized most carefully, thus offering better protection of the freedom of expression and the freedom of the press, which are fundamental rights protected by Article 27 of the Basic Law.

5.11 During the report period, I received four reports of inadvertent obtaining of information which might be subject to LPP, all from the Independent Commission Against Corruption ('ICAC'). The four cases are set out below. There was no reported case of journalistic material having been obtained during the report period.

5.12 As a matter of background, it would be helpful to set out the handling procedures of LPP cases (involving interception or Type 1 surveillance) by the LEAs and panel judges. Under a standard condition in a judge's authorization, an LEA is under a continuing duty to bring to the attention of any panel judge any material change of the circumstances upon which the authorization was granted or renewed, and changes in LPP risk is one of such circumstances. In the event that the LEA concerned considers that the conditions under section 3 of the Ordinance are no longer met as a result of such material change to the matters previously disclosed, the LEA will discontinue the operation and submit a section 57 report to the panel judge for revocation of the authorization. On the other hand, where the LEA concerned considers that the conditions under section 3 of the Ordinance continue to be met, the LEA will submit a report using form REP-11 ('the REP-11 report') to the panel judge to report the material change of circumstances, for example, there is a change in LPP risk. After considering the REP-11 report, the panel judge may agree with the LEA concerned and there will be no disruption to the operation. In other cases, the panel judge may take the view that the material change results in a situation where the conditions under section 3 are no longer met and revokes the authorization. The Administration's view is that a panel judge does not have the power to revoke an authorization in these circumstances, and further discussion of this point is set out in paragraphs 5.15 to 5.19 below.

LPP Case 1

5.13 On a day in February 2007 ('Day 1'), ICAC intercepted a call containing LPP information. On the morning two days later ('Day 3'), ICAC reported the incident to the panel judge as a material change of circumstances via an REP-11 report. After consideration of the REP-11 report, the panel judge revoked the prescribed authorization at 1115 hours that morning. ICAC duly reported this instance of obtaining LPP information to me by letter, pursuant to paragraph 117 of the Code prevailing at that time. The notification letter to me did not enclose any documents or indicate at what time the interception was stopped after the revocation of the authorization.

5.14 During an inspection visit to ICAC in March 2007, I was told that ICAC discontinued the interception at 1130 hours, which was 15 minutes after the revocation of the prescribed authorization. As a prescribed authorization ceased to have effect from the time of revocation, prima facie, the interception between 1115 hours and 1130 hours was carried out without the authority of a prescribed authorization, like the problem arising from revocation under section 58 where the panel judge revoked a prescribed authorization after receipt of a report of arrest and the covert operation conducted during the interim between the revocation and the actual cessation of the covert operation was an unauthorized activity. I advised ICAC to look into this. In a subsequent visit to ICAC in June 2007, I advised the department that the interception undertaken during the

interim period between revocation and actual cessation of interception was unauthorized and amounted to an irregularity. I required the department to submit a report on this irregularity to me in accordance with the provisions of section 54 of the Ordinance.

5.15 ICAC brought this matter to the attention of the Security Bureau. In a note dated 21 June 2007, the Security Bureau expressed to the panel judges and me that it did not consider that the panel judges had the power to revoke an authorization upon receipt of an REP-11 report on material changes of circumstances. It stated that the ICSO specifically provided for the power of revocation but only in the circumstances of sections 57 and 58. In other circumstances, it believed that the LEAs would have to treat the panel judge's view ('the Panel Judge's View') as a ground for discontinuance. Once an LEA officer was made aware of this ground, he would have a duty to cause the operation to be discontinued as soon as reasonably practicable under section 57(2)(a). He should also, as soon as reasonably practicable, report to the panel judge on the discontinuation of the operation under section 57(3). At that stage, the panel judge should exercise his power of revocation under section 57(4). Thus a 'gap' between revocation and discontinuance would not arise since revocation would invariably follow discontinuance.

5.16 The stance of the panel judges on this issue was conveyed to the Security Bureau by a memo dated 21 August 2007 from the Judiciary Administrator. The panel judges were of the opinion that an REP-11

report is made pursuant to the standard condition in a judge's authorization. Under the condition, the LEA which has obtained the authorization from the panel judge is under a continuing duty of disclosure of matters (not previously disclosed or, if previously disclosed, require qualification) which may be relevant to the question of whether the authorization should be revoked or continued with conditions or variations. In practice, the REP-11 report is required in the situation where, notwithstanding the material change to the matters as disclosed at the time of the earlier application, the LEA concerned considers that the conditions under section 3 of the Ordinance continue to be met and reports back pursuant to the standard condition for the panel judge to consider, whilst the operation continues. If after considering the REP-11 report, the panel judge agrees with the LEA concerned and allows the operation to continue, no problem would arise. The problem of a possible time gap would only arise if, having considered the REP-11 report, the panel judge, disagreeing with the LEA, takes the view that the material changes result in a situation where the conditions under section 3 are no longer met and revokes the authorization. The panel judges noted that the Security Bureau took the view that the Panel Judge's View would be treated as a 'ground for discontinuance' under section 57 of the ICSO. They doubted whether this was legally correct and suggested that the Security Bureau should seek legal advice. The panel judges opined that the revocation could be regarded as made under an implied/inherent power pursuant to the standard condition in the authorization, and is not made under section 57 or 58.

5.17 By a letter dated 5 October 2007 to me, the Security Bureau reiterated its view that the position with respect to REP-11 reports submitted by LEAs on a material change of circumstances would be different from that regarding reports submitted under section 58, in that in the former case the Panel Judge's View should be regarded as a ground for discontinuance whereupon the LEA concerned should make a report to the panel judges under section 57, and that the panel judges cannot revoke the authorizations of their own accord. The Security Bureau pointed out that while the Ordinance does provide for conditions to be imposed on a prescribed authorization, it does not provide for the power of revocation in the event of a breach of a condition *per se*. Where a breach of a condition results in a failure to meet the conditions for the continuance of the authorization so that the ground for discontinuance under section 57 exists, this can be dealt with under that provision. According to the Security Bureau, the considered view of DoJ was that the statutory scheme does not have any lacuna in relation to revocation that needs to be filled. No power is given to the relevant authority to revoke an authorization except in circumstances specified in sections 24, 26, 27, 57 and 58 of the Ordinance. Any purported revocation by the relevant authority, other than those made under section 24, 26, 27, 57 or 58, would be beyond the powers given to him under the Ordinance and would be in direct conflict with the provisions in sections 24(4), 26(4), 27(4), 57(5) and 58(3) which terminate the effective duration of authorizations by means of the revocations specified in them. In the light of DoJ's advice, the Security Bureau concluded that the panel judges did not have the authority to revoke the

authorization concerned. Accordingly, it remained of the view that where the panel judge concerned, following consideration of an REP-11 report, is of the view that the conditions for the continuance of the authorization are not met, the ground for discontinuance under section 57(2) will arise, and the LEA concerned will take action to discontinue the operation as soon as reasonably practicable, to be followed by a report to the panel judge under section 57(3) for revocation of the authorization. Based on this, the Security Bureau considered that the on-going operation after the panel judge had formed his opinion that the conditions for the continuance of the authorization were not met and before the actual discontinuation of the operations by the LEA concerned was not unauthorized.

5.18 On 16 October 2007, I conveyed to the Security Bureau and all the LEAs that I was not persuaded by the views expressed in the Security Bureau's letter of 5 October 2007 that under the section 58 situation and the REP-11 situation, any on-going operation after the revocation of the prescribed authorization by the panel judge is not unauthorized and does not amount to an irregularity. I reminded the LEAs that pending resolution of the matter, any situation that involved any on-going operation (for however short a duration) after a revocation must be reported to me.

5.19 The panel judges maintained the same stance as stated in the Judiciary Administrator's memo of 21 August 2007 to the Security Bureau.

5.20 Regarding my request made to ICAC in June 2007 to submit a report under section 54 on the 15-minute unauthorized interception stated in paragraph 5.14 above, my secretariat sent two reminders to ICAC in July and September 2007. On 11 October 2007, ICAC replied that the matter was being co-ordinated by the Security Bureau. On 13 November 2007, I personally wrote to the Commissioner, ICAC ('C, ICAC') to request him to submit a report of irregularity under section 54 on this case with sanitized copies of the relevant documents.

5.21 On 30 November 2007, C, ICAC replied that the prescribed authorization in this case was revoked at 1115 hours on Day 3, ICAC discontinued the operation at 1130 hours and the facility was disconnected at 1300 hours. As the Security Bureau was of the view that the panel judge had no power to revoke an authorization except in the circumstances specified in sections 24, 26, 27, 57 and 58 of the Ordinance, it was not clear to him if the operation carried out in the interim period after the revocation of the authorization should be regarded as 'unauthorized' and be the subject of a report under section 54 of the ICSO. Pending clarification of the matter, it was inappropriate for him to submit a case report to me under section 54.

5.22 On 11 December 2007, I wrote to C, ICAC rebutting his views. I pointed out that the fact remained that the prescribed authorization was revoked at 1115 hours by the panel judge and the interception apparently went on until, according to one version, 1130 hours and according to

another version, 1300 hours on the same day. The interception was ongoing when the authorization had been revoked. I wondered by what standard the interception between 1115 hours and 1300 hours was considered as not unauthorized when in fact it was undertaken after the only valid authorization had been revoked. If C, ICAC questioned the power of the panel judge to revoke the prescribed authorization in the circumstances of this case or if he was aggrieved by such action or decision on the part of the panel judge, he should take prompt action to seek remedy from the court, such as to quash the panel judge's decision of revocation or his refusal to allow the continuance of the prescribed authorization or for a declaration of a proper interpretation of the statutory provision. I made it clear that if he kept on delaying these matters by not submitting a case report to me, I feared that relevant material might be put beyond my reach for my investigation. In the circumstances, while I did not agree with his view that it was inappropriate to submit a report to me under section 54, I required him to provide, pursuant to section 53 of the ICSO, a report on this case of interception with all relevant facts.

5.23 The Security Bureau responded on 28 December 2007, inter alia, that notwithstanding the difference in views between the Administration and me, LEAs would follow my advice and report to me any situation that involved any on-going operation (regardless of its duration) after an adverse decision of the panel judges on an REP-11 report. (See paragraph 7.90.)

5.24 On 10 January 2008, C, ICAC submitted an incident report to me under section 53 of the ICSO setting out the relevant facts of this case, enclosing, inter alia, a chronology of events and reasons for the revocation of the authorization. C, ICAC also stated that the listener and her supervising officer were the only two officers who had listened to the recording of the LPP call. Upon being notified of the revocation at 1125 hours on Day 3, they immediately ceased listening to the intercepted facility. Both officers confirmed that they did not make any written record in respect of the content of the LPP information or disclose it to investigating officers. In accordance with the 'destruction policy' prevailing at the time of this LPP incident, all relevant records had already been destroyed. However, the destruction policy had subsequently been revised following my advice given when reviewing LPP Case 2 (see paragraph 5.33 below). All intercept materials and records relating to the obtaining of LPP information are now preserved pending my investigation of the case concerned.

5.25 As all records in this case had been destroyed, ICAC did not know whether there were calls between 1115 hours on Day 3 when the authorization was revoked and 1125 hours on the same day when the two ICAC officers ceased listening to the subject facility. Nor did they know if there were any calls between 1125 hours and 1300 hours when the facility was disconnected.

5.26 I considered that the interception during the 105 minutes

between 1115 hours and 1300 hours was conducted without the authority of a prescribed authorization and was unauthorized. Because of the destruction of records, I was unable to verify whether listening did cease at 1125 hours on the day of revocation as reported and whether the LPP information obtained had been screened out and was not disseminated to investigators.

5.27 I noted that in this case, listening continued until after revocation of the authorization. If the panel judge did not have the power to revoke this authorization upon receipt of the REP-11 report as stated by the Security Bureau, this authorization could continue until its natural expiry in which case the panel judge would have no control or power to prevent further LPP information from being obtained by ICAC through continued interception. This is, to say the least, unsatisfactory. Although the Security Bureau's stance is that the Panel Judge's View will be treated as a 'ground for discontinuance' under section 57, the ICSO does not contain provision that the LEA concerned must follow the Panel Judge's View to discontinue an operation, and even if the LEA follows, there is no control as to when it will submit the discontinuance report under section 57. This might gravely endanger LPP protection since the LEA concerned can continue to listen to LPP information until such time it wishes to stop. The control will thus be in the hands of the LEA rather than the panel judges. A further discussion of this subject can be found in paragraphs 7.85 to 7.90 of Chapter 7.

5.28 In the present case, I decided not to give a notice under section 48(1) of the Ordinance to the relevant person on the 105-minute unauthorized interception because to do so, as advised by the ICAC, would be prejudicial to the prevention or detection of crime.

LPP Case 2

5.29 LPP Case 2 and LPP Case 3 related to the same prescribed authorization, which authorized the interception of two facilities ('Facilities A and B'). Case 2 related to the obtaining of LPP information through interception on Facility B on a day in November 2007 whereas Case 3 related to the obtaining of LPP information through interception on Facility A on a later date.

5.30 At the time of applying for the grant of the prescribed authorization, the applicant assessed that there was likelihood of obtaining LPP information in conducting the telecommunications interception. When granting the authorization, the panel judge imposed further conditions the effect of which is that the case would need to be brought back to a panel judge for re-assessment as soon as any LPP information was likely to be obtained.

5.31 On a subsequent day in November 2007, ICAC intercepted a call which contained information that might be subject to LPP ('the First LPP Call'). ICAC submitted an REP-11 report to the panel judge, who

after consideration of its content, allowed the authorization to continue with the same further conditions imposed. ICAC then notified me of this incident in accordance with paragraph 120 of the Code by letter. The notification letter did not enclose any documents.

5.32 In this case, I considered that there were three matters requiring my enquiry, namely,

(a) whether the REP-11 report contained a true and complete account of what had happened;

(b) whether there was any non-compliance with the said further conditions; and

(c) whether the LPP information was screened out and was not disseminated to investigators.

5.33 During my inspection visit to ICAC about a week later ('the Inspection Visit'), I inspected the REP-11 report which outlined the content of the conversation between the caller and the subject. I required ICAC to describe in writing the detailed procedures involved in the handling of interception cases where LPP information or information which might be subject to LPP had inadvertently been obtained. I also required ICAC to provide a chronology of events of this case, from the time when any one was first alerted to the LPP information up to the time of making of the notification to me, and preserve all relevant records relating to the

inadvertent obtaining of the LPP information to facilitate my investigation of this case, including the recorded intercept product.

5.34 On 10 December 2007, I wrote to C, ICAC following up on my requests during the Inspection Visit. I stated categorically in paragraphs 4 and 7 of my letter the need to preserve relevant records for my investigation in this and future cases:

> '**During the above visit, I also advised your officers to preserve all records … [the recorded intercept product and written summaries]** relating to the inadvertent obtaining of the [LPP] Information to facilitate my investigation into the case. In this connection, please advise what records you have preserved and whether you have destroyed any records in relation to this case and if so, what they were and the time of destruction.' (Paragraph 4 of my letter of 10 December 2007.)
>
> 'In future, when you notify me of incidents of obtaining information subject to or might be subject to LPP, I would appreciate it if you could also attach copies of the relevant prescribed authorization(s) and REP-11 report to your notification letter. The copies so attached should be sanitized. **Please also ensure that all relevant records … [the recorded intercept product and written summaries] should all be preserved to facilitate my investigation**.' (Paragraph 7 of my letter of 10 December 2007.) (Emphasis added.)

5.35 By a letter dated 8 January 2008, C, ICAC provided a chronology of events of the case to me. He stated that the audit trail report revealed that the listener had accessed the First LPP Call on two occasions, the first time in the morning and the second time in the afternoon. While listening to the call the first time in the morning, the listener was not alerted to the fact that the call contained LPP information. C, ICAC stated that the listener had been strongly advised on 7 January 2008 by his senior that he should be vigilant in carrying out his duties as a listener. This disciplinary action is subject to review pending my further investigation of this case.

5.36 On the preservation of records, C, ICAC stated that the REP-11 report and the audit trail report had been preserved but the recorded intercept product had been destroyed three days after the Inspection Visit because it did not occur to the responsible officer to whom I made the request during the Inspection Visit ('the Responsible Officer') that I required the preservation of all records relating to the inadvertent obtaining of the LPP information to facilitate my investigation and the Responsible Officer was under the impression that I was satisfied with the way the matter was handled.

(a) *Non-preservation of the recorded intercept product to verify the content of the REP-11 report*

5.37 By a letter dated 23 January 2008, I questioned the

non-preservation of the recorded intercept product despite my express requirement in the Inspection Visit. The panel judge allowed the continuance of this prescribed authorization after considering the information contained in the REP-11 report. Preservation of the recorded intercept product is essential for verifying the truthfulness of the information reported to the panel judge. As my investigation of this case had just started and had not been concluded, I could not see for what reason the Responsible Officer considered that I did not require the preservation of the recorded intercept product for my investigation. I required a statement from the Responsible Officer explaining the matter and C, ICAC's view on the veracity of his explanation. I also required C, ICAC to provide a copy of the audit trail report for my inspection.

5.38 On 29 February 2008, C, ICAC provided a statement made by the Responsible Officer on 25 February 2008 and the audit trail report as required by me. The Responsible Officer stated that after I finished examining the REP-11 report at the Inspection Visit, I expressed the view that the case had been properly handled. He got the impression there and then that I was satisfied with the REP-11 report and no further action was therefore required. The Responsible Officer confirmed that during the said visit, I had specifically required that all records relating to the inadvertent obtaining of information which might be subject to LPP including the recorded intercept product be preserved for my investigation. He took that I was referring to all subsequent cases pending examination by me but not including this case. C, ICAC saw no reason why the

Responsible Officer should wish to block my access to the recorded intercept product in question. There was neither need nor advantage for him to do so. C, ICAC was of the view that the Responsible Officer had misunderstood my requirement that all records including the recorded intercept product should be preserved. That said, C, ICAC admitted that where in doubt the officers concerned should take the initiative to verify what my requirements entailed. The Responsible Officer and his team were given appropriate advice by C, ICAC and another senior officer.

5.39 By a letter dated 8 April 2008, I pointed out to C, ICAC that the recorded intercept product was an essential record to verify whether the REP-11 report to the panel judge had not misrepresented the contents of the conversation that had been listened to so that the panel judge had not been misled into allowing the interception to continue. (The panel judge did not listen to the intercept product before making the decision and legal advice from DoJ is that the panel judge is not entitled to listen.) I found it difficult to understand the logic of the Responsible Officer that in future LPP cases, it would be necessary to preserve all records for my review but for this case, it would suffice to just examine the REP-11 report and no further action would be required. Common sense tells that further action would be required because the mere examination of the REP-11 report could not be used to verify whether there was full and frank disclosure in the report on the basis of which the panel judge allowed the authorization to continue or expose other irregularities such as those described in the following paragraphs. By whatever standard, the case would unlikely be

said to have been handled properly as claimed in the Responsible Officer's statement of 25 February 2008.

5.40 In his letter of 14 May 2008, C, ICAC fully accepted the need to preserve the relevant records for my examination. Regarding the handling of the matter by the Responsible Officer, C, ICAC had nothing further to add to the reply already given.

(b) *Non-compliance on the part of the listener*

5.41 Having examined the audit trail report attached to C, ICAC's letter of 29 February 2008, I found that the listener of this case had listened to the First LPP Call in the morning. Instead of reporting to his supervisor that information which might be subject to LPP had inadvertently been obtained and reporting the case to the panel judge for re-assessment, the listener continued to listen to more than 20 other calls subsequent in time to the First LPP Call ('new calls') before he listened to the First LPP Call again in the afternoon and then reported the First LPP Call to his supervisor. The listener explained that when he first listened to the call in the morning, it did not occur to him that the call might contain LPP information. It was only after he had listened to the call again in the afternoon did he realize that LPP information might have been involved. Whatever reason it was, had this listener reported the First LPP Call immediately in the morning, he would not have listened to the 20 odd new calls unless and until a decision had been made by the panel judge upon a review of the situation.

5.42 I also found that ICAC did not tell the panel judge in the REP-11 report that the First LPP Call had been listened to twice and that 20 odd new calls had been listened to during the interval. I considered that it was improper that this fact was not reported to the panel judge. Upon my enquiry, C, ICAC explained in his letter of 14 May 2008 that at the time of submitting the REP-11 report to the panel judge, the reporting officer (who was not the listener) was not aware that the First LPP Call had been listened to twice and therefore did not mention the fact in the report. The reporting officer accepted that he had not made reference to the audit trail report when preparing the REP-11 report. C, ICAC accepted that ICAC had a duty to make full disclosure to the panel judge. In future similar circumstances, the reporting officer making the REP-11 report would be required to check with the relevant audit trail report and report to the panel judge the full circumstances including the number of access made to the subject call. This procedural change would be incorporated into the operational manual for interception.

5.43 According to the chronology of events provided by C, ICAC, after the listener reported the First LPP Call to his supervisor, his supervisor instructed him to put on hold the monitoring exercise pending re-assessment by the panel judge. His supervisor also instructed that the information which might be subject to LPP be screened out and not made accessible to the investigating officers. The listener confirmed to have complied with the supervisor's instructions and ensured that the LPP information was not included in the written summaries he prepared.

However, when I examined the audit trail report, I found that after the listener reported the First LPP Call to his supervisor in the afternoon, he continued to listen to another call intercepted after the First LPP Call. Apparently, this was a breach of his supervisor's instructions and a breach of the further conditions imposed by the panel judge as described in paragraph 5.30 above. I questioned ICAC about this. In his letter of 14 May 2008, C, ICAC stated that he had caused a full investigation into this matter and would submit a report to me with details of the case including any disciplinary action taken.

5.44 Similarly, the details of the events described in paragraph 5.43 above after the listener reported the First LPP Call to his supervisor were not mentioned in the REP-11 report to the panel judge. This amounted to a failure to make a full and frank disclosure to the panel judge. I considered that ICAC should ensure that the true and complete facts of the case are reported to the panel judge. In his letter of 14 May 2008, C, ICAC explained that the reporting officer was not aware that the listener had listened to another call after reporting the First LPP Call to his supervisor. Therefore, the reporting officer was unable to mention the fact in the REP-11 report. C, ICAC accepted that the REP-11 report submitted to the panel judge did not fully reflect the situation.

(c) *Non-preservation of the summaries*

5.45 In my letter of 10 December 2007, I asked ICAC what records

had been preserved and what records had been destroyed. In his letters of 8 January and 29 February 2008, C, ICAC stated that the REP-11 report and the audit trail report had been preserved but some other records had been destroyed. There was no mention of the existence or otherwise of the summaries prepared by the listeners ('the Summaries'). I attempted to get the Summaries for inspection during my visit to ICAC on 18 March 2008 but was told that they were no longer in existence. By a letter dated 8 April 2008, I asked C, ICAC whether the Summaries were not required to be preserved for my review under paragraph 120 of the Code, for me to verify that the information passed on by the dedicated unit to the investigators did not contain any information subject to LPP that should have been screened out. If the Summaries had not been preserved, C, ICAC should provide the reason and the time of destruction.

5.46 On 14 May 2008, C, ICAC replied that the Summaries covering the period of the First LPP Call were destroyed on 11 and 13 December 2007 in accordance with the destruction policy adopted by ICAC. He accepted that ICAC should preserve such documents for my review under paragraph 120 of the Code. As for the reason for destruction, he referred me to the reason given by the Responsible Officer in his statement of 25 February 2008 for the destruction of the documents in connection with this case (see paragraph 5.38 above).

5.47 I consider that this was a disregard of my requirement made during the Inspection Visit (paragraph 5.33 above) that all records in

whatever form, including recorded intercept product and summaries, relating to the inadvertent obtaining of LPP information be preserved to facilitate my investigation. Even if the Responsible Officer had misunderstood my requirement made in the Inspection Visit, ICAC should know my requirement by the time it received my letter of 10 December 2007 which required the preservation of all such relevant records. Moreover, my letter of 10 December 2007 itself also showed that the investigation of the case had just started and had not been concluded. It is difficult to understand why ICAC did not preserve the Summaries for my inspection to check that they did not contain any LPP information that should have been screened out. (Please also refer to paragraph 5.56 below.)

