

Legislative Council Panel on Security

Results of study of matters raised in the Annual Report 2013 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 2013 (the Report) to the Chief Executive in June 2014. 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 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 2013 to 31 December 2013 (the report period). The Chief Executive has caused a copy of the Report to be laid on the table of the Legislative Council on 26 November 2014.

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

General Observations

5. The ICSO provides 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 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 generally satisfied with the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2013.

7. The Commissioner considered that the LEAs did recognise the importance of protecting information which might be subject to legal professional privilege (LPP) /journalistic material (JM), and they continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. The LEAs also continued to adopt a very cautious approach in handling the cases. The Commissioner also observed that the panel judges handled the applications carefully and applied stringent control over the duration of the authorisations. In addition, the panel judges continued to be very cautious in dealing with cases that might possibly involve LPP information being obtained by an LEA. When it was assessed that there was such 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

8. 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 6 of the Report that he received from LEAs reports of non-compliance/irregularities/incidents relating to 10 ICSO cases during the report period. There was one case of inadvertent unauthorized interception resulting from the unavoidable time gap between the revocation of a prescribed authorization and the actual discontinuance of an operation. There were two other cases which involved the omission of required assessment/information in the application for a prescribed authorization, with one involving non-compliance with a requirement of the Ordinance and the other one involving the Code of Practice. The Commissioner reported that there was no finding that any of the other cases of irregularities/incidents was due to deliberate disregard of the statutory provisions, the Code of Practice or the control of surveillance devices. The incidents were mainly consequences of careless mistakes or lack of vigilance on the part of individual officers, as well

as technical problems. LEAs have taken follow-up actions on these cases in accordance with the Commissioner's advice and recommendations.

9. In relation to one of the two cases mentioned in paragraph 8 above, the Commissioner expressed disappointment on the omission of an assessment of the likelihood of obtaining LPP/JM in the interception application. He considered that the LEAs should look critically at their processes to prevent similar recurrence. The LEAs also need to develop a more focused and responsible mindset in officers at all levels responsible for the operation of the ICSO scheme. There is also a continuous need for the LEAs and their officers to exert more efforts in this aspect of their work and training to further improve their performance in carrying out the ICSO-related duties.

The Commissioner's Recommendations to the Administration

10. 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 LEAs' compliance with the requirements of the ICSO. The Commissioner's recommendations are summarised in Chapter 7 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**.

Conclusion

11. 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.

**Response of the Administration
to the key comments and recommendations made in the Annual Report 2013
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 use of removable storage media (RSM) (paragraphs 3.29, 3.30 and 7.2(a))</i>	
	To use tamper-proof labels to seal the removable storage media (RSM) inside the devices at the time of issue and QR Code should be used to facilitate the issue and return of the RSM through Device Management System (DMS)	<ul style="list-style-type: none">● Recommendation accepted. The recommendation is being implemented by the LEAs.
2.	<i>Recording of the reason for making post-entry records in DMS(paragraphs 3.23(b) and 7.2(b))</i>	
	The reason for making post-entry records in DMS should be recorded in the system.	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs.

	Comments and recommendations made by the Commissioner to the LEAs	The Administration's response
3.	<i>Better wording used in Records of Issue and Records of Return for surveillance devices (paragraph 7.2(c))</i>	
	The prescribed wording 'Device Authorized' used in the Records of Issue and Records of Return generated by the DMS should be changed to 'Type of Device Authorized' to make its meaning clearer.	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs.
4.	<i>A new function in the computerised application system to withdraw an application for authorization (paragraph 7.2(d))</i>	
	A function should be added to the computerised application system to allow applicants to withdraw an application and the Endorsing Officer or Approving Officer to note the withdrawal.	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs.

	<p style="text-align: center;">Comments and recommendations made by the Commissioner to the LEAs</p>	<p style="text-align: center;">The Administration's response</p>
<p>5.</p>	<p><i>Sufficient information provided in an application for Type 2 surveillance (paragraphs 3.23(a) & 7.2(e))</i></p>	
	<p>Applicants should provide sufficient information in their written statement in support to justify applications for Type 2 surveillance and the standard of information provided should be the same as Type 1 applications. Authorizing officers should take a critical approach when considering Type 2 applications and when necessary, seek clarification and explanation from the applicant before they come to any determination.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. The recommendation has been adopted by the LEAs.
<p>6.</p>	<p><i>Comprehensive information and full versions of events included in the Review Form for review by the Reviewing Officer of the LEA (paragraphs 3.23 (b) & 7.2(f))</i></p>	
	<p>Any deviation from normal procedures should be mentioned in the Review Form for the attention of the Reviewing Officer so that he could assess whether there were any irregularities or areas for improvement. This also facilitates the Commissioner to exercise his oversight function effectively.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. The recommendation has been adopted by the LEAs.

	<p style="text-align: center;">Comments and recommendations made by the Commissioner to the LEAs</p>	<p style="text-align: center;">The Administration’s response</p>
<p>7.</p>	<p style="text-align: center;"><i>Reporting of the relevant statutory activities in an application for authorization (paragraph 7.2(g))</i></p>	
	<p>In the application documents, the discontinuance of a statutory activity on the accomplice of the subject for the same investigation case should be specifically stated with reasons.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. The recommendation has been adopted by the LEAs.
<p>8.</p>	<p style="text-align: center;"><i>Detailed and accurate description of the reason for discontinuance (paragraph 7.2(h))</i></p>	
	<p>Detailed and accurate description of the reason for discontinuance of a statutory activity should be given in a discontinuance report.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. The recommendation has been adopted by the LEAs.
<p>9.</p>	<p style="text-align: center;"><i>Standardization of shorthand/symbols used in the listener’s notes (paragraph 7.2(i))</i></p>	
	<p>For consistency and easier comprehension, the shorthand/symbols used in the listener’s notes should be standardized.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. The recommendation has been adopted by the LEAs.

	Comments and recommendations made by the Commissioner to the LEAs	The Administration's response
10	<i>Better procedure for checking of previous ICSO applications and the report of the name/alias of the subject (paragraphs 6.21 to 6.26, 7.2(j))</i>	
	The LEA concerned should consider further improving its internal procedures for checking of previous ICSO applications and the report of the name/alias of the subject in the affirmation.	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs.