

Legislative Council Panel on Security

Results of study of matters raised in the Annual Report 2012 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance

Purpose

Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance (the ICSO), the Commissioner on Interception of Communications and Surveillance (the Commissioner) submitted his Annual Report 2012 (the Report) to the Chief Executive in June 2013. This note sets out the Administration's views on the matters raised in the Report.

Background

2. Interception of communications and covert surveillance operations are critical to the capability of our law enforcement agencies (LEAs) in combating serious crimes and protecting public security. The ICSO, enacted in August 2006, provides for a statutory regime for the conduct of interception of communications and covert surveillance by the LEAs. The Commissioner, appointed by the Chief Executive on the recommendation of the Chief Justice pursuant to section 39 of the ICSO, is responsible for overseeing the compliance by the LEAs with the relevant requirements of the ICSO.

3. The Report covers the period from 1 January 2012 to 31 December 2012 (the report period). The Chief Executive has caused a copy of the Report to be laid on the table of the Legislative Council on 27 November 2013.

4. The Security Bureau, in consultation with the LEAs concerned, has studied the matters raised in the Report.

General Observations

5. The ICSO provides for a statutory framework for the conduct of interception of communications and covert surveillance that aims to strike a balance between the need for prevention and detection of serious crimes and the protection of public security on the one hand and the need for safeguarding the privacy and other rights of individuals on the other. It

provides for a stringent regime with checks and balance to ensure that the LEAs' covert operations are carried out in accordance with the requirements of the ICSO.

6. During the report period, interception of communications and covert surveillance operations carried out by the LEAs continued to be subject to the tight regulation of the statutory framework under the ICSO. The LEAs, panel judges, and relevant parties provided the support and cooperation that the Commissioner needed to perform his oversight and review functions under the ICSO. On the whole, the Commissioner was satisfied with the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2012.

7. The Commissioner considered that the LEAs have adopted a cautious approach in applying for prescribed authorisations, their preparation of the applications for interception and covert surveillance operations was of a good standard and they did observe the necessity and proportionality principles as required by the ICSO. The Commissioner also indicated that the LEAs did recognise the importance of protecting information which might be subject to legal professional privilege (LPP) /journalistic material (JM). They continued to adopt a very cautious approach in handling these cases. In the report period, no irregularities were found in any of the LPP and JM cases reported.

8. The Commissioner also observed that the panel judges handled the applications carefully and applied stringent control over the duration of the authorisations. In addition, they continued to be very cautious in dealing with cases that might possibly involve LPP information being obtained by an LEA. When it was assessed that there was such a likelihood and if they granted the authorisation or allowed it to continue, they would impose additional conditions. These additional conditions were stringent and effective in safeguarding the right of individuals to confidential legal advice.

The Commissioner's Findings

9. Under section 54 of the ICSO, where the head of an LEA considers that there may have been any case of failure by the LEA or any of its officers to comply with any relevant requirement of the ICSO, he shall submit to the Commissioner a report with details of the case. The Commissioner stated in Chapter 7 of the Report that he received from LEAs reports of irregularities/incidents relating to 10 cases during the

report period. All were submitted *not* under section 54 of the ICSO i.e. they are not non-compliance cases. The Commissioner also mentioned in the same chapter two outstanding cases brought forward from the Annual Report 2011 as well as the relevant follow up actions.

10. Apart from a case which involved a false report of a storekeeper in respect of the use of certain devices for non-ICSO purpose mentioned in Chapter 4, the Commissioner did not make any finding that any of the other cases of irregularity/incidents was due to deliberate disregard of the statutory provisions, the Code of Practice or the control of surveillance devices. The cases were the consequences of inadvertent or careless mistakes or occasionally unfamiliarity on the part of officers with the rules and procedures of the ICSO scheme. LEAs have taken follow up actions on these cases of irregularity/incidents in accordance with the Commissioner's advice and recommendations. With regard to those incidents which involved technical/system problems of the computerised systems and one case on incorrect use of a prescribed application form mentioned in the Report, the Commissioner was satisfied with the prompt action of the LEAs in the investigation of the cases and the proper follow up action taken.

The Commissioner's Recommendations to the Administration

11. Under section 40(b)(iv) of the ICSO, without limiting the generality of the Commissioner's function of overseeing the compliance by the LEAs and their officers with the relevant requirements of the ICSO, the Commissioner may make recommendations to the Secretary for Security and heads of the LEAs as and when necessary. During the report period, the Commissioner continued to give advice and recommendations on various procedural matters in the course of performing his duties in overseeing the performance of the LEAs over their compliance with the requirements of the ICSO. The Commissioner's recommendations to the heads of the LEAs in respect of device control, training and application procedures are summarised in Chapter 8 of the Report. Having accepted all the recommendations, the LEAs either have implemented them in full or are taking follow up actions to address the Commissioner's concerns. The key recommendations made by the Commissioner in the Report and the response of the Administration are set out at Annex. Furthermore, the Commissioner set out in Chapter 10 of the Report his views on compliance by the LEAs. The Commissioner was encouraged by the

positive response from the LEAs to initiatives he has made to address the problem areas, particularly in the introduction of computer based processes to reduce human error. Nonetheless, the Commissioner believed that the LEAs need to concentrate on developing a more focused and responsible mind set in officers at all levels responsible for the operation of the ICSO scheme.

Conclusion

12. The control regime under the ICSO has continued to operate smoothly during the report period. The Administration will continue to closely monitor the operation of the regime, and fully co-operate with the Commissioner and the panel judges, with a view to better carrying out the objects of the ICSO.

Security Bureau
November 2013

**Response of the Administration
to the key comments and recommendations made in the Annual Report 2012
of the Commissioner on Interception of Communications and Surveillance (the Commissioner)**

	Comments and recommendations made by the Commissioner to the LEAs	The Administration's response
1.	<i>Better control of the issue and return of removable storage media (paragraphs 3.28 and 8.2(a))</i>	
	<p>The Commissioner advised the LEAs that the removable storage media (e.g. memory cards, discs and tapes) for surveillance devices should be handled in a secure and strictly regulated manner akin to the withdrawal and return of surveillance devices so as to avoid any possibility of these storage media being substituted, or in any way tampered with. The Commissioner recommended that a serial number should be assigned to each of the removable storage media and a computerised Device Management System should be used to control the issue and return of storage media.</p>	<ul style="list-style-type: none">● Recommendation accepted. The requirement is being implemented by the LEAs.

	Comments and recommendations made by the Commissioner to the LEAs	The Administration's response
2.	<i>The need to ensure that officers involved in the control mechanism for the movement of surveillance devices were properly trained, dedicated and focused (paragraphs 4.46 and 8.2(b))</i>	
	In an endeavour to address the problems arising from careless mistakes, the Commissioner recommended the LEA to devote more time and effort to instil in officers implementing and supervising the control mechanism for the movement of surveillance devices the need for strict adherence to the ICSO procedures and that those officers who did not adhere to these objectives should not be deployed in this area of work.	<ul style="list-style-type: none">● Recommendation accepted. The LEA concerned has enhanced the training on the control mechanism of surveillance devices and has reminded its officers the need for strict adherence to ICSO procedures. The LEA will deploy suitable officers to perform this area of work.
3.	<i>Inclusion of the subject's relevant criminal records in application (paragraph 8.2(c))</i>	
	In applying for a prescribed authorization, the applicant should include in the application documents information on the subject's criminal records which were relevant to the offences being investigated.	<ul style="list-style-type: none">● Recommendation accepted. The requirement has been adopted by the LEAs.