(d) *Conclusion*

5.48 Summing up, in the present case, I was unable to check the veracity of the information contained in the REP-11 report because of the destruction of the recorded intercept product. I was unable to check whether ICAC had complied with paragraph 120 of the Code (referred to in paragraph 5.7 above) because of the destruction of the Summaries. The recorded intercept product and Summaries were destroyed in spite of my express requirement to preserve such records for review purpose. The ICAC listener did not act in line with the further conditions imposed by the panel judge and in fact acted contrary to the instructions of his superior officer. The ICAC officer making the REP-11 report did not report the

fact that the ICAC listener actually listened to the First LPP Call twice and to the 20 odd new calls in between, nor the fact that the listener continued to listen to another call after reporting the First LPP Call to his supervisor. The REP-11 report presented not an entirely true picture of the case to the panel judge. Whether the non-disclosure was due to the reporting officer's genuine failure to check the audit trail report in preparing the REP-11 report or due to other reasons could not be known. On 20 June 2008, C, ICAC furnished me with a full investigation report on the handling of the case by the listener and suggested improvement measures. I have not yet made any decision pending the completion of this Annual Report.

LPP Case 3

5.49 This case was in respect of Facility A authorized by the same prescribed authorization in LPP Case 2. The further conditions imposed by the panel judge referred to in paragraph 5.30 above applied.

5.50 On Day 1, a call was intercepted by ICAC containing information which might be subject to LPP ('the Second LPP Call'). After listening to this call on Day 4, the listener reported the matter to her supervisor. The case was reported by means of an REP-11 report to the panel judge on Day 5 as a material change of circumstances. According to ICAC, before the Second LPP Call was brought to the attention of the Responsible Officer and the reporting officer of the REP-11 report, a

decision had already been made at a departmental meeting chaired by the Responsible Officer to review interception operations on Day 4 to discontinue the interception on the ground that there was no further intelligence value to continue with the interception. As a result, the interception was discontinued on the afternoon of Day 4. At the time when the REP-11 report was submitted to the panel judge on Day 5, a separate report on the discontinuance of interception under section 57 of the ICSO ('the discontinuance report') was also submitted to the panel judge for the purpose of revoking the prescribed authorization. The panel judge noted both reports and revoked the prescribed authorization on the same day. ICAC then notified me of this case under paragraph 120 of the Code by letter. It stated that the relevant recorded communication had been preserved. No documents were attached to ICAC's notification letter. Subsequently, ICAC provided a sanitized copy of the REP-11 report to me.

5.51 By a letter dated 11 December 2007 to C, ICAC, I made further enquiries on this case and required ICAC to provide a chronology of events and a sanitized copy of the discontinuance report in order to have a better understanding of the case. As ICAC indicated that the interception was discontinued not because of the obtaining of the LPP information but because of no further intelligence value to continue with the interception, I asked ICAC up till what date and time of the intercept product had been listened to (by whom) and analyzed (and by whom) for forming such view. I also stated in paragraph 6 of this letter the need to preserve records for my investigation:

> 'We require the chronology and a copy of [the discontinuance report] to be provided to us to have a better understanding of the case. We may also require additional information or details as the circumstances may require. **You are therefore requested to preserve the recorded intercept product and other records relevant to this case for me to check.**' (Emphasis added.)

5.52 By a letter dated 14 February 2008, C, ICAC informed me that the relevant records had been preserved. This letter was silent on the Summaries. According to the chronology provided by ICAC, the listener reported the Second LPP Call to her supervisor (Supervisor X) at about 1015 hours on Day 4 who in turn informed her senior (Supervisor Y). The decision to discontinue the interception was made by the departmental meeting on Day 4 held between 1200 hours and 1305 hours, chaired by the Responsible Officer and attended by Supervisor X and Supervisor Y amongst others. The Responsible Officer was informed by Supervisor Y, in the presence of Supervisor X and the reporting officer of the REP-11 report, of the Second LPP Call only at about 1310 hours after the meeting as Supervisor Y could not reach him before the departmental meeting.

5.53 During a visit to ICAC on 18 March 2008, I obtained a copy of the audit trail report and other documents for further inspection, and listened to the recording of the Second LPP Call. I also asked to inspect the Summaries but was told that they had been destroyed.

5.54 Having analyzed all the information and documents provided by ICAC, on 8 April 2008, I wrote to C, ICAC attaching a chronology prepared by my Secretariat consolidating the events in both LPP Case 2 and this case with my observations and questions indicated thereon. C, ICAC replied to my questions on 14 May 2008, on the basis of which I made the following findings in respect of LPP Case 3.

(a) *Non-preservation of Summaries*

5.55 By his letter of 14 May 2008, C, ICAC stated that the ICAC destruction policy required the Summaries to be destroyed within a certain period. The Summaries prepared in respect of the two subject facilities were destroyed on 11 and 13 December 2007 and on 12 December 2007 respectively in accordance with the destruction policy.

5.56 The following table summarizes the situation:

Case	**Facility**	**LPP Call**	**Due date for destruction of Summaries according to the policy**	**My letter to C, ICAC**	**Summaries destroyed on**
Case 2	B	First	late December 2007	10/12/2007	11/12/2007 and 13/12/2007
Case 3	A	Second	late December 2007	11/12/2007	12/12/2007

5.57 In his letter of 14 May 2008, C, ICAC accepted that his officers should have retained the Summaries in respect of LPP Case 3 to facilitate my review. There was no explanation as to why the Summaries were not preserved.

5.58 It is noteworthy that the Summaries were all destroyed ahead of their due dates under the destruction policy and shortly after receipt of my letters of 10 December 2007 and 11 December 2007 requiring ICAC to retain all relevant records including summaries to facilitate my investigation (see paragraphs 5.34 and 5.51 above). Indeed, prior to these two letters, I had as early as in the Inspection Visit (see paragraph 5.33 above) advised the department of the need to preserve records. By his statement of 25 February 2008, the Responsible Officer also admitted this point although he attempted to excuse himself by saying that he took my said advice as referring to all subsequent cases pending examination by me but not including LPP Case 2. However, the excuse would not be able to be applied to the department's failure to retain the Summaries in LPP Case 3 for my inspection.

(b) *Waste of intelligence*

5.59 The department highlighted in its REP-11 report to the panel judge and in its notification to me that the decision to discontinue the interception was made on ground of no further intelligence value and that the decision was made without knowing the Second LPP Call.

5.60 In his letter of 14 February 2008, C, ICAC stated that the interception on the two facilities authorized by this prescribed authorization had been productive since the commencement of the interception a few months ago, until the week preceding Day 4 when no intelligence was obtained and no further intelligence of value was expected. In other words, the interception in the week before Day 4 was useless. I observed from the audit trail reports that there were a large number of calls intercepted on the two facilities under this prescribed authorization for the five days preceding the time of the Second LPP Call. I asked ICAC if there were any written summaries or records of these calls in order to see if these calls were really of no intelligence value. C, ICAC replied that the relevant written summaries had been destroyed on 11 and 12 December 2007.

5.61 I asked whether information from calls intercepted after the Second LPP Call on Day 1, Day 2 and Day 3 was taken into account when the departmental meeting decided on Day 4 to discontinue the interception on ground of no further intelligence value and if not, why. C, ICAC replied that the monitoring exercise ceased after the listener reported the Second LPP Call to her supervisor and the assessment which concluded that there was no information of intelligence value was made on the basis of the intelligence obtained prior to the Second LPP Call.

5.62 In response to my question, C, ICAC stated that as a matter of practice, all relevant information obtained up to the morning of the

departmental meeting would be considered in making a decision to discontinue an operation.

5.63 I asked whether there were calls intercepted after the Second LPP Call on Days 1, 2 and 3. C, ICAC replied that as the department had not preserved the call records, the department could not verify whether any call had been intercepted after the Second LPP Call.

5.64 I had obtained call records on Facility A from the CSP. The call records showed that there were 16 calls on this facility after the Second LPP Call and before the decision was made on Day 4 to discontinue the interception.

5.65 I think it would be understandable if ICAC decided not to continue with the interception due to the obtaining of LPP information. But if the decision to discontinue was due to no further intelligence value without taking into account the Second LPP Call and the calls intercepted subsequent to the Second LPP Call, the accuracy of the department's assessment of the intelligence value of the operation would be cast in doubt. Would it not be a waste of intelligence if the department turns a blind eye to intercepted calls already available? The whole matter appeared to be against common sense.

(c) *Who was the authority to decide the discontinuance of the interception?*

5.66 There was confusion in the documentation as to who or which authority made the decision to discontinue the interception and at what time.

5.67 According to ICAC's notification letter to me and the chronology provided in its letter of 14 February 2008, it was the departmental meeting which decided to discontinue the interception and the decision was made at a meeting on Day 4 between 1200 hours and 1305 hours. However, my examination of the minutes of the meeting revealed that the departmental meeting only **recommended** the discontinuance of the interception. It did not **decide** that the interception should discontinue. C, ICAC explained in his letter of 14 May 2008 that before the implementation of the ICSO regime, the departmental meeting would recommend the discontinuance to the senior level for endorsement. Following the implementation of the ICSO regime, the decision to discontinue an interception rested with the Responsible Officer who was the chairman of the departmental meeting. Since 1 April 2008, such decision had rested with the respective Assistant Directors of ICAC. However, I found that the operational manual issued by ICAC after the implementation of the ICSO regime continued to state that the departmental meeting would make recommendations for discontinuance of interception to the senior level for consideration, contrary to the

explanation given by C, ICAC that following the implementation of the ICSO regime, the decision rested with the Responsible Officer until 1 April 2008.

5.68 In the REP-11 report to the panel judge, the reporting officer stated that the LPP matter was brought to his attention on the afternoon of Day 4 and that before the matter was brought to his attention, a decision had already been made on the morning of that day to discontinue the interception on the ground that there was no further intelligence value to continue with the interception. There was no mention in this report as to who or which authority made the decision to discontinue the interception. When I asked what the time 'the morning' referred to, C, ICAC explained in his letter of 14 May 2008 that the reporting officer was referring to the decision made by the departmental meeting during its meeting held between 1200 hours and 1305 hours on Day 4. Again, it is not clear whether the decision was made by the departmental meeting or the Responsible Officer.

5.69 In the discontinuance report to the panel judge made under section 57 of the ICSO, the reporting officer (who was also the reporting officer of the REP-11 report) reported that the interception was discontinued on Day 4 at 1700 hours after a decision to discontinue the operation was made by him at 1415 hours that day on the ground that there was no further intelligence value to continue with the interception. According to this discontinuance report, it was the reporting officer who

made the decision at 1415 hours on Day 4 to discontinue the interception, not the departmental meeting or the Responsible Officer. If so, by the time this reporting officer made the decision, he was already aware of the LPP matter as he was informed of it at 1310 hours that day. This was inconsistent with ICAC's claim that the decision was made by the departmental meeting or the Responsible Officer. C, ICAC explained that the reporting officer, being the secretary to the departmental meeting, prepared the discontinuance report pursuant to the decision of the departmental meeting to discontinue on grounds of no further intelligence value. The reporting officer recorded the time of decision as 1415 hours as he was acting in the belief that the decision was effected at 1415 hours when he made the request to disconnect the lines. C, ICAC admitted that by that time the reporting officer was already aware of the LPP matter. As a procedural change to avoid confusion, C, ICAC stated that in future the name of the respective Assistant Directors making the decision of discontinuance of operation and the time of making such decision would be recorded in the discontinuance report submitted to the panel judge.

(d) *The Second LPP Call*

5.70 I had listened to the Second LPP Call but did not find that it really contained information subject to LPP, and the REP-11 report to the panel judge reflected the content of the conversation faithfully.

(e) *Conclusion*

5.71 To conclude, in this case, it was strange that ICAC did not retain the Summaries for my inspection despite my express requirement to preserve relevant records. If the Summaries had been preserved, I would have been able to ascertain whether the discontinuance of the interception in this case was really due to no further intelligence value or for some other reasons. If one were to believe the claim that those involved in making the decision of discontinuance were genuinely not aware of the Second LPP Call when making the decision, it would be difficult to explain why ICAC did not take into account the calls already intercepted on the few days prior to Day 4 before forming the view of no further intelligence value as the ground for discontinuance of the operation. Apart from squandering intelligence, were those involved in making the decision of discontinuance aware of the fact that the assessment of no further value was made without the benefit of the knowledge of the existence of the Second LPP Call and of the information about the subsequent calls intercepted during the preceding few days? Why was the deciding authority not reminded of the availability of such information by the officer(s) in the know, so as to enable it to make a conscious decision instead of making one in an uninformed manner? It is unimaginable if the practice of the department is not to pay heed to calls already intercepted when making a decision to discontinue an interception on ground of no further intelligence value. The decision of discontinuance in this case seemed to have been made abruptly. The documentation in this case was also confusing in terms of

who made the decision to discontinue the interception, at what time the decision was taken and whether the decision was made without the knowledge of the Second LPP Call.

LPP Case 4

5.72 On a day in December 2007 ('Day 1'), two consecutive calls were intercepted pursuant to a prescribed authorization. After the calls ('LPP calls') were listened to, the listener suspected that the communications might relate to LPP information and reported to her supervisor immediately. The supervisor also listened to the two LPP calls before reporting the case upward. The matter was reported to a directorate officer who later directed that an REP-11 report on material change of circumstances be submitted to the panel judge. In the meantime, all relevant records in respect of these two calls were preserved and the information contained in them was screened out and was not disseminated to investigators involved in the investigation. On Day 2, an REP-11 report was submitted to the panel judge who revoked the authorization at 1706 hours after consideration of the report. ICAC was notified of the revocation at 1729 hours and the facility was disconnected 11 minutes later at 1740 hours.

5.73 ICAC then notified me of the incident by letter, informing me that the records of all the calls over the intercepted facility from the LPP calls to the disconnection on Day 2 had been preserved to facilitate my

enquiry. A sanitized copy of the authorization and REP-11 report was also annexed to this notification letter.

5.74 Two matters had arisen for my enquiry, namely,

(a) whether ICAC acted properly in the circumstances regarding the obtaining of possible LPP information; and

(b) whether there was any non-compliance with the requirements of the Ordinance regarding the handling of the matter.

After conducting a review, I made the following findings on this case.

(a) *Initial acts when suspicion arose*

5.75 ICAC acted swiftly and properly over this matter. No criticism can be made as to the speed with which every step was taken by officers of ICAC and as to the measures they had adopted relating to the incident, save for one matter that will be dealt with below that relates to a possible unauthorized interception in the interim between 1706 hours on Day 2 when the panel judge revoked the authorization and the disconnection of the facility at 1740 hours on the same day.

5.76 During an inspection visit to ICAC in January 2008, I listened to the intercept product of the facility that took place since the LPP calls up to the disconnection at 1740 hours on Day 2. From the conversations

heard by me, it transpired that the panel judge was over cautious in revoking the authorization. However, this caution on the part of the panel judge can be well understood, because he was exercising his judgement upon incomplete information (without the benefit of listening to the intercept product) and protecting the right to LPP of the subject in case of any doubt.

(b) *Examination of the Summaries*

5.77 I had examined the Summaries to find that there was no mention of any of the content of the sessions of conversation intercepted on the LPP calls and up to disconnection at 1740 hours on Day 2, verifying the practice that no LPP information which may be heard by listeners will be disclosed to those involved in investigation.

(c) *Unauthorized interception in the interim*

5.78 As said above, there was unauthorized interception in the interim between 1706 hours on Day 2 when the panel judge revoked the authorization and the disconnection of the interception 34 minutes later at 1740 hours. During the interim period, there were eight calls intercepted, each of which lasted less than one minute.

5.79 ICAC's stance has been that the panel judges do not have the power or authority to revoke an authorization instantaneously upon receiving an REP-11 report from ICAC and therefore the interception

during the interim period between the revocation and the time needed for effecting the disconnection should not be considered as unauthorized. However, my view is that where an authorization has been revoked, the interception during the interim period between the revocation and the disconnection should be considered as unauthorized, for without the authorization (because of its revocation), there is nothing to authorize the act of interception in the interim.

(d) *Conclusion*

5.80 Nevertheless, ICAC acted swiftly to disconnect the interception after it was notified of the panel judge's revocation at 1729 hours. There can be no valid criticism that ICAC had delayed the steps taken to effect the disconnection. While I consider that there was an unauthorized interception in the interim, there was little, if any, intrusion into the privacy of the subject or whomever he had any conversation with over the facility in the short interim period of slightly more than half an hour because, as a matter of fact, there was no listening by any ICAC officer to the conversations, if any, in this interim. In the circumstances of this case, disclosing to the subject that his facility was subject to unauthorized interception in the short interim period would doubtless give a hint to him and his associates that they were investigated for suspected crimes, which would prejudice the prevention and detection of crime. Accordingly, I decided that no notification should be given to the subject under section 48(1) of the Ordinance.

5.81 On 16 June 2008, I notified C, ICAC of my findings and commended on the swift procedures described above for handling LPP matters. I recommended that such procedures and the method I suggested for the proper sanitization of documents in this case for protection of confidential or sensitive information that would otherwise be exposed should be adopted by all LEAs. By letter dated 27 June 2008, C, ICAC informed me that ICAC had duly implemented and would continue to adhere to the said procedures and suggested method. He also advised that the procedures and method had been brought to the attention of the Security Bureau with a view to producing a set of standard procedures for LEAs to observe in handling LPP matters.

Issues for consideration

5.82 As I have mentioned in the earlier part of this chapter, the ICSO and the Code are silent on the details of some practical aspects of dealing with situations where LPP information might possibly be obtained. The handling of the LPP cases in 2007 has also highlighted some issues which are worthy of consideration. They are set out in the following paragraphs.

(a) *Extent of listening*

5.83 While it can be safely assumed that the extent of allowing interception or Type 1 surveillance to continue in the face of obtaining or

the likelihood of obtaining LPP information should be measured against the conditions set out in section 3 of the ICSO, such extent is not clearly defined in the Ordinance. On a more mundane level, how certain should an officer be in regard to the obtaining or likelihood of obtaining LPP materials before bringing the matter to the attention of his seniors and the panel judges?

(b) *Supervision of listening*

5.84 Should the supervising officer be allowed to listen to the recorded product so as to confirm or rebut the belief or understanding of the listener? Should any officer senior to the supervising officer, in charge of ICSO matters, be allowed to listen to the recorded product thereafter to confirm or rebut the belief or understanding of the listener and the supervising officer before deciding: (a) to discontinue the interception and submit a report under section 57 for the panel judge to revoke the authorization; or (b) to report the incident to the panel judge as a material change of circumstances using an REP-11 report and for the panel judge to decide whether to allow the authorization to continue?

5.85 The legal advice which I have obtained from DoJ is that the effect of LPP is that it is protected from disclosure to third parties and in particular, in criminal cases, to the prosecution. Once a view is formed that a recorded product is subject to LPP, it should not be disclosed further than is necessary. However, the screening is carried out by 'dedicated

units'. There must be supervision within these units, to ensure that the correct tests are being applied consistently and properly and that proper records are kept. Within those parameters there is scope for a supervisor to listen to recorded product. The critical issue is that information subject to LPP must not go beyond the dedicated unit. More senior officers who are not part of the dedicated unit should not be given access to the recorded product which the dedicated unit has determined to be subject to LPP.

(c) *Listening by panel judges*

5.86 When reporting the incident to the panel judge for a decision on whether to continue the authorization, the LEA will give a summary of what has been heard in the REP-11 report. Should the panel judge listen to the recorded intercept product concerned before deciding whether to revoke the authorization or allow it to continue? This could serve the purpose of verifying the content of the REP-11 report made by the LEA and would also enable the panel judge to make a better assessment of the changed circumstances so that he can justly and fairly decide whether to revoke the authorization.

5.87 The legal advice I have obtained from DoJ is, however, that there is nothing in the Ordinance to entitle the panel judge to listen to any protected product.

(d) *Listening by the Commissioner*

5.88 In accordance with paragraph 120 of the Code, the LEA concerned will report to me the incident of obtaining LPP information or possible LPP information after it has reported the matter to the panel judge. According to the DoJ's said advice, the panel judge is not entitled to listen to the recorded product. If the panel judge does not listen to the recorded product, it is incumbent upon me, as the oversight authority, to ascertain that the information reported by the LEA to the panel judge contained the whole truth. This is particularly important to ensure that the panel judge has not been misled into allowing the authorization to continue.

5.89 However, if I listen to the conversation concerned and in fact that conversation contains LPP information, that would amount to an increased intrusion into the privacy rights of the subject. But if I did not listen, there would be no other way to ascertain the truth or otherwise of the information provided by the LEA to the panel judge. For the four reported LPP cases in 2007, I listened to the related recorded product in two of them (ie LPP Cases 3 and 4).

5.90 In order to strike a fair balance between the two conflicting needs, I propose to adopt a practice of only checking the intercept product when an authorization is allowed to continue despite the obtaining or likely obtaining of LPP information or when it is necessary to do so in the hope of resolving doubts.

(e) *Record keeping*

5.91 As stated in paragraph 5.6 above, section 59(2) of the Ordinance provides that any protected product containing LPP information and obtained from telecommunications interception be destroyed as soon as reasonably practicable and that from postal interception and covert surveillance be destroyed not later than one year after its retention ceases to be necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted.

5.92 Without prejudice to section 59, each department shall in accordance with section 60(1)(g) keep a record which is to contain any record reasonably required to be kept by the department to enable me to prepare reports for submission to the Chief Executive under section 49, or otherwise to perform any of my functions under the ICSO.

5.93 To the extent that the record kept under section 60(1) relates to a prescribed authorization, section 60(2)(a) requires it to be retained:

(a) for a period of at least two years after the day on which the authorization has ceased to have effect; and

(b) without prejudice to the above, in the case of any relevant review being conducted under section 41 or any relevant application for an examination having been made under section 43, for a period of at least one year after the review or

application has been finally determined or finally disposed of.

5.94 To the extent that the record does not relate to any prescribed authorization or device retrieval warrant, section 60(2)(b) requires that the record be retained for a period of at least two years.

5.95 In view of section 59(2) and section 60(1) and (2) of the ICSO, is the Commissioner entitled to require the LEA concerned to preserve the recorded product containing LPP information or possible LPP information and other related materials for the purposes of his inquiry or performance of his functions under the ICSO and the Code, and presuming that the Commissioner is so entitled, what is the maximum period of retention he may require? For example, in a case of telecommunications interception, can the Commissioner require the LEA concerned to preserve such materials for, say, 18 months from the time of their creation?

5.96 The legal advice I obtained from DoJ is that the idea that the Commissioner could require the LEA to preserve the product of interception or the product of interception containing LPP information is ill conceived, for the following reasons. The LEA must follow the statutory requirements. Under section 59(1)(c) the head of the LEA must make arrangements for the protected product to be destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization. For any intercept product which contains information subject to LPP obtained through telecommunications interception, the head

of department must make arrangements for the information to be destroyed as soon as reasonably practicable. It is inconceivable that the Commissioner would recommend that an LEA act contrary to the statutory requirements.

5.97 I do not agree with the above legal advice for obvious reasons. If the recorded product containing LPP information or possible LPP information is destroyed as soon as reasonably practicable before the commencement of my review or investigation, how can I possibly verify if the LEA concerned had reported the whole truth to the panel judge in the REP-11 report on the basis of which the panel judge had allowed the authorization to continue? A case in point is LPP Case 2. Further, if the records such as summaries relating to the intercept product are destroyed before the commencement of my review, how can I have the opportunity to look at 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? My view is that a request to the LEAs to preserve the recorded product and relevant records for, say, 18 months from the time of creation is within the period stated in section 60(2) which specifies a retention period of at least two years after the authorization has ceased to have effect or at least one year after the review conducted under section 41 has been finally disposed of. While it may not be necessary to request the retention of all the relevant records for 18 months in each and every LPP case, in any event they should not be destroyed before the completion of my review or investigation or the department should at least

seek my agreement before destruction of such records. If section 59(1)(c) and (2) and section 60 are at odds with each other and if section 59 prevails (as it apparently does), the relevant provisions should be amended, or otherwise I would have no way to carry out my review functions on LPP cases and it would be useless for the Code to require LEAs to notify me of operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently, save for statistical purposes.

(f) *Use of information subject to LPP*

5.98 The ICSO states that telecommunications interception product cannot be used as evidence in court and LPP information obtained through telecommunications interception pursuant to a prescribed authorization is to remain privileged. Can information subject to LPP be used for criminal investigation purposes? It is possible that in the course of listening to conversations containing LPP information, the conversation might touch on matters not directly related to the legal advice but useful for crime prevention or detection purposes, such as a place for transacting a deal relating to dangerous drugs or a location of their storage being mentioned in the conversation. It is not clear if such information obtained in this manner can be used for criminal investigation purposes, relating to the offence for which the prescribed authorization was granted or to other offences.

5.99 According to DoJ's advice to me, information which is subject to LPP cannot be used for intelligence purposes. However, where the purpose of part of a conversation between lawyer and client is for the furtherance of a criminal undertaking, that part of the conversation would not be subject to LPP and could be used for intelligence purposes.

5.100 The various issues raised at paragraphs 5.83 to 5.99 above deserve further consideration. The Security Bureau has been apprised of and will take them into account when conducting a comprehensive review of the ICSO in 2009.

CHAPTER 6

APPLICATION FOR EXAMINATION AND NOTIFICATION TO RELEVANT PERSON

The law

6.1 The Ordinance stipulates that a person may apply to the Commissioner for an examination if he suspects that he is the subject of any interception or surveillance activity that has been carried out by officers of the LEAs. The application is to be made in writing. Save where the circumstances set out in section 45(1) apply, the Commissioner shall, upon receiving an application, carry out an examination to determine:

(a) whether or not the suspected or alleged interception or surveillance has taken place; and

(b) if so, whether or not such interception or surveillance has been carried out by an officer of a department without the authority of a prescribed authorization.

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.

[Sections 43 and 44.]

6.2 The circumstances provided in section 45(1) that justify the Commissioner not carrying out an examination are that, in the opinion of the Commissioner, the application is received by him more than 1 year after the last occasion on which the suspected interception or 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.

The applications under section 43

6.3 During the report period, a total of 27 applications for examination were received, among which one was subsequently not pursued by the applicant and another one was not within the ambit of my functions. Of the remaining 25 applications, eight concerned suspected cases of interception and five alleged surveillance. The other 12 related to a combination of both. As the Commissioner, I did not consider that any of the 25 applications came within the ambit of the exceptions covered by section 45(1), and thus I had carried out an examination provided for in section 44 in respect of each case.

The procedure

6.4 The steps taken for such examination can be briefly described as follows. The Commissioner's office will make enquiries with the

particular LEA who, as the applicant alleges, has carried out either interception or surveillance activity against him as to whether such a statutory activity had 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 LEA to carry out any such activity, and if so the grounds for so doing. Where enquiries with any other party may help obtain evidence regarding the existence or otherwise of any such alleged statutory activity, that will also be pursued. The results of the enquiries made will be compared and counterchecked to ensure correctness. Apart from the above information, it is undesirable to disclose more details about the methods used for the examination of applications or about the examinations undertaken, because that would probably divulge information relating to the prevention or detection of crime or to the protection of public security, which would put LEAs in a disadvantageous position as against criminals or possible criminals.

6.5 Regarding the 25 applications for examination, after making enquiries with the necessary parties, I found 24 of these cases not in the applicants' favour and I notified each of them in writing respectively of my finding accordingly, with 18 of such notices issued during the report period and six thereafter. The handling of the remaining case still continues at the time of the writing of this report. Under section 46(4) of the Ordinance, I was not allowed to provide reasons for my determination or to inform the applicant whether or not the alleged interception or surveillance that was suspected had indeed occurred.

Notification to relevant person under section 48

6.6 According to section 48, my obligation to give the notice arises whenever, during the performance of my functions under the Ordinance, I discover any interception or surveillance that is not authorized by a prescribed authorization carried out by an officer of one of the four LEAs covered by the Ordinance. However, section 48(6) makes provisions for exempting me from my obligation if the 'relevant person' cannot, after the use of reasonable efforts, be identified or traced, or where I consider that the intrusiveness of the interception or surveillance on him is negligible.

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

6.8 I have first to ascertain who the 'relevant person' is. In an interception operation, what is intercepted is the communication between the two or more persons who participate in the communication. For a telephone conversation, for example, the communication is normally that

goes on between the caller and the recipient of the call or the respondent to the call. While the interception relates to a particular telephone number, the conversation between the user of that number and the caller or the respondent is intercepted, but the caller or respondent is using another number that is (theoretically) not intercepted. Does the 'relevant person' include not only the user (and subscriber) of the particular number but also the caller or respondent?

6.9 'Relevant person' is defined by section 48(7) as meaning 'any person who is the **subject** of the interception … concerned.' While the words 'interception concerned' clearly refer to the interception 'that has been carried out by an officer of a department without the authority of a prescribed authorization' as stated in section 48(1), the word 'subject' is far from pellucid. References can be made to other provisions in the Ordinance, such as sections 3(1)(c)(i) and 58(1), and various sub-paragraphs under paragraph (b) of Part 1, Part 2 and Part 3 of Schedule 3 to the Ordinance, where the word 'subject' is used in contradistinction to any person other than him. These other persons include persons on whom interceptions have an impact. In the case of an authorized telecommunications interception, the person using a particular telephone number is the subject of the interception, while the other persons who participate in the telephone conversation with him by his using that telephone number are not subjects, although they are clearly affected by the conversation being intercepted. The definition of 'relevant person' in section 48(7) to mean 'the subject' seems deliberately restrictive. It is

therefore reasonably plain that the person to whom notice is to be given by me pursuant to that section does not include all persons who have been affected by an unauthorized interception. In the example given in the preceding paragraph, the user of the wrongly intercepted telephone number is the subject, but not the caller or the respondent. The subscriber of the telephone number, unless he is also the user, is not a subject either, because he does not communicate through that number and the interception does not relate to any communication in which he has participated. For identifying and tracing the 'relevant person', it is thus necessary first to identify the subscriber of the wrongly intercepted number, who may be the user at the time when the interception took place or from whom information of the user may be obtained.

6.10 For considering and assessing the amount of compensation that the Government ought to pay to the relevant person, a number of matters have to be taken into account, including:

(a) the duration of the interception;

(b) the number of the communications that had been intercepted;

(c) the total duration of the communications that had been intercepted;

(d) the sensitivity of the communications;

(e) injury of feelings such as feelings of insult and embarrassment, mental distress, etc;

(f) whether the unauthorized act was done deliberately, with ill will or ulterior motive, or done unintentionally and resulted from negligence, oversight or inadvertence; and

(g) the degree of the intrusion into privacy in the context of the number of persons outside the communications having knowledge of their contents, whether such persons would remember or likely remember the contents of such communications, and whether such persons know the relevant person and the other participants to the communications.

6.11 Account has to be taken of the contents of the written submissions made by the relevant person, which may deal with any or all of the above factors. It may be necessary to listen to/read the intercepted materials, but extreme care must be exercised if that step is to be taken because anyone from my office or I listening to/reading the intercepted materials would certainly multiply the degree of the intrusiveness into the relevant person's privacy.

Notice issued under section 48 in the report period

6.12 During the report period, I gave a notice to a relevant person pursuant to section 48 of the ICSO for interception conducted without the

authority of a prescribed authorization. Please refer to paragraphs 7.63 to 7.81 of Chapter 7 for the case. Up to the time when this report is prepared, the case has still not finalized.

Other section 48 cases in the report period

6.13 During an inspection visit to an LEA, I noted that there appeared to be a one-minute time gap between the expiry of the original authorizations and the start of the renewed authorizations in several renewed authorizations. Upon my request, the LEA later reported that between 9 August 2006 and 31 July 2007, there were altogether 15 renewed executive authorizations (eight in 2006 and seven in 2007) in relation to which there was an apparent time gap of one or two minutes between the expiry of the initial authorizations and the commencement of the renewed authorizations. However, as no covert surveillance had ever been carried out during the time gap in question, it would not be necessary for me to give notice pursuant to section 48(1) to the relevant persons. Details of these cases can be found in paragraphs 7.91 to 7.93 of Chapter 7.

6.14 As stated in paragraphs 13.34 to 13.44 of Chapter 13 of my last report, where the relevant authority to whom a section 58 arrest report is made decides to revoke the prescribed authorization, there would be an interim period during which the interception or surveillance would remain in operation after the prescribed authorization (which is sought to be continued) is revoked but before the revocation (with immediate effect) is

conveyed to officers carrying out the operation to cause it to be discontinued. The interception or surveillance carried out during the interim period would in the circumstances become in theory an unauthorized activity.

6.15 Since the commencement of the Ordinance on 9 August 2006 and up to the end of the report period, there were four cases of interception falling within the situation described in the preceding paragraph (two in 2006 and two in 2007). I considered, however, that pursuant to section 48(3) of the Ordinance, no notification should be given to the relevant persons affected by the unauthorized interceptions for all these cases, mainly because it would prejudice the prevention and detection of crime as these persons were the subjects of the prescribed authorizations which had been properly granted for investigating their criminal activities.

6.16 To address the problem, the LEAs have implemented enhanced arrangements for handling such cases with a view to effecting the discontinuance of the operations in question within a short period of time after the revocation of prescribed authorizations by the relevant authority. Nevertheless, I remained of the view that a solution would be to amend the relevant provisions of the Ordinance to allow the relevant authority flexibility to defer the time of revocation of prescribed authorizations to some time as the relevant authority will state in the revocation. More details on the issue can be found in paragraphs 7.82 to 7.90 of Chapter 7.

6.17 In the result, during the report period, there was no occasion on which the provisions of section 44(3) regarding my making an order for payment of compensation by the Government to any successful applicant had been invoked and the necessity for my assessing such compensation never arose.

CHAPTER 7

REPORTS OF IRREGULARITIES AND INCIDENTS AND FINDINGS

Reports received

7.1 During the report period, I received five reports of irregularities from heads of LEAs made pursuant to section 54 of the Ordinance. They relate to four Type 2 surveillance and one interception cases, as follows:

Type 2 surveillance

Case 1 : Non-compliance with section 57(3) – Failure to cause a report on discontinuance to be provided to the relevant authority

Case 2 : Non-compliance with section 29(2)(a) – Carrying out of Type 2 surveillance at a place other than that authorized by a prescribed authorization

Case 3 : Incorrect statement in application for executive authorization

Case 4 : Non-compliance with section 19(a) – Incorrect commencement time of a renewed executive authorization

Interception

Case 5 : Wrong interception of a facility

7.2 I also received two reports of irregularities from LEAs not made under section 54 as the LEAs concerned did not consider them as irregularities. They were reported to me upon my request. The first report concerned four interception cases and the second report concerned 15 renewed executive authorizations for Type 2 surveillance, as follows:

Cases 6 to 9 : Interception conducted after the revocation of prescribed authorization under section 58

Case 10 : One- or two-minute time gap between expiry of the original executive authorizations and commencement of the renewed executive authorizations (involving 15 renewed executive authorizations)

7.3 In addition, the LEAs also reported to me two incidents that were not treated as irregularities, one on the reactivation of interception after discontinuance and the other on an initial material inaccuracy under a prescribed authorization for interception.

7.4 I have reviewed all the above irregularities and incidents. Details are given below.

Irregularities reported under section 54

Case 1: Failure to report discontinuance of covert surveillance under section 57

7.5 This irregularity related to a failure by an officer of an LEA to report the discontinuance of a Type 2 surveillance operation to the authorizing officer for the revocation of a prescribed authorization following the arrest of the subject.

7.6 The executive authorization authorized the use of surveillance devices to record conversations between the complainant and the suspect. The validity of the authorization was for one week from the evening of Day 1 to Day 8, which was the duration sought in the application. The suspect was arrested on Day 2 as a result of the covert surveillance conducted pursuant to the executive authorization. The surveillance operation stopped after the arrest.

7.7 Section 57(3) and (4) of the Ordinance require that where any officer has caused any interception or covert surveillance to be discontinued, he shall, as soon as reasonably practicable after the discontinuance, cause a report on the discontinuance and the ground for the discontinuance to be provided to the relevant authority to whom an application for the issue of the prescribed authorization concerned has last been made. Where the relevant authority receives a report on discontinuance, he shall, as soon as reasonably practicable, revoke the

prescribed authorization concerned.

7.8 However, the applicant of the executive authorization in this case, Officer X, who was also the officer in charge of the surveillance operation, failed to report the arrest or the discontinuance of the covert surveillance to the authorizing officer, as a result of which the authorization was allowed to hang on until it expired naturally on Day 8. This non-compliance with section 57(3) of the Ordinance was discovered about two months later by the reviewing officer of the LEA when Officer X submitted a review report to the reviewing officer on the Type 2 surveillance carried out pursuant to the executive authorization. One week after the discovery, pursuant to section 54 of the Ordinance, the head of the LEA made an initial report to me on this non-compliance with section 57(3), followed by an investigation report subsequently.

7.9 According to the LEA's investigation, Officer X admitted that the purpose sought to be furthered by carrying out the Type 2 surveillance had been achieved after the arrest of the suspect and that he had overlooked the need to cause the revocation of the authorization as he was pre-occupied with other matters relating to the investigation of the crime.

7.10 The LEA's investigation report made the following conclusions:

> ' The investigation concluded that the non-compliance was caused by an oversight on the part of [Officer X] and that no further covert

surveillance had been carried out on the suspect or any other persons under the authorization after the arrest of the suspect. It was also **unfortunate** that [Officer X] only submitted a review report about two months after taking overt action, hence the **delay** in discovering the non-compliance. [Officer X] has since been given appropriate advice.' (Emphasis added.)

7.11 To avoid recurrence, the LEA had introduced a reminder mechanism to remind officers in charge of investigations to comply with the requirements under section 57 and section 58 of the Ordinance to report discontinuance and arrest.

7.12 After receipt of the LEA's investigation report, I examined all the documents relevant to the case including, inter alia, the application and the statement in support, the prescribed authorization, the device register, the Operational Manual and the case diary and sought clarification from the LEA. Having conducted a review, I found that apart from the non-compliance under section 57, there were other irregularities or areas requiring improvement. I made the following findings and recommendations to the head of the LEA.

(a) *Non-compliance with section 57(3)*

7.13 There was non-compliance with section 57(3) of the Ordinance on the part of Officer X as he had failed to, as soon as reasonably practicable, cause a report on discontinuance and the ground for

the discontinuance to be provided to the authorizing officer following the arrest of the subject and the discontinuance of the covert surveillance, as a result of which the authorization was not revoked in accordance with section 57(4) but remained in force until its natural expiry. The non-compliance was due merely to an oversight of Officer X. There was no ulterior motive behind as evidence showed that the Type 2 covert surveillance was ceased after the arrest and there was no further intrusion into the privacy of the subject.

7.14 The non-compliance was revealed during a departmental review of this Type 2 surveillance authorization by the reviewing officer in accordance with section 56 of the Ordinance. The review process prevailing at the time was that it would take in total two months for a review report to reach the reviewing officer after the discontinuance of an operation or expiry of an authorization. Hence, the non-compliance with section 57(3) in this case was only discovered two months after the discontinuance of the surveillance operation, and the LEA had complied with section 54 of the Ordinance to report the non-compliance to me very soon after discovery. (Please refer to (c) below on my further findings on the department's review system.)

(b) *Duration of the Type 2 surveillance authorization*

7.15 When applying for the prescribed authorization to carry out the Type 2 surveillance, Officer X stated in his statement in support of the application that the expected date of the completion of the crime in this

case was Day 2 ('expected completion date'). I was of the opinion that according to the spirit of the Ordinance in protecting privacy, the authorization should not have been granted beyond this expected completion date unless specifically justified by the applicant. Officer X did not provide any material in the application to justify the duration of the authorization sought insofar as it was extended beyond the expected completion date, nor did the authorizing officer seek any explanation from Officer X before granting the authorization valid up to and including Day 8.

7.16 In response to my enquiry during the review, the authorizing officer explained that he was aware of the expected completion date (Day 2) mentioned in the statement in support by Officer X but he held the view that the time and date(s) of any subsequent meeting(s) between the complainant and the suspect would be dictated by the outcome of the monitored conversations. In order to allow a reasonable degree of operational flexibility in preparing for all eventualities in the following few days, he granted the authorization for the duration sought beyond the expected completion date without seeking any clarification from Officer X.

7.17 What the authorizing officer did was plainly wrong. One of the conditions for the issue of a prescribed authorization, as mandated by section 3 of the Ordinance, is that the covert surveillance is necessary for and proportionate to the purpose sought to be furthered by carrying it out. This condition must be applied stringently, not loosely. To satisfy the

necessity and proportionality tests, the authorizing officer for Type 2 surveillance must consider, inter alia, whether there are sufficient materials in the application to justify the duration of the authorization that he is going to grant. An authorizing officer should not take it as a matter of course to grant the authorization for the duration sought, as what had been done in this case. On the basis of the authorizing officer's admitted knowledge of the expected completion date of Day 2 being mentioned in the statement in support of the application when he granted the authorization, and even accepting that he had abundant knowledge of the department's operational needs and vicissitudes, his readiness to allow operational flexibility to the applicant in the circumstances reflected badly on his suitability as an authorizing officer. Either he did not understand or appreciate that he was required to apply the conditions of necessity and proportionality mandated by section 3 of the Ordinance with great care and rigour, or he had taken a lax approach in issuing the authorization with duration beyond the expected completion date of crime to provide operational flexibility without measuring the materials furnished by the applicant (which did not show justification for the duration at all) against the stringent conditions, or worse still he preferred providing operational flexibility to the applicant rather than to ensuring that the statutory conditions were fully complied with. A confidence question had therefore been aroused regarding the suitability or reliability of the authorizing officer. Given his inadequacy or lax attitude which cast doubt on his suitability or reliability to perform the functions of an authorizing officer, I recommended that he be discharged from the position of authorizing officer unless steps were taken

by the head of the LEA to assure me that the authorizing officer had been reformed.

7.18 Arising from this case, I also recommended to the Secretary for Security to amend the COP-9 form to require the applicant to justify the duration of the authorization sought.

(c) *Misrepresentation to the Commissioner*

7.19 At the initial stage, incorrect information was provided to me regarding the department's review process prevailing at the time of this case.

7.20 The clear purport of the second sentence ('the Second Sentence') in the quotation in paragraph 7.10 was that Officer X had been late in submitting the review report, resulting in the delay in discovering the non-compliance with section 57(3). During an inspection visit to review this case, I questioned the LEA as to why it allowed Officer X to submit the review report in two months. In reply, the LEA informed me that such report should be submitted within one month from the date of discontinuance of operation or expiry of authorization. Such requirement was set out in the Operational Manual but that some officers, including Officer X in this case, did not observe the required timeframe. The department's ICSO Central Registry ('CR') would try its best to chase the review reports as far as possible.

7.21 In a subsequent detailed review of the documents, I noted from the Operational Manual that it was CR which initiated action on the review. The Operational Manual reads:

> 'On a monthly basis, the relevant [officer] will complete a Monthly Review of Type 2 Surveillance [Form …] for each of the Type 2 surveillance authorization under his charge and submit it to [reviewing officer] for the purposes of review. … **CR will co-ordinate the monthly review procedures** … ' (Emphasis added.)

7.22 I also discovered from the case diary that it was four weeks after the natural expiry of the Type 2 surveillance authorization that CR sent the review folder to Officer X for completion of the review report on the required form. No deadline was set by CR. Officer X completed and submitted the review report on the required form to the reviewing officer slightly over three weeks after receipt of the review form from CR. In my view, since CR sent the review form to Officer X for completion four weeks after the expiry of the authorization, Officer X should not have been blamed for not submitting the review report within one month from the date of discontinuance or within one month from the expiry date of the authorization as he received the review folder so late from CR. I therefore sought clarification from the head of LEA as to whether it was Officer X who did not observe the time requirement for submitting the review report or it should be CR which was at fault in not forwarding the review folder to Officer X earlier. It was not until this further probe that the true and

complete picture was presented to me by the LEA. In brief, the previous practice was for the review report to reach the reviewing officer within two months from the expiry of the authorization (ie one month for CR to initiate action and another month for the applicant concerned to complete the review form for submission to the reviewing officer). With effect from a certain date, this procedure was enhanced by commencing the review process on Friday of the week in which the authorization had expired, and CR would send a notification to the relevant applicant requiring him to initiate the review process with the reviewing officer within two weeks of the notification. This new procedure was implemented when the review process related to the present case had already started and it therefore did not apply. The head of LEA concluded that neither CR nor Officer X had breached any internal rules or instructions insofar as the timing for submission of the review report was concerned.

7.23 This new information was apparently at variance with the Second Sentence (ie the second sentence in the quotation in paragraph 7.10 above) which used the words 'unfortunate' and 'delay', suggesting that Officer X had been late in submitting the review report, hence the delay in discovering the non-compliance with section 57(3) and in the subsequent report to me under section 54. If the new information was correct, the Second Sentence would have been wrong or, to say the least, not appropriately couched. I therefore asked the LEA to reconcile the two. I also asked the LEA to clarify what 'advice' had been given to Officer X to make sure that this officer had not been put to task for something he ought

not to be held responsible, save for the non-compliance with section 57(3).

7.24 The LEA was unable to give an explanation to reconcile the Second Sentence with the new information. Instead of admitting frankly that the Second Sentence was wrong or inappropriately couched, the LEA took an arbitrary and wrong assumption that I had misinterpreted the word 'non-compliance' in the Second Sentence to be 'the lapse of about two months between the time of taking overt action and the time of submitting a review report' instead of the correct interpretation of 'failure to report on the discontinuance of the Type 2 surveillance'. I was very disappointed with this attitude of the LEA to get round the issue.

7.25 Nonetheless, the LEA confirmed that the 'advice' it gave to the applicant pertained only to his failure to report the discontinuance under section 57 of the Ordinance. The advice was disciplinary in nature.

7.26 I advised the LEA that in future, it should ensure that I am given the full picture of the relevant facts of the case when reporting irregularity pursuant to section 54 of the Ordinance and that the information provided to me should be correct and up-to-date. This would facilitate the performance of my functions.

(d) *Issue of surveillance devices*

7.27 In checking the device register, I found that the time of the withdrawal of one of the surveillance devices was not shown. Only the

date was indicated. I advised the LEA to properly record the issue time of surveillance devices in the device register to ensure that the devices are issued after the prescribed authorization has become effective. I also recommended to the LEA that control over the issue and return of surveillance devices should be tightened to prevent any abuse.

7.28 My findings and recommendations were accepted by the head of LEA who had taken a series of measures to address the issues identified in my findings, as follows:

(a) The authorizing officer had been given appropriate advice by his senior that he is required to adopt a cautious approach, ie to exercise care and prudence in applying the conditions of necessity and proportionality mandated by section 3 of the Ordinance, and to be mindful of the need to seek justification from the applicants on the duration sought. [This advice was disciplinary in nature.] The LEA had reviewed subsequent Type 2 surveillance applications approved by this authorizing officer which did not reveal any irregularity. The LEA was also not aware of any further adverse comments expressed by me on the performance of this authorizing officer during subsequent inspection visits. The LEA has the reason to believe that the authorizing officer is now mindful of his duties to prudently consider all Type 2 applications in accordance with the laid down requirements of the Ordinance.

(b) The LEA had also strengthened the internal review system to make sure that all Type 2 surveillance operations complied with the requirements of the ICSO.

(c) Arising from my recommendation, the Security Bureau had amended the COP-9 form (statement in writing in support of an application for executive authorization) to require applicants to provide justification for the duration sought in all Type 2 surveillance applications. This amended form was incorporated in the revised Code issued on 29 October 2007.

(d) The LEA undertook to provide me with all relevant facts and with correct and up-to-date information when reporting any case of irregularity pursuant to section 54 of the Ordinance. It had formed a new group for the purpose of ensuring strict compliance with my requirements and the accuracy of facts presented to me to facilitate the performance of my statutory functions under the Ordinance.

(e) The LEA had also taken steps to ensure that the date and time of issue and return of surveillance devices were properly recorded in the device registers, and that no surveillance device would be issued prior to the time when the relevant prescribed authorization takes effect. A computer software would also be introduced to properly manage the issue and return of surveillance devices and to provide full audit trail.

7.29 After this event, I had paid particular attention to the performance of the authorizing officer. I found that he had adopted a practice of asking pertinent questions and seeking clarifications from applicants on matters related to the application and the questions and answers were recorded for my review.

Case 2: Carrying out of Type 2 surveillance at a place other than that authorized by a prescribed authorization

7.30 Section 29(2)(a) of the Ordinance provides that a prescribed authorization for covert surveillance may contain terms that authorize the use of any surveillance devices in or on any premises specified in the prescribed authorization. This case related to a breach of section 29(2)(a) for carrying out Type 2 surveillance operation at a place other than that specified in the prescribed authorization.

7.31 The LEA received a complaint from a female complainant on an alleged offence. In order to collect more information, the officer in charge of the investigation, Officer A, applied for an executive authorization for conducting Type 2 surveillance over the telephone conversations of controlled telephone calls that the complainant would be arranged to make to the suspect. In the written statement in support of the application, Officer A had specified that the relevant controlled telephone calls would be made at an LEA office as he was under the impression that an application for executive authorization would be granted only if a specific location for the intended surveillance was ascertained and

stated. As a result, a prescribed authorization was granted for the use of listening devices at the LEA's offices to record telephone conversations between the complainant and the suspect. The authorization was granted for seven days. Immediately after the issue of the authorization, Officer A handed a copy of the authorization to the case handling officer, Officer B, for necessary preparatory work. Without noticing the restrictive nature in respect of the location for the surveillance, Officer B passed it to another officer for the purpose of drawing of surveillance devices. Officer B had originally made arrangements with the complainant to attend the LEA office to make a controlled telephone call to the suspect on Day 1 of the authorized period, but the complainant subsequently called Officer B that she could not attend the LEA office as arranged and requested that the telephone call and recording be made at her own office instead. Officer B acceded to her request without consulting Officer A and without realizing that this change of location might lead to non-compliance with the Ordinance. Accordingly, a telephone conversation between the complainant and the suspect was recorded at the complainant's office. Several minutes later, Officer B reported to Officer A by telephone the result of the covert surveillance and the change of the surveillance location. Officer A immediately pointed out to Officer B over the phone that under the authorization, the location of the controlled telephone call was restricted to the LEA's offices.

7.32 Despite his knowledge of the change of location, Officer A did not make a prompt report on this non-compliance to the LEA management

as he believed that he could do it when the authorization was due for review.

7.33 For the remainder of the authorized period, further arrangements were made for the complainant to call the suspect at the LEA office, which was within the scope of the authorization concerned. One more telephone conversation between the complainant and the suspect was recorded on Day 6 after which the covert surveillance was discontinued and the authorization was revoked pursuant to section 57(4) of the Ordinance. Again, Officer A did not report the non-compliance (ie the call made on Day 1 at the complainant's office) at the time of the revocation. He only reported it when he submitted a review report on this Type 2 surveillance operation three weeks later. The reviewing officer then caused an investigation to be conducted.

7.34 Officer B explained that he was not aware of the restrictive condition of the authorization until he was told by Officer A after the first controlled telephone call had been made. He was engaged in preparing for the covert monitoring exercise and did not read the content of the prescribed authorization carefully before passing it to another officer to draw surveillance device.

7.35 Officer A admitted that in retrospect, he should have, in the application for the authorization, requested a more flexible term with regard to the location for the Type 2 surveillance to take place. It was his first time to apply for a prescribed authorization for covert surveillance.

He also acknowledged that he should have reminded Officer B of the restrictive condition of the authorization when handing it over to Officer B, and made a prompt report on the non-compliance.

7.36 The LEA's investigation concluded that whilst the non-compliance was caused by an oversight on the part of Officer B, Officer A should be held accountable for failing to remind his subordinate officers of the restrictive conditions of the authorization. Both officers had since been given appropriate advice by their Assistant Head of Department. The advice was disciplinary in nature.

7.37 After the incident, the LEA had taken follow up actions to prevent recurrence of similar mistakes. First, a number of briefings had been arranged for investigating officers of various ranks to remind them of the importance of strict compliance with all ICSO authorizations and to enhance their awareness of all ICSO related matters. Second, for better administration in future, respective officers at the most senior non-directorate rank would be given a copy of the prescribed authorization in order to ensure compliance by officers under their charge.

7.38 The head of LEA reported this irregularity to me under section 54 of the Ordinance. I reviewed all the relevant documents and interviewed Officer A as to why he did not report the non-compliance to the management immediately. Officer A replied that he reported the incident through the review report. Upon receipt of a verbal advice given by his Assistant Head of Department, he came to realize that he should have

reported the non-compliance as soon as reasonably practicable. I strongly advised him that his wait until the submission of the review report to report the non-compliance was improper. Should similar late report of non-compliance recur, verbal advice would no longer suffice and appropriate disciplinary action should be taken.

7.39 I made the following findings to the head of LEA after the review:

(a) There was unauthorized Type 2 surveillance carried out at the complainant's office on the night of Day 1, which was a breach of section 29(2)(a) as the surveillance was carried out at a place other than the premises specified in the executive authorization.

(b) The irregularity was partly due to the oversight of Officer B on the restrictive condition of the authorization which specified the surveillance to be conducted at the LEA's offices only, coupled with his failure to report the change of location to Officer A before the operation took place.

(c) The irregularity was also partly caused by Officer A's failure to remind Officer B of the restrictive condition of the authorization before the relevant operation started.

(d) It was the first ICSO application ever made by Officer A and

Officer B for conducting covert surveillance. They were not familiar with the relevant requirements of the Ordinance for covert surveillance operations.

(e) There was no indication of any ulterior motive in this irregularity.

(f) The unauthorized surveillance (controlled telephone call) was only conducted once that had recorded a telephone conversation lasting eight minutes. Other telephone calls were all made at the LEA's office in accordance with the terms of the authorization.

(g) The relevant surveillance was designed to record the telephone conversations between the complainant and the suspect. There could not have been any added intrusiveness caused to the suspect over that contemplated by the executive authorization merely by reason of the change of the place from which the controlled call was made to him. There was no apparent prejudice to the suspect.

(h) There was no intrusion on any person unrelated to the investigation either.

(i) Appropriate advice had been given by the department to the two officers concerned on their improper act.

7.40 This incident had revealed the fact that some investigating officers in the LEA still did not have basic knowledge of the statutory requirements of the ICSO. I therefore advised the LEA that it should ensure that all officers involved in the application and implementation of ICSO authorizations would fully appreciate the statutory requirements of the Ordinance. I also made the point that following the refresher briefings and improvement of operational procedures, officers in the department should become fully aware of the mistakes exposed by this case. In this connection, I advised that appropriate disciplinary actions (over and above a mere verbal advice as in this case) should be taken against officers for similar mistakes in future.

7.41 Notwithstanding the unauthorized surveillance as revealed in this incident, I decided not to give notice pursuant to section 48(1) of the Ordinance to the relevant person because I considered that to do so would be prejudicial to the prevention or detection of crime according to section 48(3). The relevant person was the suspected culprit of a serious crime under investigation.

Case 3: Incorrect statement in application for executive authorization

7.42 This irregularity related to an incorrect statement contained in paragraph 3(i)(b) of COP-9 in support of an application for a Type 2 surveillance authorization which targeted the culprit of a serious offence. Two Type 2 surveillance authorizations were involved, referred to below as the first authorization and the second authorization.

7.43 The first authorization allowed the carrying out of the operation at the victim's address ('Address A'). After the authorization became effective, the victim decided to stay at a location ('Address B') other than Address A. As the applicant of the first authorization ('Applicant 1') was engaged in another urgent operation, another officer ('Applicant 2') was assigned to make a report on discontinuance of the operation under the first authorization and also a fresh application for another executive authorization to allow the operation to be carried out at Address B. Both went before the authorizing officer who revoked the first authorization under section 57(4) of the Ordinance and issued the second authorization six minutes after revoking the first authorization. The second authorization had a validity period of seven days.

7.44 COP-9 is a statement in writing in support of an application for an executive authorization for Type 2 surveillance. When submitting his application for the second authorization, Applicant 2 had entered 'No' in the answer to the question in paragraph 3(i)(b) of COP-9 ('the Question'), which read:

> 'If known, whether, during the preceding 2 years, there has been any application for authorization or renewal in which any persons set out in paragraph (iii)(a) below has been identified as the subject of the interception or covert surveillance concerned:
>
> *(If positive, state the date of approval or refusal of the previous application and the covered period.)'*

His application was endorsed by the endorsing officer and the authorization was granted by the authorizing officer. At the material time, all the three officers were aware of a previous prescribed authorization on the same subject (ie the first authorization). Indeed, the endorsing officer and the authorizing officer were respectively the endorsing officer and authorizing officer in respect of the first authorization.

7.45 This irregularity was discovered by the department's reviewing officer the next day after the issue of the second authorization. Upon the reviewing officer's enquiry, the authorizing officer clarified that she was aware of the 'No' answer in paragraph 3(i)(b) of COP-9, but accepted the answer as it was her interpretation that the Question was about whether there was a previous authorization on the same subject **and** at the same location. After going through the paragraph very carefully, she agreed that the answer should have been 'Yes'. However, she was of the view that her misinterpretation would have had no bearing on her decision to issue the second authorization.

7.46 The Type 2 surveillance operation pursuant to the second authorization had continued until discontinuance by the officer-in-charge on the morning of the last day. No arrest was made during the period covered by the authorization.

7.47 Applicant 2 explained that he was aware of the first authorization when he made the fresh application that resulted in the second authorization. He gave a 'No' answer to the Question because he

considered the operation to be a continuing one related to the same subject in the same case, with the only difference being the change to a different address to be monitored.

7.48 The endorsing officer explained that he agreed to the answer 'No' for the same reason given by Applicant 2, namely the second application was merely a continuation of the surveillance operation covered by the first authorization.

7.49 The authorizing officer approving the second application by issuing the second authorization felt nothing wrong with the answer 'No' because of her misinterpretation of the Question, as aforesaid.

7.50 The LEA made an initial report to me under section 54 of the Ordinance, followed by an investigation report subsequently. The LEA's investigation concluded that:

(a) Misinterpretation of the Question by all the three officers concerned had led to the omission of information on the previous application involving the same subject.

(b) The fact that the report on the discontinuance of the surveillance covered by the first authorization was made and processed together with the second authorization in question and the circumstances of the case clearly showed that there was no wilful intent whatsoever of the officers concerned to

hide the previous authorization involving the same subject, nor was there any ulterior motive on the part of any officers involved.

(c) It was the decision of the victim to change address that necessitated the discontinuance of the first authorization one day after its issue. Officers concerned were under great time pressure to discontinue the first authorization and to seek the issue of a second authorization to cover the new location at the same time. This resulted in the rush to complete the relevant procedures under the ICSO, without a well thought out interpretation of the Question in processing the second application.

(d) The omission had not materially affected the decision of the authorizing officer.

7.51 The LEA's management had also interviewed the authorizing officer and advised her to exercise utmost care in processing ICSO-related matters.

7.52 In my review of this case, I asked the LEA to provide, inter alia, a statement made by the authorizing officer as well as any further explanation that she might give on her misinterpretation of the Question. It was submitted that prior to this incident, the authorizing officer had only one opportunity to issue an executive authorization for Type 2 surveillance

and on that occasion there was no need for her to interpret the Question. Arising from this incident, the LEA had taken follow up actions to enhance officers' awareness and understanding of the requirement of the ICSO, which included a training package for all frontline officers, as well as periodical bulletins and seminars for officers involved in the implementation of the ICSO.

7.53 Having examined all the relevant facts of this case and the documents, I made the following findings and recommendations:

(a) I agreed with the findings of the LEA in paragraph 7.50 above.

(b) The explanations from the endorsing officer and Applicant 2 on the misinterpretation that they treated the operation as a continuing one related to the same subject in the same investigation case were not unreasonable and were therefore acceptable.

(c) The explanation given by the authorizing officer was alarming. She was aware of the 'No' answer in paragraph 3(i)(b) of COP-9 but accepted the answer as it was her interpretation that the Question was about whether there was a previous authorization on the same targeted subject **and** at the same location. While the authorizing officer's misinterpretation would have no bearing on her decision to issue the second authorization, if she had indeed adopted this very restrictive

interpretation, the occasion to give a 'Yes' answer in COP-9 would hardly arise since almost all 'previous authorizations' would not qualify. Moreover, in my view, the wording of the Question did not reasonably admit of the misinterpretation, which was too artificial to be credible. The authorizing officer was not a junior officer and she had reposed in her the responsibility of an authorizing officer, deciding on whether the necessity and proportionality tests stipulated in the ICSO for the issue of a Type 2 surveillance authorization were satisfied. Rejecting her explanation would doubtless reflect badly on her credibility and integrity, but accepting her explanation would give rise to grave concern about her competence and suitability in performing the functions of an authorizing officer. I considered that confidence in her reliability and ability in performing such functions had been damaged to such an extent that I recommended that she be discharged from the position of an authorizing officer.

(d) What happened in this case had also caused grave concern over the standard of understanding of the ICSO by officers (and even senior officers) operating pursuant to the Ordinance. For the improvement of the standard, focused training should be given to those officers whom the head of LEA had designated or would designate as the endorsing or authorizing officers under the Ordinance as well as officers who might

make applications for a prescribed authorization.

(e) The department should consider ways to assist applicants and authorizing officers in checking whether previous applications on the same subject had been made.

7.54 The LEA accepted my findings and informed me that another officer had been assigned to take the place of the authorizing officer in this case. It also briefed me on its experience sharing strategy which aimed at improving officers' understanding of and familiarity with the ICSO and the progress of other follow up actions taken.

Case 4: Incorrect commencement time of the renewed executive authorization

7.55 This irregularity related to a break of nine hours between the expiry of an original executive authorization for Type 2 surveillance and the commencement of the renewed executive authorization.

7.56 The authorizing officer issued a Type 2 surveillance authorization which ended at 2359 hours on 22nd of X month of 2007.

7.57 Towards the expiry of the original authorization, an officer who was not the original applicant submitted an application for renewing the authorization. In his statement in writing in support of the application (COP-13), he entered '2007-X-23 0900 hours' as the anticipated starting date and time of the renewal in paragraph 2(d) thereof. Having taken into

consideration the time required to reorganize the surveillance operation, the authorizing officer renewed the authorization effective from 0900 hours on the 23rd of X month of 2007 ('the renewed authorization'), ie nine hours after the expiry of the original authorization. This was, however, contrary to section 19(a) of the Ordinance which prescribes that a renewal of an executive authorization takes effect at the time when the executive authorization would have ceased to have effect but for the renewal.

7.58 This irregularity was discovered by an officer of the department's ICSO Central Registry a few days later. Upon being informed on the 27th that the renewed authorization might have breached section 19(a) of ICSO, the authorizing officer immediately ordered the suspension of the surveillance operation pending legal advice on the status of the renewed authorization. While waiting for legal advice, one of the subjects of the targeted gang was arrested by other LEA officers. The renewed authorization was revoked following the arrest. No surveillance activity had been conducted between the suspension on the 27th of X month and the revocation on the 7th of the following month. The surveillance device was returned to the issuing registry two days after revocation of the renewed authorization.

7.59 The LEA made an initial report to me under section 54, followed by a detailed investigation report subsequently. The LEA indicated that the authorizing officer had been interviewed by his senior and was advised to be more careful in approving authorizations and

especially renewals. Lesson learnt from this incident was also shared among relevant officers of the department.

7.60 After examining all the relevant documents including the relevant COP forms (then prevailing) and seeking further information on the details of the operation of the surveillance device in this case, I made the following findings and recommendations:

(a) There was non-compliance with section 19(a) of ICSO in that the authorizing officer had made a mistake in setting the commencement time of the renewed authorization at 0900 hours on 23rd of X month instead of at the expiry of the original authorization at 2359 hours on 22nd of X month.

(b) The mistake was not caused by any ulterior motive. The authorizing officer explained that his decision was made on the principle that authorizations under the ICSO should be as restrictive as possible without defeating the ends of justice, and he set the time with a view to keeping the effective time of the authorization to a minimum. His explanation was credible.

(c) No surveillance was conducted during the nine hours between the expiry of the original authorization and the commencement of the renewed authorization.

(d) Between the commencement of the renewed authorization on the 23rd and the suspension of the operation on the 27th, no communication took place, hence no surveillance was undertaken. The operation was suspended thereafter until revocation.

(e) Paragraph 2(d) of the form 'COP-13: statement in writing in support of an application for renewal of an executive authorization for Type 2 surveillance' was misleading. It read:

> '(d) The proposed duration of the renewal:
>
> (no more than 3 months.)
>
> Anticipated Starting Date: Time:
>
> Anticipated Operation Period-
>
> □ Finishing Date: Time:
>
> □ Until the following event takes place or 3 months, whichever is the earlier: '

The starting date and time of the renewal was dictated by the expiry date and time of the original authorization, as prescribed in section 19(a) of the Ordinance. The wording in paragraph 2(d) might have misled the applicant, as in the present case, to fill in the 'anticipated starting date and time of the **operation** under the renewed authorization' as the 'anticipated starting date and time of the **renewed**

authorization'. The same misunderstanding might also be caused to the authorizing officer. This paragraph should be improved by adding a remark to alert the applicant that the starting time of the renewal should dovetail with the expiry time of the authorization to be renewed.

(f) The authorization form 'COP-14: renewal of executive authorization for Type 2 surveillance' attached to the Code issued in August 2006 applicable to the current case was even more misleading, if not totally wrong. Paragraph 5 thereof stated:

> 'This renewal authorization takes effect from **[day after last day of authorization being renewed]** and remains in force …'

Section 19(a) of the Ordinance prescribes that a renewal of an executive authorization takes effect at the time when the executive authorization would have ceased to have effect but for the renewal. If an authorization expired at say, 1400 hours on Day 1, it would be wrong to say that the renewal authorization should take effect from Day 2. This paragraph of COP-14 was imprecise and might cause confusion to authorizing officers. The form should be amended.

(g) Consideration should also be given to providing an alert function in the computer system for processing renewal

applications in a manner that any invalid data entered would prompt the applicant to check the correctness of the data.

7.61 In the course of the review, I also found that:

(a) The effective date and time of the original authorization was not stated in the authorization (the then prevailing COP-10: executive authorization for Type 2 surveillance) itself and that the authorization only contained the date, but not the time, of issue. This was due to the unsatisfactory design of the form prevailing at that time which did not require the authorizing officer to fill in such information. The COP-10 form read as follows:

> 'This executive authorization takes effect from the time of its issue and remains in force for [**please specify a period which should in no case be longer than 3 months from the time when the authorization takes effect].**
>
> Dated this ____ day of _____ .'

I recommended that the COP-10 form should be improved to require authorizing officers to state the effective date and time of the authorization and to time the issue of the authorization in addition to dating it.

(b) The surveillance device was not returned to the issuing

registry immediately after the suspension of the operation on the 27th of X month or shortly thereafter but was returned two days after the authorization had been revoked. I considered that the device should have been returned as soon as it was not required for the operation. The procedure for return of surveillance devices should be tightened.

7.62 My recommendations were accepted and implemented by the LEA and the Secretary for Security, as follows:

(a) The LEA had upgraded its system to provide an automatic checking function whereby the starting time of all renewal applications will be checked against the finishing time of the previous authorizations and only applications with a valid starting time can be submitted. The same checking function was also incorporated into the application systems of the other LEAs.

(b) The Secretary for Security had amended the wording of COP-13 to make it clear that the renewal should take effect at the time when the executive authorization would have ceased to have effect but for the renewal. The amended form has been put into use and will be incorporated in the next issue of the Code.

(c) Officers of the LEA involved in the implementation of the

ICSO (including designated applicants and endorsing officers) were reminded through different channels of the requirement of timely return of surveillance devices. To tighten the guidelines on the return of covert surveillance devices that are no longer required for the operation concerned, the Secretary for Security had also expanded paragraph 129 of the Code to provide additional guidelines to LEAs.

(d) The Secretary for Security had also amended COP-10 and COP-14, which were attached to the revised Code issued on 29 October 2007.

Case 5: Wrong interception of a facility

7.63 This irregularity was caused by an error in the execution of interception resulting in an additional facility being intercepted on top of the facility authorized by a prescribed authorization.

7.64 The LEA had obtained a renewed authorization from a panel judge to intercept a particular facility ('the first facility'). On the fifth day after the issue of the renewed authorization, the officer in charge of the interception became alerted that the intercept product might have come from the interception of a second facility (which was not authorized) in addition to the first facility (which was authorized). The interception of the second facility was immediately ceased to avoid further unauthorized intrusion. The head of the LEA forwarded an initial report to me the next

day, followed by an interim report two days later and a full investigation report three weeks thereafter.

7.65 In the investigation report, the LEA proposed a series of preventive measures to minimize wrong interception. It also verbally warned the officer who committed the error to exercise great care in ensuring the proper execution of interception in future. It also verbally advised the officer's supervisor to exercise vigilance when checking the subordinate's work. These were disciplinary actions.

7.66 I carried out a review of this case by interviewing the relevant officers and conducting site visits to have a fuller understanding of how the wrong interception could have come about. I also requested the LEA to preserve all evidence relating to the degree and duration of the intrusion towards the person affected by this wrong interception to facilitate the performance of my duty under section 48 of ICSO.

7.67 Section 48 of the Ordinance provides:

> '(1) If, in the course of performing any of his functions under this Ordinance, the Commissioner … considers that there is any case in which any interception or covert surveillance has been carried out by an officer of a department without the authority of a prescribed authorization, subject to subsection (6), the Commissioner shall as soon as reasonably practicable give notice to the **relevant person** –
>
> (a) stating that there has been such a case and indicating whether the case is **one of interception** or covert surveillance and the **duration** of the interception or covert surveillance; and

(b) informing the relevant person of his right to apply to the Commissioner for an examination in respect of the interception or covert surveillance.

…

(4) Without prejudice to subsection (3), in giving notice to a relevant person under subsection (1), the Commissioner shall **not** –

(a) **give reasons** for his findings; or

(b) give details of any interception or covert surveillance concerned further to those mentioned in subsection (1)(a).

…

(7) In this section, "relevant person" (有關人士) means any person who is the **subject of the interception** or covert surveillance **concerned**.'

(Emphasis added.)

7.68 As the wrong interception on the second facility had taken place for about five days, I considered that I was duty bound to give notice pursuant to section 48(1) of the Ordinance to the relevant person stating the duration of the interception and where appropriate consider awarding to him compensation. Before I gave notice to the relevant person, the following questions arose:

(a) Who is the 'relevant person'?

(b) What does the term 'duration' in section 48(1)(a) mean?

(c) Am I entitled to inform the relevant person that the wrong

interception was carried out, for instance, 'by mistake' or 'by careless mistake'? Does that amount to a reason for the Commissioner's finding under section 48(4)(a)?

7.69 The first question has been discussed at length in paragraphs 6.6 to 6.9 of Chapter 6.

7.70 Section 48(1)(a) requires me to indicate to the relevant person whether the case is one of interception or covert surveillance. However, for interception, it does not allow me to further state whether it is postal interception or telecommunications interception.

7.71 Section 48(1)(a) requires me to state the duration of the interception in the notice to the relevant person. It is not clear whether the duration should be date and time specific (say, from 0900 hours on 1 January 2007 to 1800 hours on 5 January 2007) or only period specific (say, five days). The legal advice I obtained was that 'duration' had the meaning of length of time and that the legislation did not provide for the subject to be notified of the dates and times.

7.72 Section 48(4) prohibits me from giving reasons for my findings and from giving details of interception concerned further to those mentioned in section 48(1)(a). The legal adviser advised me that descriptions such as 'by mistake' or 'by careless mistake' would fall into giving reasons for my findings or arguably a detail of the interception.

7.73 In short, according to the relevant provisions of section 48, the notice that I could give to the relevant person, taking the present case as an example, was that 'there has been a case of **interception** which has been carried out by an officer of a department without the authority of a prescribed authorization and the **duration** of the interception was five days'.

7.74 However, to identify the relevant person, I had to first write to the person or persons who might be so qualified. Needless to say, I could not disclose to the addressee more than I could disclose to a 'relevant person' under the Ordinance. In other words, I could not ask whether he or she was the user of a certain facility during a certain period. What I could say would thus be along these lines:

> 'There has been a case of interception which has been carried out by an officer of a department without the authority of a prescribed authorization and that the duration of the interception was five days. Please advise what telecommunications facilities [to cover telecommunications interception] and addresses [to cover postal interception] you were using during those five days.'

7.75 The person who receives such a letter would be extremely clever if he/she could understand to which five days of which year the letter refers for him/her to provide any sensible answer to the enquiry. Worse still, before ascertaining that the recipient was the user hence the relevant person under the Ordinance, I might not even disclose the fact that there

had been interception without the authority of a prescribed authorization. Hence, what I could tell the recipient would be further limited to:

> 'I am investigating a case under the ICSO. Please inform me what telecommunications facilities and postal addresses you used during a period of five days.'

7.76 The above illustrates how absurd it would have been if I were to comply fully with the provisions of section 48. It is simply not workable. At the very least, I must be allowed to state the approximate period during which the interception concerned took place, for otherwise I could not effectively seek information from the addressee about the identity of the user of the facility at the material time.

7.77 Moreover, where only a duration but not a period with reference to some dates is mentioned in a notice to the relevant person, the written submissions that he/she may make to seek an order for compensation pursuant to section 44(2)(b) of the Ordinance would not be able to found on any matters that related to the nature of his/her communications at any given moment unless such communications were stereotyped and did not differ throughout all times.

7.78 In the present case, I was bound to indicate an approximate period during which the interception concerned took place when I wrote to the person who was believed to be closely related to the second facility to ascertain who the 'relevant person' was. After the addressee had

confirmed that he/she was the user, I gave a notice to him/her as the relevant person pursuant to section 48. The case has not yet finalized.

7.79 In my notice to the relevant person, I complied with section 48(1)(a) and (4) by not mentioning the type of interception that had taken place nor the reason for my finding nor any other details. I have also taken into account this spirit when I work on the description of the case above which may appear to many to be cryptic and to read like a riddle, because I have to restrict the information that I could disclose in my annual report. I may even be justified when dealing with any similar irregularity to report in the following simple manner: 'there has been a case of interception (or covert surveillance as the case may be) carried out by an officer of a department without the authority of a prescribed authorization for ____ days and I have [have not yet] given a notice to the relevant person under section 48'. Either of these alternatives will comply fully with the wording and spirit of the provisions of section 48; otherwise by the time the annual report is published, if the relevant person reads the report, he or she would have known all the details that I am not allowed by the Ordinance to disclose.

7.80 I consider that the dilemma I face in relation to the execution of section 48 should be looked into when the Ordinance is next revised.

7.81 Regarding this case of wrong interception, I have suggested to the Secretary for Security that the checking and verification process should be enhanced, in addition to those preventive measures already proposed by

the LEA to avoid wrong interception in future. My suggestion is being explored by the Secretary for Security in consultation with the LEAs. This case has not yet been concluded pending the completion of this report.

Irregularities reported not under section 54

Cases 6 to 9: Interception conducted after the revocation of prescribed authorization under section 58

7.82 As mentioned in paragraph 13.36 of my 2006 Annual Report, during my inspection visit to an LEA towards the end of March 2007, I noted that there were instances where a time gap existed between the revocation of a telecommunications interception authorization by panel judges pursuant to section 58(2) of the Ordinance following a report of arrest made under section 58(1) and the actual disconnection of the facilities intercepted. I was concerned that this would render any interception carried out during the time gap an unauthorized activity. The LEAs were required to report to me on the cases in which such irregularity had taken place.

7.83 Only one LEA had encountered such a situation and it had submitted a report to me upon my request. The report indicated that there were four such cases, two happened in 2006 and two in 2007. The time gap between the revocation and disconnection of lines in each of these four cases was:

2006

Case 6: About 19 hours

Case 7: 1 hour 22 minutes

2007

Case 8: 3 hours 50 minutes

Case 9: 2 hours 16 minutes

7.84 According to the LEA, no useful information was captured from the interception carried out during the time gap. This means that either no communications were intercepted at the material time or the communications intercepted contained nothing of intelligence value. Having examined all these four cases, I decided not to give notice to the relevant persons under section 48(1) of the Ordinance for the interception conducted without the authority of a prescribed authorization during the time gap since to do so would be prejudicial to the prevention or detection of crime (section 48(3) of the Ordinance). The four subjects of the interception operations in question were notorious crime figures. The disclosure would reveal the LEA's attention on them and would seriously jeopardize the on-going investigation against them and their associates.

7.85 As I had mentioned in my 2006 Annual Report, one way of addressing the problem of unauthorized interception or covert surveillance during the time gap was to discontinue the interception or covert

surveillance temporarily at the time of submitting the arrest report to the relevant authority and re-start the activity if the relevant authority decides not to revoke the prescribed authorization. But this has the undesirable effect of missing the intelligence in between and is not conducive to the prevention or detection of crime or the protection of public security in the event that the relevant authority does not revoke the prescribed authorization after considering the report of arrest. The solution would be to amend the relevant provisions of the Ordinance to allow the relevant authority flexibility to defer the time of revocation of the prescribed authorizations.

7.86 The Security Bureau had attempted to work out pragmatic ways to resolve the difficulties. It maintained the view that the provision of the law was not and could not have been intended to lead to an unworkable situation whereby the panel judges might have to revoke an authorization making the LEAs liable to breaching the law. It suggested that where a panel judge was minded to revoke a prescribed authorization on receipt of a section 58 report but before he made his final decision, he afforded the LEA concerned a chance to make representations. That way, the LEA might explain in detail to the panel judge why the operation should continue despite the arrest. On receipt of the notice from the panel judge of the impending hearing, the LEA would arrange for the suspension of the operation which would be resumed only if the panel judge decided not to revoke the prescribed authorization after the hearing.

7.87 The panel judges held the view that under section 58(2), where a panel judge receives a report on arrest under section 58(1), he shall revoke the prescribed authorization if he considers that the conditions for the continuance of the prescribed authorization under section 3 are not met. The Ordinance, in its existing wording, does not permit a 'stay' of the revocation. If the panel judge has reached a decision to revoke but nevertheless holds a hearing simply for the purpose of enabling the LEA to bridge the possible time gap, this would be artificial and is inappropriate.

7.88 To tackle the problem, the Security Bureau had worked out alternative enhanced arrangements for handling such cases, ie to arrange staff to stand by at PJO to receive the revocation and to immediately notify officers concerned to discontinue the operation or disconnect the facilities at once. As an additional measure to minimize possible intrusion into the privacy of individuals concerned, subsequent to the submission of the section 58 report, save for critical cases, LEA officers would not listen to or observe the information obtained from the operation on a real time basis until and unless it had been confirmed that the panel judge had not revoked the authorization concerned. In the event that the authorization was revoked, any information obtained or recorded during the period from the time of revocation to the point of actual discontinuance would not be used and would be destroyed upon confirmation with me that I no longer needed it for the performance of my oversight functions. The Security Bureau considered that the revised arrangement would keep the time between the panel judge's decision on revocation of an authorization and the

implementation of that decision to the minimum. According to the legal advice obtained by the Security Bureau, the proposed package of measures, ie taking immediate steps to discontinue the operation as soon as reasonably practicable, and not listening to, observing or using any information obtained by the operation after the revocation (except in critical cases where the information had been listened to real time), was legally in order and would enable the Administration to better comply with the requirements under section 58. In the light of the above, the Security Bureau was of the view that the on-going operation between the panel judge's revocation of an authorization and the actual discontinuance of the operation concerned was not unauthorized and there was no irregularity in these circumstances.

7.89 I was not persuaded by the Security Bureau's above view, expressed in its letter of 5 October 2007, that any on-going operation after the revocation of the prescribed authorization by the panel judge was not unauthorized and did not amount to an irregularity. I categorically pointed out on 16 October 2007 to the Security Bureau and all the LEAs that pending resolution of the matter, any situation that involved any on-going operation (for however short the duration) after a revocation must be reported to me. I would consider each case as it came along.

7.90 The Security Bureau responded on 28 December 2007 that there remained a difference in views between the Administration and me on whether the operation during the interim period between the revocation of

an authorization after submission of a report on arrest under section 58 and the actual discontinuance of the operation should be treated as unauthorized. In any event, LEAs would in line with the advice given by me report to me any situation that involved any on-going operation (regardless of its duration) after a revocation under section 58. The Security Bureau would consider in the context of the comprehensive review of the ICSO in 2009 whether there would be a need to amend the Ordinance.

Case 10: One- or two-minute time gap between the expiry of the original executive authorizations and the renewed executive authorizations for Type 2 surveillance

7.91 During an inspection visit to an LEA in August 2007, I observed that several renewed executive authorizations took effect from one or two minutes after the expiry of the original authorizations. By way of illustration: the original authorization ended at 2359 hours but the renewed authorization took effect from 0000 hour or 0001 hour of the following day. The one- or two-minute break, though short in duration, was not covered by any authorization and might amount to an irregularity because under section 19 of the Ordinance, a renewal of an executive authorization takes effect at the time when the executive authorization would have ceased to have effect but for the renewal. I advised the LEA to seek legal advice and report the case to me.

7.92 In a memo dated 10 December 2007 to me, the LEA stated that there were 15 renewed executive authorizations with a time gap of one

or two minutes between the expiry of the original authorization and the start of the renewed authorization. Thirteen of the cases involved one minute and two cases involved two minutes; eight took place in 2006 and seven in 2007. No covert surveillance had ever been carried out during the time gap in question. On a strict interpretation of the term '2359 hours', there was technically a time gap between the original authorizations and the renewed authorizations, but the *de minimis* principle was applicable in these cases. The identified short time gaps were not caused deliberately, but arose from an inadequate understanding of the meaning of expressions such as '2359 hours' or '0001 hour'. Since it was clear that no gap was intended, any 'non-compliance' was minor and technical in nature and did not involve anything of consequence. Having regard to section 64 of the Ordinance which prescribes that a prescribed authorization is not affected by any minor defect relating to it, the LEA considered that the said 15 cases did not warrant the submission of reports to me under section 54 of the ICSO. The LEA had duly advised the authorizing officer to avoid giving the impression of any gap between the expiry of an executive authorization and the commencement of the renewed authorization when granting future renewed authorizations.

7.93 I considered that the one- or two-minute break in these 15 renewed authorizations amounted to non-compliance with section 19 of the Ordinance. However, I agreed that the breach in all these cases was technical in nature and would not affect the validity of the renewed authorizations by virtue of section 64 of the Ordinance. The breach was

caused by the inadequate understanding by the officers concerned of the meaning of the expressions such as '2359 hours', '0000 hour' or '0001 hour'. While it was noted that no similar mistake was made in subsequent renewed executive authorizations after the discovery of this irregularity in August 2007, I advised that the LEA should clearly explain to all officers who act as applicants and authorizing officers for ICSO prescribed authorizations the correct meaning of those expressions of time, and draw their attention to the statutory requirement of section 19(a) that there should be no break between the expiry of the original authorization and the commencement of the renewed authorization, and that the LEA should consider incorporating this explanation in the department's operational guidelines. My recommendations were accepted by the head of the LEA.

Reports of incidents

7.94 The first incident report concerned the reactivation of a discontinued interception. An LEA had discontinued the interception of a telephone line and was submitting a report to the panel judge for revocation of the prescribed authorization under section 57. However, due to the technical complications at the CSP's end, the interception of this line was reactivated for seven hours until it was discovered and removed immediately. The prescribed authorization was revoked half an hour later. There was no call during the reactivation period. The Team reported this incident to me. Having reviewed the facts of this case with the Team and the CSP concerned, I was satisfied that the reactivation was caused by the

technical complications, not due to any human error. The Team and the CSP concerned had also worked out ways to avoid recurrence. I consider it would not be prudent, for security reasons, to divulge any further details about this incident.

7.95 The second incident report concerned initial material inaccuracies under a prescribed authorization for interception. The first digit of the telephone number which should be '6' had been wrongly typed as '9' in the affirmation in support of the application and in the prescribed authorization that was issued. The mistake was discovered prior to interception being carried out. The LEA withheld the commencement of the interception and reported the initial material inaccuracy to the panel judge by an REP-11 report. The panel judge immediately revoked the authorization. I had caused a check on the non-commencement of interception before the revocation of the prescribed authorization and confirmed that what was claimed was correct. Nothing untoward occurred, and the case serves as an example to warn LEA officers to use utmost care in typing and checking ICSO-related documentation.

Irregularities identified during review

7.96 Apart from the above irregularities and incidents reported by LEAs, I also identified during my inspection visits to LEAs two Type 2 surveillance authorizations which I considered had not been granted entirely properly: one was granted with marginally justified grounds and

the other was granted with an overly long duration. These two cases are covered in paragraph 4.20 (e) and (f) of Chapter 4.

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CHAPTER 8

THE CODE OF PRACTICE AND RECOMMENDATIONS TO THE SECRETARY FOR SECURITY

Code of Practice

8.1 Section 63 of the ICSO provides for the issue of a code of practice ('Code') by the Secretary for Security to provide practical guidance to officers of the LEAs in respect of matters provided for in the Ordinance. Any officer of an LEA shall, in performing any function under or for the purpose of any provision of the Ordinance, comply with the provisions of the Code. Non-compliance with the Code constitutes non-compliance with the 'relevant requirements' of the Ordinance and has to be reported to the Commissioner. 'Relevant requirement' means any applicable requirement under any provision of the Ordinance, the Code or any prescribed authorization or device retrieval warrant concerned. Depending on the circumstances of the case, the relevant officer may be subject to disciplinary action or the common law offence of misconduct in public office, in addition to the full range of existing law.

8.2 Pursuant to section 63 of the Ordinance, the Secretary for Security issued a Code on 9 August 2006. It was revised on 29 October 2007 taking into account the operational experience of LEAs and my recommendations made in the course of my review and oversight

functions under the ICSO regime.

Recommendations to the Secretary for Security

8.3 Under section 51 of the Ordinance, if the Commissioner considers that any provision of the Code should be revised to better carry out the objects of this Ordinance, he may make such recommendations to the Secretary for Security as he thinks fit.

8.4 During the report period, I made a number of recommendations to the Secretary for Security. These are set out below. Recommendations 1 to 5 have already been incorporated in the revised code issued on 29 October 2007 ('the revised Code').

Recommendation 1: Justification for the duration of the executive authorization in COP-9 and similar forms

8.5 One of the conditions for the issue of a prescribed authorization is that the statutory activity is necessary for and proportionate to the purpose sought to be furthered by carrying it out. To satisfy the necessity and proportionality test, the authorizing officer for Type 2 surveillance must consider whether there are sufficient materials in the application to justify the duration of the authorization sought. However, during my inspection visits to LEAs to check applications for authorization for Type 2 surveillance, I found that in most of the cases, the applicant did not include such material in the statement in writing in support of the

application (Form COP-9) to justify the duration of the proposed covert surveillance. Worse still, in one of the irregularities reported by the LEAs (Case 1 in Chapter 7), I discovered that the applicant applied for an authorization for Type 2 surveillance for a period lasting several days beyond the anticipated date of completion of the offence without giving any explanation on the proposed duration. Nor, according to what I was told, did the authorizing officer seek clarification from the applicant before granting the authorization with the duration sought.

8.6 I examined COP-9 and found that section 3(i)(c) thereof only required the applicant to state the proposed duration of the Type 2 surveillance. Nowhere in the form did it require the applicant to provide justification for the duration of the proposed surveillance. This was perhaps the reason why applicants for Type 2 authorizations did not feel the need or realize that they had to justify the duration sought.

8.7 I therefore recommended to the Secretary for Security that COP-9 should be amended to require applicants to explain or justify the period of authorization sought. Similar amendment should also be made to internal forms such as AFF-1 which is the affidavit/affirmation in support of the application for an authorization for interception or Type 1 surveillance.

8.8 My recommendation was accepted by the Secretary for Security. COP-9 was amended by adding a new sub-paragraph 4(v)(a) requiring the applicant to justify the proposed duration of the authorization.

The amended form was incorporated in the revised Code. The Secretary for Security has agreed to make similar amendments to internal forms used for similar purposes, such as AFF-1.

Recommendation 2: Justification for the proposed duration in the renewed authorization in COP-13 and similar forms

8.9 Section 18(2) stipulates that the authorizing officer shall not grant the renewal unless he is satisfied that the conditions for the renewal under section 3 have been met and he has taken into consideration the period for which the executive authorization has had effect since its first issue. Same as COP-9, there was no reference in COP-13 (statement in writing in support of an application for renewal of an executive authorization for Type 2 surveillance) requiring the applicant to explain or justify the proposed duration sought in the renewed authorization. I therefore recommended to the Secretary for Security that COP-13 and other similar forms, such as AFF-2 which is an affidavit/affirmation in support of application for renewal of authorization for interception and Type 1 surveillance, should be amended to include such a requirement.

8.10 This recommendation was accepted and paragraph 2(d) of COP-13 was duly amended by adding a new sentence requiring the applicant to set out relevant matters for assessing whether the proposed duration was necessary. The amended COP-13 had been incorporated into the revised Code. The Secretary for Security has also undertaken to

amend other internal forms such as AFF-2 in the same manner.

Recommendation 3: Effective time of the renewal of executive authorization in COP-14

8.11 Section 19 of the Ordinance states that a renewal of an executive authorization takes effect at the time when the executive authorization would have ceased to have effect but for the renewal. Where an authorization expires on, say, 1000 hours on Day 1, the renewal authorization should take effect from 1000 hours on Day 1 but not on Day 2. However, as mentioned in Case 4 in paragraph 7.60(f) of Chapter 7, the wording in the last paragraph of COP-14 (renewal of executive authorization for Type 2 surveillance) was imprecise and might cause confusion to authorizing officers. It read:

> 'This renewal authorization takes effect from **[day after last day of authorization being renewed]** and remains in force …'

8.12 Upon my recommendation that this form should be amended, the Secretary for Security had caused the relevant wording to be amended to read:

> 'This renewed executive authorization takes effect from the ___ day of ___ at ____ hours and remains in force …'

The amended COP-14, retitled 'Renewed Executive Authorization for Type 2 Surveillance', had been incorporated in the revised Code.

Recommendation 4: Starting time of the executive authorization for Type 2 surveillance in COP-10 and the time of issue of the authorization

8.13 COP-10 is the form of executive authorization for Type 2 surveillance. In paragraph 7.61(a) of Chapter 7, I have commented that the starting date and time of the executive authorization could not be found in COP-10 itself. The form was worded in such a way that the executive authorization must take effect from the time of issue of the authorization. However, it only contained the date of issue of the executive authorization, but not the time of issue. This was improper. Moreover, the form did not cater for a situation where an authorizing officer might wish to grant an executive authorization taking effect from a time later than the time of its issue.

8.14 Section 16 of ICSO states that an executive authorization takes effect at the time specified by the authorizing officer when issuing the executive authorization, which in any case is not to be earlier than the time when it is issued. Where an authorization takes effect on the day the authorization is issued, it is necessary to indicate not only the date but also the time of issue of the authorization to ensure that section 16 is satisfied. Moreover, with the time of commencement of authorization and the time of issue stated in the authorization, there will be little doubt whether an operation starts before or after the effective time.

8.15 I therefore recommended that COP-10 should be suitably amended to address the above concerns and that similar amendment should

be made to the authorization forms of other types of authorization such as COP-14 (renewed executive authorization for Type 2 surveillance) and judge's authorizations for interception and Type 1 surveillance.

8.16 My recommendation was accepted. Forms COP-10 and COP-14 were duly amended and incorporated in the revised Code. The Secretary for Security has also agreed to amend the authorization forms of other types of authorization in the same manner.

Recommendation 5: Confirmation of emergency authorization issued as a result of oral application

8.17 For emergency authorization issued as a result of oral application, section 26 of the Ordinance requires the applicant to seek confirmation from the head of department as the authorization is issued upon oral application. On the other hand, section 23 of the Ordinance requires the applicant to seek confirmation from the panel judge because it is an emergency authorization. Both applications for confirmation should be made within 48 hours beginning with the time when the authorization is granted. Section 28 provides that section 26 does not apply if an application for confirmation of the emergency authorization has been made to a panel judge within the specified period and supported by documents listed in that section. Paragraph 103 of the Code issued on 9 August 2006 stated:

> 'To obviate the need for two separate applications to be made …, section

28 of the Ordinance sets out special arrangements regarding the confirmation of an emergency authorization issued as a result of an oral application directly to a panel judge. **This procedure should be followed in normal circumstances, i.e. only one application for confirmation from the panel judge should be made**.' (Emphasis added.)

8.18 The Code made it clear that under normal circumstances only one application for confirmation to the panel judge will be required, instead of two separate applications to the head of department and the panel judge. However, the Code was silent on the circumstances under which two separate applications for confirmation would be required.

8.19 In response to my comments on the forms for seeking confirmation of emergency authorization granted upon oral application, the Security Bureau stated that there was a need to retain the option of seeking confirmation from both the head of department and the panel judge, as it is provided for in the law, so that the head of department's confirmation of the emergency authorization granted upon oral application could be sought in appropriate cases.

8.20 I recommended to the Secretary for Security that the Code should spell out under what circumstances two separate applications to the head of department and the panel judge should be made so that officers of LEAs knew exactly what to follow. My recommendation was taken by the Secretary for Security. Accordingly the relevant paragraph was

revised in the revised Code to provide guidance to LEA officers, as follows:

> 'To obviate the need for two separate applications to be made …, section 28 of the Ordinance provides for special arrangements regarding the confirmation of an emergency authorization issued as a result of an oral application under which it is unnecessary to make a separate application to the head of department under section 26 of the Ordinance. This procedure should be followed unless the head of department specifically requests that the two-step confirmation procedure be followed when he issues an emergency authorization on an oral application, or when no operation has been carried out pursuant to the emergency authorization. …' (Paragraph 105 of the revised Code.)

A footnote was also added to paragraph 105 of the revised Code to clarify that where no operation has been carried out pursuant to an emergency authorization, no application for confirmation is required to be made to a panel judge under section 23; section 28 is therefore inapplicable and the application for confirmation should be made under section 26 instead.

Recommendation 6: Tightening of the return of surveillance devices

8.21 In my findings on one of the irregularity cases (Case 4 in paragraph 7.61(b) of Chapter 7), I made recommendation that the procedure for return of surveillance devices should be tightened so that the devices are returned as soon as they are no longer required for the operation

concerned. To this end, the Secretary for Security has expanded paragraph 129 of the revised Code to provide additional guidelines to LEAs, along the following line:

> 'Departments should ensure that proper records are kept on the inventories and movement of devices to minimize any possibility of unauthorized usage. Individual officers should also return their devices in hand as soon as it is firmly established that the operation concerned would not be reactivated even though the related authorization is still in force. Officers-in-charge of the central registry should pay attention to the time of discontinuance of an operation or the expiry date of individual authorization so as to ensure that loaned items will be returned as soon as reasonably practicable and there are no outstanding items kept in officers' hands after the conclusion of the operation.'

8.22 The above change has been implemented by LEAs with effect from 11 April 2008 pending formal amendment to the Code when it is next issued.

Recommendation 7: Starting date and time of renewed authorization in COP-13

8.23 As described in paragraph 7.60(e) of Chapter 7, when reviewing a case of irregularity with a nine-hour break between the expiry of an original executive authorization for Type 2 surveillance and the

commencement of the renewed executive authorization, I pointed out that the wording in paragraph 2(d) of the form 'COP-13: statement in writing in support of an application for renewal of an executive authorization for Type 2 surveillance' was misleading. I recommended to the Secretary for Security that the paragraph should be improved by adding a remark to alert the applicant that the starting time of the renewal should dovetail with the expiry time of the prescribed authorization to be renewed so as to comply with the requirement in section 19(a) of the Ordinance.

8.24 In the light of my advice, the Secretary for Security has amended the wording of the relevant paragraph of COP-13 with effect from 11 April 2008 to draw attention to the requirement that the renewal should take effect at the time when the executive authorization would have ceased to take effect but for the renewal. The Security Bureau has similarly revised the relevant paragraph of the internal form 'REC-6: record of application for renewal of executive authorization made orally' where the starting date and time of the renewal are required to be filled in. This serves as an additional reminder to both the applicant and the authorizing officer so that any irregularity arising from an inappropriate starting time of a renewal sought by way of oral application can be identified at an early stage.

Recommendation 8: Revocation of an executive authorization (REV-1)

8.25 Section 57 of the Ordinance provides that if a reviewing

officer or an officer in charge of the statutory activity is of the opinion or becomes aware that the ground for discontinuance of the prescribed authorization exists, he shall cause the interception or surveillance to be discontinued and shall, after the discontinuance, cause a report on the discontinuance and the ground for discontinuance to be provided to the relevant authority. The relevant authority shall after receiving the report revoke the prescribed authorization concerned. It is clear from section 57 that it is the reviewing officer or the officer in charge of the operation who discontinues the interception or surveillance whereas it is the relevant authority (ie the panel judge, the head of department or the authorizing officer) who revokes the prescribed authorization.

8.26 However, in the course of examining Type 2 surveillance cases during inspection visits, I found that mistakes were made by LEAs in the revocation of executive authorizations. The revocation was worded in such a way as if it had been the officer in charge of the operation who discontinued the executive authorization or it had been the authorizing officer who discontinued the operation. It was also not clear whether the time of discontinuance entered referred to the time of discontinuance of the operation or the time of discontinuance of the executive authorization. This confusion was caused mainly by the wrong wording in paragraph 3 of the internal form 'REV-1: revocation of an executive authorization upon a report on the discontinuance of an executive authorization for Type 2 surveillance', which was to be filled in by the authorizing officer. Paragraphs 3 and 4 of REV-1 read:

> 'The executive authorization was discontinued by [name, rank and post of the officer] on ____ day of ____ at ____ hours on the ground that the conditions for its continuance were not met.
>
> In accordance with section 57(4) of the Ordinance I hereby revoke the executive authorization.'

The title of REV-1 was also inappropriate as the revocation was upon a report on the discontinuance of an operation, not upon a report on the discontinuance of an executive authorization.

8.27 I recommended that the wording in REV-1, which was misleading, should be changed because the reviewing officer or the officer in charge of an operation only has the power to discontinue an operation. He or she does not have the power to discontinue an executive authorization. I made my recommendation to the LEAs concerned who in turn requested the Secretary for Security to amend the form. The revised REV-1 has been adopted for use by all LEAs since 11 April 2008.

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CHAPTER 9

RECOMMENDATIONS TO LAW ENFORCEMENT AGENCIES

My function to recommend

9.1 My functions and duties as the Commissioner are clearly defined in section 40 of the Ordinance. According to section 40(b)(iv), without limiting the generality of my function of overseeing the compliance by the LEAs and their officers with the relevant requirements of the Ordinance, I may make recommendations to the Secretary for Security and heads of the LEAs as and when necessary. In respect of making recommendations to the LEAs, further elaboration can be found in section 52. Section 52(1) provides that, in the course of performing any of my functions under the Ordinance, if I consider that any arrangements made by any LEA should be changed to better carry out the objects of the Ordinance, I may make such recommendations to the head of the LEA as I think fit.

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

the Secretary for Justice, although wherever the recommendations concerned the panel judges, I had informed them of the same, so that they were fully apprised of my recommended arrangements well in advance.

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

(1) Interpretation of 'if known' under Part 1(b)(xi), Part 2(b)(xii) and Part 3(b)(xii) of Schedule 3 to the ICSO

9.4 Part 1(b)(xi), Part 2(b)(xii) and Part 3(b)(xii) of Schedule 3 to the ICSO require the affidavit or statement supporting an application for the issue of an authorization for interception, Type 1 surveillance or Type 2 surveillance to set out, if known, whether during the preceding two years, there has been any application for the issue or renewal of a prescribed authorization in which any person set out in the affidavit or statement has also been identified as the subject of the interception or covert ICSO activities concerned. The knowledge was interpreted by an LEA to be the personal knowledge of the applicant rather than that of the department.

According to the LEA, information on covert operations was very sensitive and was confined to those with a need to know. The LEA therefore adopted the principle of compartmentalization, under which all possible measures were taken to ensure that sensitive operational information would not be divulged to officers not authorized to access that information. They considered that the arrangement could also serve to protect the privacy of the subjects concerned. In this regard, an applicant who applied for a prescribed authorization in a division/unit would not be aware of the operations against the same subject in another division/unit. It might therefore be possible for an applicant declaring in an affidavit/statement that during the preceding two years, there had not been any application for authorization or renewal in which any person set out in the relevant paragraph of the affidavit/statement had also been identified as the subject of the interception or covert surveillance concerned, while previous applications on the same subject had actually been made by another division/unit of the LEA.

9.5 As advised by the LEA, it had all along been their interpretation that the requirement in Part 1(b)(xi), Part 2(b)(xii) and Part 3(b)(xii) of Schedule 3 should be the personal knowledge of the applicant who made the affidavit/statement, instead of the knowledge of the entire department. They were worried that any deviation from the principle of compartmentalization would seriously undermine their operations.

9.6 I do not agree with the LEA's interpretation. Whether there

has been any application for a prescribed authorization during the two years preceding the present application is considered by the Ordinance to be a relevant factor for the consideration of a relevant authority, the words 'if known' should be interpreted liberally as the knowledge of the LEA to which the applicant belongs and not limited to the applicant's own personal knowledge. Moreover, if the words 'if known' are confined to the personal knowledge of the applicant, the statutory requirement for providing such information might easily be circumvented, eg by asking the most junior or ignorant officer to be the applicant so as to avoid giving any information on such previous applications. I therefore recommended that the LEA should have a central database with suitable search functions to facilitate applicants or authorizing officers to ascertain whether previous applications on the same subject had been made by the department before.

9.7 During my inspection visits to the LEA, they expressed their concerns on and difficulties in implementing the recommendation in full due to the principle of compartmentalization and restricted release of information regarding ICSO applications on a 'need to know' basis. I advised them to discuss the matter with the Security Bureau and submit their counter-proposal to me where necessary. The LEA has submitted a counter-proposal and a position paper to me. As the matter is quite complicated, detailed study and deliberation will be required in order to have a thorough grasp of the spirit and requirement of the ICSO in this respect.

9.8 Apart from the subject in question, Part 1(b)(xi)(B) of Schedule 3 to the ICSO also requires the affidavit supporting an application for the issue of an authorization for interception to set out, if known, whether during the preceding two years, there has been any application for the issue or renewal of a prescribed authorization in which, where the particulars of any telecommunications service have been set out in the affidavit, the interception of any communication to or from that telecommunications service has also been sought. However, during an inspection visit to an LEA, I noticed that in two separate applications for the issue of an authorization for interception on subjects whose identities were unknown, the affidavit for one of the applications stated that checks made on the telephone number concerned had confirmed that there had been no issue of a prescribed authorization for interception since the enactment of the Ordinance, while that for the other application only specified that since the enactment of the Ordinance, there had been no issue of any prescribed authorization against the subject with only a known nickname. It was not mentioned in the affidavit for this latter application whether there had been any application for the issue or renewal of a prescribed authorization in respect of the telephone number in question. The approach in making the affidavit for this latter application was not in full compliance with Part 1(b)(xi) of Schedule 3 to the Ordinance. The LEA was advised to deal with the telephone number(s) concerned as required by the Ordinance for similar cases in future. It was also advised that Part 1(b)(xi) of Schedule 3 requires the applicant to state, if known, whether there has been any previous **application** for a prescribed

authorization. In other words, if there was previous application which had been refused, this should also be mentioned in the affidavit. It would not suffice to just mention that there had been no previous issue of a prescribed authorization. The LEA should change the wording in the affidavit in order to comply fully with the requirement of the relevant provisions.

(2) Regular submission of inventory list of surveillance devices and device registers

9.9 As stated in my 2006 Report, I had requested each LEA to furnish me with an inventory list of all the surveillance devices, together with a device register for loan requests of surveillance devices with a prescribed authorization in support ('ICSO device register') and a separate device register for loan requests in respect of which no prescribed authorization is required ('non-ICSO device register'). During my inspection visits to LEAs for checking purpose, I found that for some LEAs, the inventory lists provided to me only contained surveillance devices which were employed or would be employed for covert surveillance in pursuance of prescribed authorizations under the ICSO. Devices capable of performing covert surveillance but were employed for purposes other than covert surveillance had not been included. The situation was unsatisfactory as one could not rule out the possibility that officers of the LEAs might make use of such device(s) for performing covert surveillance without a prescribed authorization. Apart from the above, I also found that different LEAs had prepared their inventory lists and device registers

differently. There is a need to standardize the format and presentation. I have therefore made the following recommendations to the Secretary for Security and the LEAs –

(a) LEAs should provide me afresh with the inventory list, the ICSO device register and the non-ICSO device register in the prescribed format.

(b) The inventory list should include all devices (excluding fixtures) capable of performing covert surveillance even though they might not be used for covert surveillance.

(c) Each device is assigned a unique device code and/or serial number and therefore the same type of device with more than one item should be separately identified in the inventory list.

(d) The device code is to identify the division or unit using the device. The serial number is the number shown on the product by the manufacturer. For the inventory list, both the device code and the serial number should be shown. But in the device registers, only the device code needs to be shown.

(e) LEAs should provide a detailed description of the functions of the device in the inventory list.

(f) Whenever there is an addition of device to the inventory list, LEAs should mark the 'ADD' column and enter the date of addition, and copy the relevant part to me on a weekly basis, together with the other weekly reports. For deletion of items, LEAs should mark the 'DEL' column and enter the date of deletion and inform me quarterly of such deletion.

(g) For device registers, if there is a new entry, it should be copied to me on a weekly basis as the weekly reports. If there is no change, LEAs should send the last page of the last entry to me on a 4-weekly basis.

(h) All the device registers should be paginated for easy reference.

9.10 I have also advised the LEAs that for withdrawal of devices, be it for ICSO purpose or non-ICSO purpose, there should be a request memo or an application form. If the withdrawal of device is for ICSO purpose, it would suffice for it to be signed by the officer withdrawing the device and approved by the team leader of the operation who should at least be an officer of the Inspector (or equivalent) grade. But for withdrawal of devices for non-ICSO purpose, I would require that it be signed by the officer withdrawing the device, endorsed by the team leader who should at least be of Inspector (or equivalent) grade, and approved by

an officer outside the team who must be senior in rank to the endorsing officer.

9.11 Whilst the LEAs have agreed to comply with the requirements set out in items (a), (c), (d), (e) and (h) of paragraph 9.9 above, they are of the view that there would be practical difficulties for them to adopt in full the rest of the recommendations described in items (b), (f) and (g) of paragraph 9.9 and paragraph 9.10. They considered that enormous resources would be needed and their operations would be seriously impaired if these requirements were to be met. To resolve the problem, an LEA has recently put forward an alternative proposal on the scope of control as well as the registration and withdrawal of surveillance devices. No decision on the matter has yet been made pending the completion of this report.

9.12 More details relating to the checking of inventory lists and device registers for surveillance devices can be found in paragraphs 3.28 to 3.32 of Chapter 3.

(3) Duration of executive authorization for Type 2 surveillance

9.13 To satisfy the necessity and proportionality tests mandated by section 3 of the ICSO, an authorizing officer for Type 2 surveillance authorization must consider, inter alia, whether there is sufficient information in the application to justify the duration of the executive authorization that he is going to grant. However, during my inspection

visits to the LEAs, it came to my attention that many of the executive authorizations for Type 2 surveillance were granted for duration relatively longer than the Type 1 authorizations approved by the panel judges. Having examined the cases concerned, I noticed that in most of the cases, the statement in writing in support of the application (Form COP-9) did not give any explanation or evidence in support of the requested duration. Notwithstanding this, the authorizing officers approved such applications without seeking further explanation from the applicants. I considered this practice unsatisfactory. The LEAs were advised that applicants had the duty to provide sufficient grounds or evidence for the duration sought. At the same time, authorizing officers should take a critical approach when considering applications and should seek further clarification from applicants whenever necessary. The justification and further clarification should be properly recorded.

9.14 The LEAs accepted my advice. Officers concerned were reminded to provide full justification for the duration of executive authorization for Type 2 surveillance in the application submitted by the applicant and the authorizing officer to pay attention to such justification when deciding whether to grant the executive authorization sought. Granting an executive authorization for a long period must be avoided and should only be made in circumstances with full justification based upon the necessity and proportionality tests. At the same time, I also made recommendations to the Secretary for Security for the amendment of the COP-9 and other similar forms to require applicants to explain or justify

the period of the authorization sought. Details of my recommendations related to the matter are shown in paragraphs 8.5 to 8.8 of Chapter 8.

9.15 A typical case illustrating the long duration granted by an LEA can be found in paragraph 4.20(f) of Chapter 4.

(4) Duration of authorization for interception

9.16 Similar to Type 2 surveillance cases, to satisfy the necessity and proportionality tests as required under section 3 of the Ordinance, the panel judge must consider, inter alia, whether there are sufficient materials in the application to justify the duration of the authorization sought.

9.17 During an inspection visit to an LEA, I noticed that the LEA, in most of the cases, applied for the longest duration of three months, and they were almost always shortened to one month by the panel judges. The LEA pointed out that the one month duration was too short and much workload in preparing renewals would be reduced if a longer duration could be granted. LEAs did not seem to have the chance of making representations and explaining their cases before the panel judges. Even though there were genuine cases that warranted a longer duration, the justification might not be sufficiently explained in the affidavit concerned. I therefore suggested to the LEA that they should consider applying for shorter duration than three months in normal cases and highlighting their justification for a longer duration when submitting applications that deserved special consideration.

(5) Memo on request for surveillance devices

9.18 During an inspection visit to an LEA, I observed that in some cases the memo on request for surveillance devices ('request memo') did not indicate the quantity of devices required. For example, the request memo might just state 'binoculars' without indicating how many pairs of binoculars were required. The officer endorsing the request memo ('endorsing officer') also did not know how many pairs of binoculars were eventually withdrawn by the bearer of the memo. The arrangement was undesirable and susceptible to abuse. I suggested that the LEA should improve the arrangement by requiring the endorsing officer to state the quantity requested. The issuing officer should in any event state at the bottom of the request memo the quantity issued, say, four pairs of binoculars, and photocopy the request memo for the bearer to present it to the endorsing officer so that the latter would know how many devices were actually withdrawn and whether they corresponded with his request.

(6) Early issue of surveillance devices due to operational need

9.19 During an inspection visit to an LEA, I noted from two authorizations for covert surveillance that the relevant surveillance devices were issued before the effective time of the authorization. The LEA explained that there was an urgent operational need in these two cases. In one case, information revealed that the suspects would meet within a very short time. In another case, the surveillance was to be conducted at a location quite far away from the device registry. The LEA further assured

me that although the devices were withdrawn in advance, they would not be used until the authorization took effect. I considered such arrangement unsatisfactory as the withdrawal of surveillance devices might become unauthorized if the relevant application was refused by the authorizing officer. I suggested that, should there be similar urgent operational need, the relevant devices should be first held by an officer of the device registry who would go along with the investigating team. The officer of the device registry should not issue the devices to the investigating team unless he received confirmation that an authorization granted had become effective for the surveillance concerned.

(7) Report on material change of circumstances ('REP-11')

9.20 An authorization for interception or Type 1 surveillance was issued by the panel judge upon the general condition that the applicant or any other authorized officer of the LEA should, as soon as practicable, in any event during the validity of the authorization (or any period of renewal thereof) bring to the attention of any panel judge any initial material inaccuracies or material change of circumstances upon which the authorization was granted (or later renewed) which the applicant became aware of during such period of validity or renewal. Such a report on initial material inaccuracies or material change of circumstances was made in an REP-11 report form.

9.21 In view of the foregoing, when a previously unidentified subject was subsequently identified, the LEAs would make use of the

REP-11 form to report to the panel judge the identity of the subject and whether, during the preceding two years, there has been any application for the issue or renewal of a prescribed authorization for interception or covert surveillance on the subject concerned. However, during my inspection visits to the LEAs, I noticed that the REP-11 reports prepared by the LEAs for the purpose failed to meet the above requirement. I therefore recommended the LEAs to make improvement as follows:

(a) There was no indication in the REP-11 report regarding a previously unidentified subject being identified as to whether, during the preceding two years, there had been any application for interception or covert surveillance on the subject concerned. In some cases, it was only stated in the REP-11 report that since the enactment of the Ordinance, 'there has been no issue of any prescribed authorization in which the subject has been subject to **interception**', there was no mention about whether the subject had been subject to **covert surveillance**, as required under Part 1(b)(xi)(A) of Schedule 3 to the Ordinance. The LEAs were requested to provide such information in the REP-11 report.

(b) An REP-11 report indicated that there had been two 'prescribed authorizations' (one new and one renewal) to which the suspect had been subject. It also stated that an

additional application for interception on the suspect had been made separately. However, the REP-11 report did not indicate the ICSO numbers of these previous authorizations. The LEA was advised to indicate the ICSO numbers in all future REP-11 reports. I also suggested that 'prescribed authorizations' should be replaced by 'applications' in order to comply with Part 1(b)(xi) of Schedule 3 to the Ordinance.

(8) Ground for discontinuance of interception

9.22 Under section 57 of the ICSO, an officer concerned of an LEA should cause an interception (or covert surveillance) to be discontinued if he is of the opinion or becomes aware that the ground for discontinuance of the prescribed authorization exists. The officer concerned shall then report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization.

9.23 During an inspection visit to an LEA, I noted that the reason 'intelligence of value had been obtained' was used as the ground for discontinuance for a number of interception cases. I considered such description ambiguous and confusing. It was not clear why the operation was not continued even when useful information had been obtained and could presumably continue to be obtained from the authorized operation. I advised the LEA concerned that a more specific and clearer description should be given for the ground of discontinuance. More details on the

issue can be found in paragraphs 2.13 to 2.16 of Chapter 2.

(9) Description of ambit for 'premises-based' surveillance

9.24 I noted that the form of surveillance in a number of applications for Type 2 surveillance of an LEA was categorized as both premises-based and subject-based. For the cases in question, it appeared that the following descriptions for the premises-based ambit of the surveillance were too wide:

(i) listening device(s) at specified premises or any other premises or place;

(ii) listening device(s) at premises or place operationally suitable; and

(iii) listening device(s) at premises or place as arranged.

9.25 After examining these cases, I asked the LEA to tighten the wording so as not to unwittingly expand the ambit of the authorization. The LEA concerned accepted my recommendation. Details on the matter can be found in paragraph 4.20(b) of Chapter 4.

(10) Counting of renewals

9.26 Pursuant to section 49(2)(a) of the ICSO, I am required to include, inter alia, in my Annual Report the respective numbers of judge's authorizations and executive authorizations that have been renewed during the report period further to five or more previous renewals. However,

during my inspection visit to an LEA, I noted that there was a discrepancy in the counting of renewals between the LEA and PJO in the same investigation case as the two parties were using different reference points in the counting. While the LEA started counting from the original fresh application, PJO started counting from a related authorization that was later combined with the former one upon renewal.

9.27 To avoid misunderstanding, I recommended that when different authorizations of the same case were combined on occasion of renewal, the counting should start from the earliest authorization, irrespective of any subsequent discontinuance of facilities contained in that authorization. Where different authorizations of the same case had not been combined, such authorizations should be treated as stand-alone cases and the counting of renewal should not be affected by each other. The recommendation was accepted by the LEA.

(11) Disconnection of telecommunications facility after the revocation of authorization

9.28 During an inspection visit to an LEA, I had chosen for examination, amongst others, a report on discontinuance relating to a partial revocation of one of the three telecommunications facilities under a prescribed authorization. In the course of examining the relevant documents of this case, I found that the facility concerned was disconnected only **after** the panel judge had revoked the relevant part of the authorization for its interception. This was improper as the disconnection

should be made before the revocation. In response to my enquiry, the LEA explained that when a decision was made to discontinue the interception on a facility, their officers would first cease listening to the intercept product and then take steps to disconnect the facility. At the same time, a report on discontinuance would be submitted to the panel judge for revocation of the authorization on that facility. In this case, the listening to the intercept product had already ceased for over one and a half hours before the authorization for intercepting that facility was revoked.

9.29 I advised the LEA that although it had discontinued the listening on its side, the facility concerned was still being intercepted until the process of actual disconnection had completed. The disconnection of the facility only after the revocation of the prescribed authorization on its interception might constitute an irregularity since the interception in the interim between the revocation and the disconnection would amount to unauthorized interception. To avoid such a risk, the LEA was required to ensure that the facilities had been disconnected before it reported the discontinuance to the panel judge.

(12) Recommendations made upon review of cases of irregularities and incidents

9.30 In the course of my review of the irregularities and incidents mentioned in Chapter 7, I also made a number of recommendations to the Secretary for Security and the LEAs concerned. A summary of those recommendations to the LEAs is shown below –

Case 1: ***Failure to report discontinuance of covert surveillance under section 57***

(a) Given the authorizing officer's inadequacy or lax attitude, he should be discharged from the position of authorizing officer unless steps were taken by the LEA concerned to assure me that he had been reformed [paragraph 7.17].

(b) To facilitate the performance of my functions, the LEA concerned should ensure that in future, I am given the full picture of the relevant facts of the case when reporting irregularity pursuant to section 54 of the Ordinance and that the information provided to me should be correct and up-to-date [paragraph 7.26].

(c) The issue time of surveillance devices in the device register should be properly recorded to ensure that the devices are issued after the prescribed authorization has become effective. Control over the issue and return of surveillance devices should also be tightened to prevent any abuse [paragraph 7.27].

Case 2: ***Carrying out of Type 2 surveillance at a place other than that authorized by a prescribed authorization***

(d) The LEA concerned should ensure that all officers involved in the application and implementation of ICSO authorizations would fully appreciate the statutory requirements of the Ordinance [paragraph 7.40].

(e) Following the refresher briefings and improvement of operational procedures, officers in the department concerned should become fully aware of the mistakes exposed by the case. Appropriate disciplinary actions (over and above a mere verbal advice) should therefore be taken against officers for similar mistakes in future [paragraph 7.40].

Case 3: ***Incorrect statement in application for executive authorization***

(f) The authorizing officer should be discharged from the position of an authorizing officer as confidence in her reliability and ability in performing such functions had been damaged to a substantial extent [paragraph 7.53(c)].

(g) To improve their standard of understanding of the ICSO, focused training should be given to those officers whom the head of LEA had designated or would designate as the endorsing or authorizing officers under the Ordinance as well as officers who might make applications for a prescribed authorization [paragraph 7.53(d)].

(h) The department should consider ways to assist applicants and authorizing officers in checking whether previous applications on the same subject had been made [paragraph 7.53(e)].

Case 4: ***Incorrect commencement time of the renewed executive authorization***

(i) Paragraph 2(d) of the form 'COP-13: statement in writing in support of an application for renewal of an executive authorization for Type 2 surveillance' was misleading. The paragraph should be improved by adding a remark to alert the applicant that the starting time of the renewal should dovetail with the expiry time of the authorization to be renewed [paragraph 7.60(e)].

(j) Paragraph 5 of the authorization form 'COP-14: renewal of executive authorization for Type 2 surveillance' attached to the Code issued in August 2006 applicable to the case was misleading, if not totally wrong. The form should be amended to comply with the requirement of section 19(a) of the Ordinance that a renewal of an executive authorization takes effect at the time when the executive authorization would have ceased to have effect but for the renewal [paragraph 7.60(f)].

(k) Consideration should be given to providing an alert function in the computer system for processing renewal applications in a manner that any invalid data entered would prompt the applicant to check the correctness of the data [paragraph 7.60(g)].

(l) The starting date and time of the original authorization was not stated in the authorization (COP-10) itself and that the authorization only contained the date, but not the time, of issue. The COP-10 form should be improved to require authorizing officers to state the effective date and time of the authorization and to time the issue of the authorization in addition to dating it [paragraph 7.61(a)].

(m) The procedure for return of surveillance devices should be tightened [paragraph 7.61(b)].

Case 5: ***Wrong interception of a facility***

(n) The checking and verification process should be enhanced, in addition to those preventive measures already implemented by LEAs to avoid wrong interception [paragraph 7.81]. The Security Bureau and the LEAs are considering my suggestion. The case has not been finalized.

Cases 6 to 9: ***Interception conducted after the revocation of prescribed authorization under section 58***

(o) One way that I suggested for addressing the problem of unauthorized interception during the time gap between the revocation of a telecommunications interception authorization by a panel judge pursuant to section 58(2) of the Ordinance following a report of arrest made under section 58(1) and the actual disconnection of the facilities intercepted is to discontinue the interception temporarily at the time of submitting the arrest report to the relevant authority and re-start the activity if the relevant authority

decides not to revoke the prescribed authorization. But the LEA concerned opined that this has the undesirable effect of missing the intelligence in between and is not conducive to the prevention or detection of crime or the protection of public security in the event that the relevant authority agrees not to revoke the prescribed authorization after considering the report of arrest [paragraph 7.85]. This matter has not yet been resolved.

Case 10: ***One- or two-minute time gap between the expiry of the original executive authorizations and the renewed executive authorizations for Type 2 surveillance***

(p) The LEA should clearly explain to all applicants and authorizing officers for prescribed authorizations the correct meaning of expressions of time such as '2359 hours' or '0001 hour' and draw their attention to the statutory requirement of section 19(a) of the Ordinance that there should not be any break between the expiry of the original authorization and the commencement of the renewed authorization. Consideration should also be made to incorporate this into the department's operational guidelines [paragraph 7.93].

CHAPTER 10

OTHER RECOMMENDATIONS

Introduction

10.1 In my 2006 Annual Report, I set out certain provisions of the ICSO which are subject to different interpretations by the Security Bureau, the LEAs, the panel judges and me. In the course of performing my functions as the Commissioner in 2007, I have discovered more provisions of the ICSO that are subject to different interpretations or difficult to comply with fully. There are also matters that are not expressly covered by the provisions of the Ordinance, which have given rise to different ways of understanding of what is to be done.

The issues

10.2 The issues concerned are:

(a) whether the interception or surveillance conducted after the revocation of a prescribed authorization by a panel judge under section 58 constitutes an unauthorized activity;

(b) whether a panel judge has the power to revoke a prescribed authorization upon receipt of an REP-11 report on material change of circumstances or initial material inaccuracies;

(c) the proper construction of the terms 'duration' and 'relevant person' under section 48(1) and (7);

(d) the practical difficulties in complying fully with the provisions and spirit of section 48(1)(a) and (4) regarding the identification of the 'relevant person', the giving of notice to him and the reporting of the incident in my Annual Report;

(e) the different interpretations of the 'if known' requirement in paragraph (b)(xi) of Part 1, paragraph (b)(xii) of Part 2 and paragraph (b)(xii) of Part 3 in Schedule 3 to the ICSO and the difficulty in complying fully with those provisions in some situations;

(f) the various issues relating to the obtaining of LPP information or where LPP information is likely to be obtained; and

(g) receipt of discontinuance report under section 57 after the natural expiry of a prescribed authorization.

10.3 A summary of all these issues is given in the ensuing paragraphs so that they could be further considered and taken into account when the ICSO is next reviewed. Save for (g) above, the other issues have also been separately covered in individual chapters of this report. This chapter makes further elaboration where appropriate.

(a) <u>Interception or covert surveillance conducted after the revocation of prescribed authorization under section 58</u> [paragraphs 7.82 to 7.90 of Chapter 7]

10.4 As stated in my 2006 Annual Report and paragraph 7.85 of Chapter 7, my view is that the interception or surveillance carried out during the interim between the revocation of a prescribed authorization under section 58 and the actual discontinuance of the operation is unauthorized as it is carried out without the authority of a prescribed authorization.

10.5 The Security Bureau, however, considers that the provision of the law could not have been intended to lead to an unworkable situation whereby the panel judges might have to revoke an authorization making the LEAs liable to breaching the law. It contends that insofar as prompt action is taken to discontinue the operation as soon as reasonably practicable and as long as the information obtained by the operation in the interim (except in critical cases) is not listened to, observed or used, together with arrangements being made to ensure that the product gathered during that period is destroyed, the on-going operation in the interim is not unauthorized and there is no irregularity in these circumstances.

10.6 I am not convinced by this argument. Using telecommunications interception as an example, although the intercept product is not listened to, the fact remains that the facility is still connected for interception and data are recorded during a period when the

authorization no longer exists. On what basis can one say that the interception that continues in the interim is authorized with the authority of a prescribed authorization? The argument would be further weakened in situations where listening continues in the interim (eg critical cases). The Security Bureau seems to consider that with immediate action taken by the LEA to disconnect the facility after being informed of the revocation, the time gap between revocation of authorization and cessation of interception would be short. Be that as it may, the short duration would not render the activity an authorized one. Moreover, if the interception in the interim is not regarded as unauthorized notwithstanding the revocation of the authorization, would this not be open to abuse by not ceasing the interception promptly?

10.7 In my view, no matter how short the duration, the continued interception or surveillance after the revocation of a prescribed authorization remains an activity which is in actual fact without the authority of a prescribed authorization and it therefore amounts to an unauthorized activity. The enhanced arrangements worked out by the Security Bureau could only reduce the impact of this unauthorized activity on the intrusion into the privacy of the persons concerned. The arrangements could not transform the nature of this activity into an authorized one. I consider that the solution lies in amending the provisions of section 58 to allow the relevant authority flexibility to defer the time of revocation of prescribed authorizations as he considers appropriate.

(b) ***<u>Revocation of a prescribed authorization upon receipt of an REP-11 report</u>*** [paragraphs 5.15 to 5.19 of Chapter 5]

10.8 On the basis of legal advice from DoJ, the Security Bureau is of the view that a panel judge does not have the power to revoke a prescribed authorization upon receipt of an REP-11 report on material change of circumstances or initial material inaccuracies because a prescribed authorization can only be revoked in circumstances specified in sections 24, 26, 27, 57 and 58 of the ICSO. It considered that the panel judge had acted ultra vires in revoking the authorization in LPP Case 1 upon receipt of the REP-11 report. Accordingly, ICAC refused to submit a report of irregularity on this case to me as it considered that the interception carried out after the 'revocation' was not an irregularity because the authorization should not have been revoked in the first instance. It was not until I invoked my power under section 53 of the Ordinance that ICAC submitted an incident report to me.

10.9 The panel judges do not consider the view of the Security Bureau as legally correct. They take the view that the revocation should be regarded as made under an implied/inherent power pursuant to the standard condition in the authorization, and is not made under section 57 or 58.

10.10 I also find it difficult to concur with the view of the Security Bureau. By way of illustration, it would be absurd if upon receipt of an REP-11 report on initial material inaccuracies that the name of the subject

against whom a prescribed authorization for interception has been issued by a panel judge is wrong or has been wrongly typed but the panel judge is not entitled to revoke the authorization solely because the report is not made under section 57 (because the LEA is not prepared to discontinue the operation). If this view is correct, the control would be in the hands of the LEA and not the panel judge, as the former could decide whether and at what time it wants to cease the statutory activity by submitting or not submitting a report under section 57. As long as the LEA does not submit a report under section 57 to the panel judge, the authorization will continue until it expires naturally even if the panel judge considers that the conditions in section 3 of the Ordinance are no longer met. This is dangerous. Although the Security Bureau has stated that the LEA should take the Panel Judge's View as a ground for discontinuance and submit a discontinuance report under section 57 as soon as reasonably practicable, it would still be the LEA which has the say on what 'as soon as reasonably practicable' is, instead of the panel judge who would revoke the authorization upon discovery of the mistake.

10.11 In paragraph 7.95 of Chapter 7, I have described an incident where the panel judge revoked an authorization after receiving an REP-11 report that the telephone number authorized for interception was wrong. In that case, the LEA concerned did not state that the panel judge had acted ultra vires in revoking the authorization and it never submitted a report of discontinuance under section 57, be it before or after the panel judge's revocation. Instead, the LEA submitted a fresh application to the panel

judge for authorization to intercept the correct telephone number. This case serves as an obvious example that the soundness of the Security Bureau's view that the panel judge has no power to revoke an authorization upon receipt of a report on material change of circumstances or initial material inaccuracies is dubious.

(c) The proper construction of the terms 'relevant person' and 'duration' under section 48(7) and (1) [paragraphs 6.6 to 6.9 of Chapter 6 and paragraph 7.71 of Chapter 7]

10.12 'Relevant person' is defined by section 48(7) as meaning 'any person who is the subject of the interception or covert surveillance concerned'. The word 'subject' is far from pellucid in situations, for example, where a telephone line has been intercepted by mistake. In paragraph 6.9 of Chapter 6, I have explained how I interpreted the term 'relevant person' in such a situation to mean 'the user' of a wrongly intercepted telephone number as the subject, but not the caller or the respondent. Neither is the subscriber of the telephone line the subject unless the subscriber is also the user at the material time.

10.13 There is no definition of the term 'duration' in section 48(1)(a) of the Ordinance. It is not clear whether it is date and time specific or period specific. As indicated in paragraph 7.71 of Chapter 7, the legal advice is that it has the meaning of a length of time without any identifying particulars.

(d) Practical difficulty in complying fully with section 48(1)(a) and (4)

[paragraphs 7.63 to 7.80 of Chapter 7]

10.14 As pointed out in paragraphs 7.67 to 7.80 of Chapter 7, section 48 of the Ordinance imposes on me various constraints and restrictions in giving notice to the relevant person. If the interpretation of the terms 'relevant person' and 'duration' mentioned in the preceding paragraphs is correct and if I were to comply fully with the words and spirit of section 48(1)(a) and (4), I may not be able to find out who the relevant person is. Nor may the relevant person be able to make meaningful written submissions to me for the purpose of seeking an order for the payment of compensation. I may not be able to disclose in my Annual Report more than I can disclose in a notice to the relevant person, or else the relevant person may still get the information by reading the relevant part of my Annual Report. The problem in executing section 48 should be looked into when the Ordinance is next revised.

(e) Different interpretation of the 'if known' requirement in Part 1 (b)(xi), Part 2 (b)(xii) and Part 3 (b)(xii) in Schedule 3 to the ICSO

[paragraphs 9.4 to 9.7 of Chapter 9]

10.15 As advised by an LEA, it had all along been their interpretation that the information required to be included in the application for prescribed authorization under the Ordinance set out in Schedule 3: paragraph (b)(xi) of Part 1 (for interception), paragraph (b)(xii) of Part 2 (for Type 1 surveillance) and paragraph (b)(xii) of Part 3 (for Type 2

surveillance) ('the Information') should be the personal knowledge of the applicant who made the affidavit/statement, instead of the knowledge of the entire department. The LEA concerned was worried that any deviation from the principle of compartmentalization would seriously undermine their operations.

10.16 This is an interesting and yet vexing problem. In addition to what have been stated in paragraphs 9.4 to 9.7 of Chapter 9, I would like to elaborate further on this issue. The paragraphs concerned in Parts 1 to 3 of Schedule 3 are similar in wording, and paragraph (b)(xii) of Part 2 is cited below for ease of reference:

> '**if known**, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in which any person set out in the affidavit under subparagraph (ii) [ie, the subject] has also been identified as the subject of the interception or covert surveillance concerned, and if so, particulars of such application; …' (Emphasis added).

While there is no dispute that the Information required to be included in the application documentation must be relevant for the consideration of the relevant authority, its extent may well be directly proportional to the number of persons covered by the term 'if known'. The applicant officer's own knowledge will be less than that of the entire department to which he belongs, which includes his knowledge and that of all of his

colleagues. Thus, the extent of the knowledge referred to by the term can differ tremendously, from the centre of the spectrum referring to the knowledge of the applicant officer himself to the entirety of the spectrum referring to the knowledge of the department or LEA to which the applicant officer belongs; and the extent of the Information disclosed may accordingly differ. However, the term 'if known' is not defined and its precise interpretation and ambit cannot be ascertained with the aid of the text of the relevant Parts of the Schedule or the other provisions of the Ordinance.

10.17 Viewing from the position of the relevant authority, which includes the three panel judges for interception and Type 1 surveillance, authorizing officers for Type 2 surveillance, and the department head for emergency authorizations, the three individual judges to whom an application may be made are strangers not within the department and cannot be said to be aware of the information available within the department itself.

10.18 The panel judges, as such strangers, should be apprised of the information available to the department as a whole. Even if they had previously dealt with the relevant applications before the current application is made, they should be appropriately reminded of those former applications, so that the applicant who is required to provide the Information cannot be blamed for not having complied with the requirement of the Ordinance or for material non-disclosure. Moreover, if

the term 'if known' is restricted to the knowledge of the applicant himself, it can be argued that if he happens to be the most ignorant person in the department, by chance or by deliberate design, his application documentation will certainly include none of the Information and the panel judge who deals with the application could never justifiably complain if it transpires that there has been such former applications: the failure to disclose the Information arose from ignorance of the applicant rather than his wilful non-disclosure.

10.19 On the other hand, each of the LEAs always wishes to ensure that all applicants within its own department will only be apprised of matters on a 'need-to-know' basis. If the applicant is required to disclose in his application documentation the Information, meaning all former ICSO applications with particulars, the department may often need to make available to him information which he would otherwise not know, increasing the risk of leakage of such information which will doubtless prejudice the prevention or detection of serious crimes or the protection of public security, against which prejudice the Ordinance makes express provision.

10.20 Regarding the increased security risk described above, it can be argued that the authorizing officer and the department head can be taken as already possessing the Information, and insofar as an application is made to these senior officers, as opposed to the panel judges, in circumstances that apply, the prejudice to a proper consideration of the application by

these officers that may result from the applicant not telling them the Information is significantly reduced.

10.21 I have not yet made any decision to deal with the conundrum that has been identified as having spawned from the term, and a final and determinative resolution should eventually rest with the Legislature.

(f) ***Issues relating to the obtaining of LPP information or where LPP information is likely to be obtained*** [paragraphs 5.82 to 5.100 of Chapter 5]

10.22 *Extent of listening and supervision of listening.* The extent of listening in the face of obtaining or likely obtaining of LPP information is not defined in the Ordinance. It is also not clear from the Ordinance whether supervising officers or more senior officers should be allowed to listen to the recorded product so as to confirm or rebut the belief or understanding of the listener that LPP information has been or is likely to be involved. These should be clearly defined in the Ordinance to avoid ambiguity.

10.23 *Listening by the panel judges and the Commissioner.* One of the conditions that may be imposed by the panel judge in a case where LPP information may be involved for the LEA to continue with an operation under a prescribed authorization is to report any possible LPP information to him, so that the situation will be subject to further review by him. According to the legal advice I obtained from DoJ, a panel judge is not

entitled to listen to the protected product. If the panel judge does not listen, it is incumbent upon me, as the oversight authority, to ascertain that the information reported by the LEA to the panel judge represents the whole truth and that the panel judge has not been misled into allowing the authorization to continue. However, if I listen to the conversation, whether that conversation contains LPP information or otherwise, that would further add to the intrusion into the privacy right of the subject concerned. To strike a balance between the two conflicting needs, I propose to adopt a practice of only checking the intercept product when an authorization was allowed by a panel judge to continue despite the obtaining or likely obtaining of LPP information; and when it is necessary for me to do so in the hope of resolving doubts.

10.24 *Record keeping.* For how long the intercept product that contains LPP information or any record of it should be kept? Section 59(1)(c) of the Ordinance, read in conjunction with section 59(2)(b), requires the head of department to make arrangements to ensure that the protected product containing LPP information obtained through telecommunications interception be destroyed as soon as reasonably practicable. The said advice from DoJ is that the idea that the Commissioner could require the LEA to preserve the product of interception or the product of interception containing LPP information is ill conceived. But if such protected product is destroyed as soon as reasonably practicable prior to my commencement of the review or prior to my completion of the review, how could I carry out my oversight and

review functions on LPP cases envisaged by the Ordinance and the Code? If section 59 is in conflict with the retention period specified in section 60 of the Ordinance and if section 59 prevails (as it apparently does), I recommend that the relevant provisions of the Ordinance be amended, or otherwise my oversight and review functions on LPP cases would be severely hampered.

10.25 *Use of information subject to LPP.* LPP information obtained pursuant to a prescribed authorization is to remain privileged. However, some conversations containing LPP information or possible LPP information might touch on matters not directly related to legal advice but useful for crime prevention or detection purposes. It is not clear if information obtained in this manner can be used for crime prevention or detection purposes.

(g) Report of discontinuance under section 57 received after the expiry of a prescribed authorization

10.26 Section 57(4) provides that where the relevant authority receives a report of discontinuance of operation under section 57(3), he **shall**, as soon as reasonably practicable after receiving the report, **revoke** the prescribed authorization concerned. In the course of my review, I found that there were a number of cases where the report of discontinuance pursuant to section 57 reached the relevant authority at a time when the authorization had already expired, for example, when the operation was discontinued one or two days before the natural expiry of the authorization

and there were public holidays in between the discontinuance and the receipt of the report by the relevant authority. As the authorization had already expired, there was nothing for the relevant authority to revoke. I observed that in some of the cases (mostly executive authorizations), the relevant authority still revoked the prescribed authorization as if it had not yet expired. It was considered that the relevant authority was bound by the words 'shall revoke' in section 57(4) which do not give him any flexibility or discretion not to revoke. In some other cases (mostly panel judges' authorizations), the panel judge would merely note the discontinuance without 'revoking' the authorization, which he would otherwise have been obliged by section 57(4) to do so. I consider that the latter approach seems more sensible than the approach of revoking an authorization which has already expired. I recommend that section 57(4) be amended to cater for the situation where a discontinuance report is received by the relevant authority after the natural expiration of a prescribed authorization so that the relevant authority would not be obliged by section 57(4) to revoke a prescribed authorization which is no longer afoot.

Different interpretations of provisions

10.27 The earlier chapters of this report show that there were occasional disagreements between the LEAs and me on the proper interpretation of certain provisions of the ICSO or on the proper procedures to be adopted for or applied to certain situations. The following are

notable ones, namely,

(a) whether the panel judge is entitled to revoke a prescribed authorization upon receipt from the LEA concerned of a report (in the form of an REP-11 report) to him on material change of circumstances such as LPP information having been obtained; and

(b) whether I as the Commissioner am entitled to request LEAs to preserve protected product for my examination, which they are obliged to destroy as soon as reasonably practicable under section 59(1)(c) and (2)(b) of the ICSO.

10.28 The argument process may take quite some time, which may cause delay in the submission of reports by LEAs under section 54 to initiate my review functions. The longer the argument lasts, the greater the delay. It may even render my review exercise futile such as where the LEA followed the destruction policy or requirement under section 59(1) and (2) meanwhile, as intimated in my review of the LPP cases in Chapter 5.

10.29 The Security Bureau has been apprised of these various issues and will take them into consideration when conducting a comprehensive review of the ICSO in 2009.

CHAPTER 11

STATUTORY TABLES

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

(a) Table 1(a) – interception – number of authorizations issued / renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];

(b) Table 1(b) – surveillance – number of authorizations issued / renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];

(c) Table 2(a) – interception – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];

(d) Table 2(b) – surveillance – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];

(e) Table 3(a) – interception – number of persons arrested as a result of or further to any operation carried out pursuant to a

prescribed authorization [section 49(2)(b)(ii)];

(f) Table 3(b) – surveillance – number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)];

(g) Table 4 – interception and surveillance – number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) and (ii)];

(h) Table 5 – summary of reviews conducted by the Commissioner under section 41 [section 49(2)(d)(i)];

(i) Table 6 – number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)];

(j) Table 7 – number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)];

(k) Table 8 – respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)];

(l) Table 9 – number of cases in which a notice has been given by the Commissioner under section 48 [section 49(2)(d)(v)];

(m) Table 10 – broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)];

(n) Table 11(a) and (b) – number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]; and

(o) Table 12 – number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such action [section 49(2)(d)(viii)].

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

Table 1(a)

		Judge's Authorization	Emergency Authorization
(i)	Number of authorizations issued	798	0
	Average duration[Note 3]	30 days	-
(ii)	Number of authorizations renewed	727	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	23	Not applicable
(vi)	Number of applications for the issue of authorizations refused	16	0
(vii)	Number of applications for the renewal of authorizations refused	15	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	Not applicable

Note 2 Executive authorization is not applicable to interception.

Note 3 The average duration is arrived at by dividing the sum total of the duration of all cases under a category by the number of cases under the same category. The same formula is also used to work out the 'average duration' in Table 1(b).

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

Table 1(b)

		Judge's Authorization	Executive Authorization	Emergency Authorization
(i)	Number of authorizations issued	123	107	0
	Average duration	3 days	11 days	-
(ii)	Number of authorizations renewed	11	17	Not applicable
	Average duration of renewals	12 days	22 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	1	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

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

Table 2(a)[Note 4]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Managing a triad society	Cap. 151	Section 19(2), Societies Ordinance
Arson	Cap. 200	Section 60, Crimes Ordinance
Criminal damage (being reckless as to whether life will be endangered)	Cap. 200	Section 60(2), Crimes Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Theft	Cap. 210	Section 9, Theft Ordinance
Robbery	Cap. 210	Section 10, Theft Ordinance
Handling stolen property/goods	Cap. 210	Section 24, Theft Ordinance
Conspiracy to inflict grievous bodily harm/shooting with intent/wounding with intent	Cap. 212	Section 17, Offences Against the Person Ordinance
Conspiracy to commit forcible detention with intent to procure a ransom/forcible taking or detention of persons (with intent to sell him)/false imprisonment	Cap. 212	Section 42, Offences Against the Person Ordinance
Possession of arms/firearms/ammunition without a licence	Cap. 238	Section 13, Firearms and Ammunition Ordinance

Note 4 The offences in this Table are arranged in the order of the respective chapter numbers of the Ordinances prohibiting them.

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

Table 2(b)[Note 5]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Attempting to export unmanifested cargo	Cap. 60 & Cap. 200	Section 18(1)(b), Import and Export Ordinance & Section 159G, Crimes Ordinance
Trafficking in dangerous drugs	Cap. 134	Section 4, Dangerous Drugs Ordinance
Manufacture of dangerous drugs	Cap. 134	Section 6, Dangerous Drugs Ordinance
Conspiracy to commit an offence	Cap. 200	Section 159A, Crimes Ordinance
Attempting to commit an offence	Cap. 200	Section 159G, Crimes Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Obtaining property by deception	Cap. 210	Section 17, Theft Ordinance
Blackmail	Cap. 210	Section 23, Theft Ordinance
Perverting the course of public justice	--	Common Law

Note 5 The offences in this Table are arranged in the order of the respective chapter numbers of the Ordinances prohibiting them.

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

Table 3(a)

	Number of persons arrested[Note 6]		
	Subject	**Non-subject**	**Total**
Interception	121	396	517

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

Table 3(b)

	Number of persons arrested[Note 7]		
	Subject	**Non-subject**	**Total**
Surveillance	127	110	237

Note 6 Of the 517 persons arrested, 93 were attributable to both interception and surveillance operations that had been carried out.

Note 7 Of the 237 persons arrested, 93 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 661.

Interception and surveillance - Number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) & (ii)]

Table 4

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

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

Table 5

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
Section 41(1) Reviews on compliance by departments and their officers with relevant requirements, as the Commissioner considers necessary			
(a) Regular reviews on weekly reports	208	Interception & Surveillance	LEAs are required to submit weekly reports to the Commissioner providing relevant information on authorizations obtained, applications refused and operations discontinued in the preceding week, for the Commissioner's checking and review purposes. During the report period, a total of 208 weekly reports were submitted by the LEAs.
(b) Periodical inspection visits to LEAs	33	Interception & Surveillance	In addition to the checking of weekly reports, the Commissioner had paid 33 visits to LEAs during the report period. During the visits, the Commissioner conducted detailed checking on the application files of doubtful cases as identified from the weekly reports. Moreover, random inspection of other cases would also be made. Whenever he considered necessary, the Commissioner would seek clarification or explanation from LEAs directly. From the said inspection visits, a total of 618 applications and 197 related documents /

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			matters had been checked. (See paragraphs 2.31, 3.23, 3.33 and 4.20. Also see the two cases in Table 6, item (a).)
(c) Irregularities discovered by the Commissioner	2	Interception	There were four cases (two in 2006 and two in 2007) where there was a time gap between the revocation of the prescribed authorization by the panel judge under section 58(2) of the ICSO and the actual disconnection of the facilities concerned. The time gap ranged between about 1.5 hours and 19 hours. Having examined all these four cases, the Commissioner concluded that the interception conducted during the time gap was without the authority of a prescribed authorization and was unauthorized. But he decided not to give a notice to the relevant persons under section 48(1) as to do so would be prejudicial to the prevention or detection of crime. (See paragraphs 7.82 – 7.90.)
		Surveillance	There were 15 renewed executive authorizations (eight in 2006 and seven in 2007) with a time gap of one or two minutes between the expiry of the original authorization and the start of the renewed authorization. The Commissioner concluded that the one- or two-minute break in these 15 cases

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			amounted to non-compliance with section 19 of the ICSO. But the breach was technical in nature and would not affect the validity of the renewed authorizations by virtue of section 64 of the ICSO. While no similar mistake was made in subsequent renewed executive authorizations after the discovery of this irregularity in August 2007, the LEA concerned was advised to explain clearly the statutory requirement of section 19(a) to their officers and to include such explanation in its operational guidelines. (See paragraphs 7.91 – 7.93.)
(d) Incidents reviewed by the Commissioner	2	Interception	The interception of a facility had been discontinued but subsequently reactivated for seven hours until it was discovered and removed. The Commissioner reviewed the case and was satisfied that the reactivation was caused by technical complications, not due to any human error. (See paragraph 7.94.)
		Interception	The telephone number had been wrongly typed in the affirmation in support of the application and in the prescribed authorization. The mistake was discovered prior to interception being carried out, and interception

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			was withheld. The panel judge revoked the prescribed authorization upon receipt of an REP-11 report from the LEA on this initial material inaccuracy. The Commissioner conducted a review and confirmed that before the revocation of the prescribed authorization, the interception had not commenced. (See paragraph 7.95.)
Section 41(2) 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 to the Commissioner on cases in default of application being made for confirmation of emergency authorization within 48 hours	Nil	Not applicable	For the report period, there was no report submitted under this category.
(b) Report submitted under section 26(3)(b)(ii) by the head of department to the Commissioner on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours	Nil	Not applicable	For the report period, there was no report submitted under this category.
(c) Report submitted under section 54 by the head of department to the Commissioner on any case of failure by the department or any of its officers to comply with any relevant requirement	5	Surveillance	Report 1 An LEA officer failed to report the discontinuance of a Type 2 surveillance operation to the authorizing officer for the revocation of a prescribed authorization following the arrest of the subject. As a

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			result, the authorization was not revoked in accordance with section 57(4) but remained in force until its natural expiry. This irregularity was discovered about two months later by the reviewing officer of the LEA when the officer submitted a review report on the case concerned. Having reviewed this case, the Commissioner accepted that the irregularity was due merely to an oversight of the officer. There was no ulterior motive behind as evidence showed that the Type 2 covert surveillance was ceased after the arrest and there was no further intrusion into the privacy of the subject. (See paragraphs 7.5 – 7.29.)
		Surveillance	<u>Report 2</u> An LEA officer acceded to the complainant's request for making a controlled telephone call to the suspect at her office instead of the place as originally arranged. As a result, a Type 2 surveillance operation was carried out at a place other than that specified in the prescribed authorization. Instead of consulting his supervisor prior to the operation, the officer concerned reported to his supervising officer several

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			minutes after the operation. However, despite his knowledge of the change of location, the supervising officer did not make a prompt report on this non-compliance to the LEA management. He only reported it when he submitted a review report on this operation three weeks after the revocation of the authorization concerned. Having reviewed this case, the Commissioner accepted that the mistake was mainly caused by the oversight of the officers concerned and their insufficient basic knowledge of the statutory requirements of the Ordinance. There was no indication of any ulterior motive in this irregularity. Notwithstanding the unauthorized surveillance as revealed in this incident, the Commissioner decided not to give notice pursuant to section 48(1) of the Ordinance to the relevant person because he considered that to do so would be prejudicial to the prevention or detection of crime according to section 48(3). (See paragraphs 7.30 – 7.41.)

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
		Surveillance	Report 3 The irregularity related to an incorrect statement contained in paragraph 3(i)(b) of COP-9, a statement in writing in support of an application for a Type 2 surveillance authorization which targeted the culprit of a serious offence. After an authorization ('the first authorization') became effective, the victim decided to stay at a location other than that specified in the first authorization. The first authorization was then revoked and another fresh executive authorization was granted ('the second authorization'). When answering the question of whether there had been any application for authorization or renewal in respect of the subject (ie paragraph 3(i)(b) of the statement in writing in support of the application for the second authorization), the applicant indicated 'No' as the answer. Both the applicant and the endorsing officer treated the operation as a continuing one related to the same subject in the same

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			investigation case. Although the authorizing officer was aware of a previous authorization, she interpreted that the question was about whether there was a previous authorization on the same subject and at the same location. Having reviewed the case, the Commissioner accepted that the mistake was caused by misinterpretation of the question concerned by all the three officers and there was no wilful intent whatsoever of any of the officers to hide the previous authorization involving the same subject. The Commissioner, however, had grave concern about the competence and suitability of the authorizing officer in performing the functions of an authorizing officer and recommended that she be discharged from the position of an authorizing officer. (See paragraphs 7.42 – 7.54.)
		Surveillance	<u>Report 4</u> The irregularity related to a break of nine hours between the expiry of an original executive authorization for

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			Type 2 surveillance and the commencement of the renewed executive authorization. Toward the expiry of the original authorization at 2359 hours on a particular day, the applicant sought renewal to start at 0900 hours on the following day. The authorizing officer renewed the authorization, having taken into consideration the time required to reorganize the surveillance operation, to commence at the time sought. This was in breach of section 19(a) of ICSO which provides that a renewed authorization takes effect at the time when the original authorization would have ceased to have effect but for the renewal. After examining this case, the Commissioner accepted that the mistake was not caused by any ulterior motive. The authorizing officer set the time with a view to keeping the duration of the authorization to a minimum. (See paragraphs 7.55 – 7.62.)
		Interception	<u>Report 5</u> An irregularity was caused by

Number of reviews conducted under		Interception / Surveillance	Summary of reviews
			an error by an LEA officer in the execution of interception resulting in an additional facility being intercepted on top of the facility authorized by a prescribed authorization. The wrongly intercepted facility had been intercepted for about five days before disconnection upon detection of the error. The Commissioner gave a notice under section 48(1) to the relevant person. This case has not yet been concluded pending the completion of this report. (See paragraphs 7.63 – 7.81 and Table 9.)

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

Table 6

Number of cases of irregularities or errors identified in the reviews under		Interception / Surveillance	Broad nature of irregularities or errors identified
Section 41(1)			
(a) Reviews during the periodical inspection visits to LEAs	2	Surveillance	Case 1 An executive authorization for Type 2 surveillance was granted with marginally justified grounds. (See paragraph 4.20(e).)
		Surveillance	Case 2 An executive authorization for Type 2 surveillance was granted with an overly long duration. (See paragraph 4.20(f).)
(b) Other reviews	21	Interception	4 cases Interception conducted after the revocation of prescribed authorization under section 58.
		Surveillance	15 cases One- or two-minute time gap between the expiry of the original executive authorizations and the renewed executive authorizations for Type 2 surveillance.
		Interception	1 case Reactivation of a discontinued interception.
		Interception	1 case Initial material inaccuracy in the telephone number authorized for interception. (For details, see Table 5 and Chapter 7.)

Number of cases of irregularities or errors identified in the reviews under		Interception / Surveillance	Broad nature of irregularities or errors identified
Section 41(2)			
(a) Reviews on cases in default of application being made for confirmation of emergency authorization within 48 hours as reported by the head of department under section 23(3)(b)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(b) Reviews on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours as reported by the head of department under section 26(3)(b)(ii)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(c) Reviews on non-compliance cases as reported by the head of department under section 54	5	Surveillance Surveillance Surveillance Surveillance Interception	<u>Case 1</u> Non-compliance with section 57(3) – Failure to cause a report on discontinuance to be provided to the relevant authority. <u>Case 2</u> Non-compliance with section 29(2)(a) – Carrying out of Type 2 surveillance at a place other than that authorized by a prescribed authorization. <u>Case 3</u> Incorrect statement in application for executive authorization. <u>Case 4</u> Non-compliance with section 19(a) – Incorrect commencement time of the renewed executive authorization. <u>Case 5</u> Wrong interception of a facility. (For details, see Table 5 and Chapter 7.)

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

Table 7

Number of applications received	Applications for examination in respect of			
	Interception	Surveillance	Both Interception and Surveillance	Case could not be processed [Note 8]
27	8	5	12	2

Note 8 Of the 27 applications received, two applications could not be further processed. One applicant had not given his formal consent to the Commissioner to use his particulars for processing the examination. The other application fell outside the ambit of the Commissioner.

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

Table 8

Number of notices to applicants given by the Commissioner		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 9]	24	8	5	11

Note 9 As mentioned in Note 8 above, there were two out of the 27 applications for examination that could not be processed. There was also one application still being processed at the time of compiling this table. As a result, the number of cases that the Commissioner had not found in the applicant's favour was 24. The number of notices given by the Commissioner under section 44(5) was therefore 24, 18 of which were given during the report period and six of which thereafter.

In addition, the Commissioner had also issued three notices during the report period under section 44(5) in respect of applications for examination brought forward from 2006 which was reported in the 2006 Annual Report.

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

Table 9

	Number of cases in which a notice has been given in relation to	
	Interception	**Surveillance**
Notice to the relevant person by the Commissioner stating that he considers that there has been a case of interception or surveillance carried out by an officer of a department without the authority of a prescribed authorization and informing the relevant person of his right to apply for an examination [section 48(1)]	1 (See paragraphs 7.63 – 7.81 and Report 5 in Table 5.)	0

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

Table 10

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
Reports to the Chief Executive on any matter relating to the performance of the Commissioner's functions [section 50]	Nil	Not applicable	Not applicable
Recommendations to the Secretary for Security on the Code of Practice [section 51]	8	Interception & Surveillance	(1) COP-9 and similar forms should be amended to require applicants to explain or justify the period of authorization sought. (2) COP-13 and similar forms should be amended to require applicants to explain or justify the period of the renewed authorization sought. (3) COP-14 should be amended to avoid the misunderstanding caused by the wrong wording in the form that the renewed authorization takes effect from the day after the last day of the authorization being renewed. (4) COP-10 and similar forms should be amended to indicate the starting date and time of the authorization and the time of issue of the authorization. (5) The Code should be amended to spell out under what circumstances two separate applications to the head of department and the panel judge

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			should be made for confirmation of an emergency authorization issued as a result of oral application. (6) The Code should be amended to tighten the procedure for return of surveillance devices. (7) COP-13 should be amended by adding a remark that the starting time of the renewal should dovetail with the expiry of the prescribed authorization to be renewed. (8) REV-1 should be amended to correct the wrong wording of its paragraph 3, which caused confusion as to whether the reviewing officer or the officer in charge of an operation would have the power to discontinue an executive authorization. (For details, see Chapter 8.)
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the Code of Practice [section 52]	12	Interception & Surveillance	(1) Interpretation of 'if known' under Part 1(b)(xi), Part 2(b)(xii) and Part 3(b)(xii) of Schedule 3 to the ICSO (see paragraphs 9.4 to 9.8). (2) Regular submission of inventory list of surveillance devices and device registers (see paragraphs 9.9 to 9.12). (3) Duration of executive authorization for Type 2 surveillance (see paragraphs 9.13 to 9.15). (4) Duration of authorization for interception (see paragraphs 9.16 to

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			9.17). (5) Memo on request for surveillance devices (see paragraph 9.18). (6) Early issue of surveillance devices due to operational need (see paragraph 9.19). (7) Report on material change of circumstances ('REP-11') (see paragraphs 9.20 to 9.21). (8) Clearer description of ground for discontinuance of interception (see paragraphs 9.22 to 9.23). (9) Tighter description of ambit for 'premises-based' surveillance (see paragraphs 9.24 to 9.25). (10) Counting of renewals (see paragraphs 9.26 to 9.27). (11) Disconnection of telecommunications facility after the revocation of authorization (see paragraphs 9.28 to 9.29). (12) Recommendations made as a result of reviews of irregularities and incidents relating to – (i) failure to report discontinuance of covert surveillance under section 57; (ii) carrying out of Type 2 surveillance at a place other than that authorized by a

Recommendations made by the Commissioner		Interception / Surveillance	Broad nature of recommendations
			prescribed authorization; (iii) incorrect statement in application for executive authorization; (iv) incorrect commencement time of the renewed executive authorization; (v) wrong interception of a facility; (vi) interception conducted after the revocation of prescribed authorization under section 58; and (vii) one- or two-minute time gap between the expiry of the original executive authorizations and the renewed executive authorizations for Type 2 surveillance. (See paragraph 9.30.)

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

Table 11(a)

	Number of cases[Note 10]
Interception	1

Table 11(b)

	Number of cases
Surveillance	0

Note 10 There is only one sure case amongst the four reported in Chapter 5 that 'information subject to legal professional privilege has been obtained'. Of the three other cases, the nature of the information in one of them is unknown because of the destruction of the relevant records. The other two cases did not show that information subject to LPP had in fact been obtained.

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

Table 12

	Interception / Surveillance	Broad nature of the disciplinary action	Number of cases
Disciplinary action taken as a result of the findings of the Commissioner in a review on compliance by departments under section 41(3) [section 42]	Not applicable	Not applicable	0
Disciplinary action taken to address any issues arising from the determination on an examination made by the Commissioner referred to in section 44(2) [section 47]	Not applicable	Not applicable	0
Disciplinary action taken as a result of recommendations made by the Commissioner for better carrying out the objects of the Ordinance or the provisions of the Code of Practice [section 52]	Not applicable	Not applicable	0
Disciplinary action taken in case of report on non-compliance [section 54]	Surveillance	Case 1 (i) An LEA officer failed to cause an executive authorization to be revoked following the arrest of the subject. A verbal advice was given to the officer advising him to thoroughly	Case 1 Verbal advice was given on 5.3.2007.

	Interception / Surveillance	Broad nature of the disciplinary action	Number of cases
		familiarize himself with the relevant provisions of the ICSO to ensure full compliance with the legislation. (ii) The authorizing officer who granted the relevant executive authorization did not thoroughly consider the necessity and proportionality of the case when determining the duration sought for the executive authorization concerned. Also, he did not seek justification from the applicant as to the duration sought. A verbal advice was given to the authorizing officer advising him to adopt a cautious approach by exercising care and prudence in applying the conditions of necessity and proportionality mandated by the ICSO, and to be mindful of the need to seek justification from the applicant on the duration sought. (See paragraphs 7.5 – 7.29.)	Verbal advice was given on 7.8.2007.
	Surveillance	<u>Case 2</u> (i) An LEA officer failed to observe the prescribed condition as set out in an executive authorization. As a result a Type 2 surveillance operation was carried out at a place other than that authorized by a prescribed authorization. A verbal advice was given to the officer advising him to	<u>Case 2</u> Verbal advice was given on 12.3.2007.

	Interception / Surveillance	Broad nature of the disciplinary action	Number of cases
		thoroughly familiarize himself with the provisions of the ICSO to ensure enforcement action is compliant with the prescribed conditions for the conduct of covert surveillance. (ii) Another LEA officer, who was the case handling officer of the relevant surveillance operation, failed to remind his subordinate (referred to in (i) above) of the prescribed condition as set out in the executive authorization concerned. A verbal advice was given to this superior officer advising him to thoroughly familiarize himself with the provisions of the ICSO to ensure enforcement action is compliant with the prescribed conditions for the conduct of covert surveillance. (See paragraphs 7.30 – 7.41.)	Verbal advice was given on 12.3.2007.
	Interception	<u>Case 3</u> (i) An LEA officer in effecting the renewal of an interception operation, mistakenly caused an additional facility being intercepted on top of the facility authorized by a prescribed authorization, resulting in an unauthorized interception on an innocent party. This officer was verbally warned to exercise due	<u>Case 3</u> Verbal warning was given on 22.6.2007.

	Interception / Surveillance	Broad nature of the disciplinary action	Number of cases
		diligence in ensuring the proper execution of interception. (ii) Another LEA officer, who was the supervisor of the subordinate officer mentioned in (i) above, was given a verbal advice to exercise vigilance when supervising the subordinate. (See paragraphs 7.63 – 7.81.)	Verbal advice was given on 22.6.2007.

11.2 In accordance with section 49(2)(e), I am required to give an assessment on the overall compliance with the relevant requirements during the report period. Such assessment and the reasons in support can be found in Chapter 12.

CHAPTER 12

REVIEW OF LAW ENFORCEMENT AGENCIES' COMPLIANCE

LEAs' compliance

12.1 Almost two years have elapsed since the ICSO had been put into operation, with the LEAs carrying out the statutory activities only with prescribed authorizations granted by the panel judges and other relevant authorities within the departments, and with I as the Commissioner to oversee and review the LEA officers' actions to ensure that they comply with the stringent requirements imposed by the Ordinance. I have designed and made improvements to various schemes and vehemently enforced them for the purposes of performing and facilitating my oversight and review functions and I have exercised great care and vigilance in checking any matter that is discrepant or dubious and any conduct that requires clarification and explanation.

12.2 In my 2006 Annual Report, I expressed the view that the panel judges had been vigilant and applied stringent conditions in their consideration of applications and granting of prescribed authorizations. From all the materials in that regard for the year of 2007 that I have examined, I remain of the same view.

12.3 After thorough examination of the relevant documentation and

having fully considered the explanations and clarifications provided by the LEAs concerned, I formed the view that although there were some instances of non-compliance with the ICSO requirements by some officers of the LEAs, such non-compliance was mainly due to inadvertence or the lack of thorough understanding or familiarity with the related ICSO requirements. There was no or no sufficient evidence of any wilful or deliberate flouting of such requirements. Despite the occasional disagreement between the LEAs and I on the proper interpretation of certain statutory provisions or on the proper procedure to be adopted or applied to certain situations, I am satisfied that the LEAs were as a whole compliant with the ICSO requirements regarding them as Government departments, and that they had been cooperative in assisting me in the performance of my oversight and other functions under the Ordinance. However, I should mention that my work was somewhat delayed as a result of the attitude or conduct of some LEA officers described in some detail below.

Attitude of some LEA officers

12.4 I think that the schemes mentioned above and my vigilance has gradually succeeded in creating an impression amongst the LEAs and their officers that I mean business and everything they do would be under my watchful eye and scrutinised without any effort spared. That apart, however, during the year of 2007, the attitude of some of the LEA officers still gave rise to concern.

12.5 My feelings revealed in the following paragraphs are based on the findings that I have made of the actions of certain ICAC officers and a police officer during the performance of my review functions under the Ordinance.

12.6 Before I elaborate, it is necessary to distinguish between the leadership of the LEAs and their individual officers in this respect. Since the commencement of my tenure as Commissioner, I have found the leadership of the LEAs extremely helpful and constructive. They have incorporated procedures and provided me with assistance whenever necessary to facilitate my investigation into cases which were required to be investigated. They were cooperative in agreeing to and did implement the measures that I had suggested in improving or fine-tuning procedures in applications for prescribed authorization and in reducing ambiguities and irregularities that surfaced from time to time after the commencement of their operations under the Ordinance. There is little doubt that the leadership of the LEAs was as concerned as I have been that their officers would not carry out any of the statutory activities without a prescribed authorization, and such activities were carried out in a manner within the confines of the law. They have also assigned a group of officers to act as the central control point reviewing the statutory activities within their department, which also acted as a bridge between the department and me, serving me and my staff in my reviewing task.

12.7 On the other hand, I have found that individual officers of

certain LEAs were not as frank and forthcoming as I would have liked. For instance, when I investigated an irregularity which I eventually found to be of little consequence regarding the compliance by the ICAC with the requirements of the Ordinance, such as whether a Type 2 surveillance authorization had been granted on sound basis, which eventually I found to pass the threshold, the copy documents provided to me at my request were over-sanitized so as to confront the reader with no material by which to examine the issue. The details of this case can be found in paragraphs 4.20(e), and 4.22 to 4.24 of Chapter 4. There was another occasion where I had requested records of certain matters to be kept for my examination if necessary, but such records were destroyed because of a claimed misunderstanding of my request as only applying to the future and not to the current case. The details can be found in LPP Case 2 and LPP Case 3 described in Chapter 5. While I have not had sufficient evidence to justify a finding of recalcitrance or wilful obstruction on the part of the officers concerned, the effect was that my investigation of the main issue was obstructed or distracted and somewhat hindered and delayed.

12.8 There was also an occasion when I sought statements from some officers of the Police in order to clarify certain issues, one of the officers expressed dissatisfaction in his statement that my request for statements had deprived him of precious time from his work for the protection of the community and that I, as Commissioner, should have trust in him and his colleagues and not have doubted their professionalism and integrity. For details, please see paragraphs 4.20(f), and 4.25 to 4.27 of

Chapter 4.

12.9 I made my observations and had them provided to the respective officers and the LEAs to which they belonged, explaining as to how they should have acted properly and their roles under the Ordinance as complemented by my functions as the Commissioner.

12.10 With regard to the case mentioned in paragraph 12.8 above, the Commissioner of Police, in his letter to me, indicated that the officer's comments were wrong and inappropriate. The officer concerned had been advised by the Police management that his comments, albeit personal, were wrong and inappropriate and were disagreed by the Police management. I was also informed that the officer had been advised of the duties and functions of the Commissioner as required by the law and the LEA's role in facilitating the discharge of my duties and functions as the Commissioner.

12.11 My concern with the officers' attitude is not so much about why they did what they did, because the motive behind should be reasonably obvious, namely, being over zealous in fighting or detecting serious crimes or protecting public security or in seeking advancement of their careers, and such zeal can be reined and controlled by the careful implementation of the statutory scheme. My concern is rather for the fact that they did it. Upon proper analysis, where an LEA officer failed to follow or comply fully with the procedural steps and my requirements in the process of my review exercise, that may be indicative of one or more of three likely reasons: (1) he was ignorant of such procedures that he should

know; (2) he could not care less about following such procedures and requirements; or (3) he was recalcitrant in submitting to my oversight authority.

12.12 Ignorance can be cured by learning. The other two likely reasons relate to attitude which could only be changed by education with the necessary heart to accept. As a starting point, the person concerned must have willingness to learn, or else the task of the educator would be rendered almost impossible. The crucial thing to learn is respect for the law and for the rule of law. The ICSO makes provisions for prescribed authorizations for the statutory activities to be carried out by LEA officers while giving me the discretion to design procedures and make requirements for the exercise of my oversight and review functions. Such procedures and requirements are part and parcel of the due process required to ensure compliance with the statutory provisions. LEA officers should learn to respect and comply with those provisions, procedures and requirements. Once they appreciate the importance of respect for the law and rule of law, I have little doubt that their attitude will change.

CHAPTER 13

ACKNOWLEDGEMENT AND LOOKING FORWARD

Acknowledgement

13.1 For the past two years, the panel judges, the Security Bureau and all the LEAs under the Ordinance have provided me with all the assistance I need. Some may think that they did no more than what they are obliged under the statutory scheme to do. It must, however, be remembered that despite my statutory power to require them to provide me with information and documents in the performance of my functions as the Commissioner, they have no obligation to be cooperative with me, but in fact they were. Similarly, other parties including CSPs from whom I requested information on a frequent or occasional basis have also been most cooperative and helpful. My task as the Commissioner would have been rendered impossible without all such help and cooperation. I take this opportunity to express my gratitude to each and every one of them.

Looking forward

13.2 The irregularities noted in this Report were subject to my careful examination and gave rise to my searching enquiries with the LEAs and critical analysis of the actions of the LEA officers concerned. These spawned the benefit of enriching the experience of all stakeholders under the ICSO scheme leading to improvement of the practical aspects with a

view to achieving full compliance with the ICSO provisions. The only matter that caused frustration to me and the staff at my Secretariat is that referred to in Chapter 12 as the attitude of some LEA officers. The inadequacies of the officers, for instance, those identified in LPP Cases 2 and 3 mentioned in Chapter 5, can be viewed as glitches at the initial stage of the ICSO scheme having been put into effect, and LPP Case 4 (paragraphs 5.72 to 5.81 refer) helps demonstrate how such initial glitches had been purged. I trust that after my explanations to the LEAs and their officers, things will be smoothened and the running of the system will be bettered. Once the attitude problems are resolved, I am confident that the obstacles and difficulties that I encountered in 2007 will not recur.

13.3 No doubt, further or other problems will surface when the operation of the scheme under the Ordinance continues to develop, when further improvements will be made to tackle such problems. Not all problems can be anticipated in human ingenuity. What I can promise is that as the Commissioner, whenever any problem arises it will be taken up as a challenge and an opportunity to make improvements with the aim of better protecting the right of Hong Kong people to privacy.