

**Commissioner on Interception of Communications and Surveillance
Annual Report 2013**

Summary

1. Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance, Cap. 589 ('Ordinance' or 'ICSO'), Mr. D. G. Saw, the Commissioner on Interception of Communications and Surveillance ('Commissioner'), submitted his second annual report, i.e. Annual Report 2013, to the Chief Executive on 30 June 2014. The report covers the period from 1 January 2013 to 31 December 2013. The following is a summary of the report.

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

3. During the report period, a total of 1,412 prescribed authorizations (including fresh and renewed authorizations) were issued.

Among them, 1,365 were judge's authorizations for interception, 34 were judge's authorizations for Type 1 surveillance, and 13 were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs. These authorizations included 41 cases that had been renewed more than five times.

4. During the report period, a total of 11 applications were refused (including seven applications for interception and four applications for Type 1 surveillance). For the reasons for refusal, please see paragraph 2.3 of Chapter 2 and paragraph 3.4 of Chapter 3 of the report.

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

6. A total of 261 persons were arrested in 2013 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. In response to the Commissioner's suggestion in 2012 on the use of the computerised device management system ('DMS') to record the movement of removable storage media ('RSM') for surveillance devices, an LEA has adopted the use of tamper-proof labels to seal the RSM inside the devices at the time of issue; and developed prototypes of RSM which have affixed to them a Quick Response Code so as to facilitate the issue and return of the RSM through the DMS. The new system was eventually

rolled out in 2014. The Commissioner has suggested that other LEAs consider adopting similar systems.

8. The Ordinance makes specific reference to legal professional privilege ('LPP') and journalistic material ('JM') for particular caution when interception or covert surveillance is to be authorized and carried out. Paragraph 121 of the COP also provides that the LEA should notify the Commissioner of cases that are likely to involve LPP information/JM as well as other cases where LPP information/JM has been obtained ('COP 121 report').

9. When making an application for a prescribed authorization, the LEA applicant is obligated to state his assessment of the likelihood of obtaining LPP information. If subsequently there is anything that transpires which may affect the assessment, the officer concerned has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, to notify the authorizing officer by way of an REP-13 report. If the subject of the interception or covert surveillance has been arrested and the officer concerned considers that the operation should continue, the officer should also submit a section 58 report to the relevant authority assessing the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the interception or covert surveillance. The concerned LEA is required to give the Commissioner a similar notification of each of such occurrences. In the report period, COP 121 reports were submitted on 35

LPP cases. Amongst these cases, there were 24 LPP cases with submission of REP-11 reports, REP-13 reports or section 58 reports to the relevant authorities. They included two cases of possible obtaining of LPP information and 22 cases of heightened LPP likelihood. Please refer to Chapter 4 of the report for details of the Commissioner's reviews of the LPP cases. As regards JM cases, in the report period, the Commissioner did not receive any report on obtaining of JM through interception or covert surveillance operations.

10. The Commissioner observed that the panel judges continued to be very cautious in dealing with cases that might possibly involve LPP information. When it was assessed that there was such likelihood and if they granted the authorization or allowed it to continue, they would impose additional conditions. These additional conditions were stringent and effective in safeguarding this important right of individuals to confidential legal advice.

11. During the report period, a total of 19 applications for examination were received, five of which were subsequently not pursued by the applicants. Of the remaining 14 applications, one alleged interception, one alleged covert surveillance and 12 claimed a combination of interception and covert surveillance. After making all necessary enquiries, the Commissioner found all these 14 cases not in the applicants' favour and accordingly notified each of them in writing. Under the Ordinance, the Commissioner is not allowed to provide reasons for his

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

12. Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person when the Commissioner discovers there is a case in which interception or covert surveillance has been carried out by an officer of any of the four LEAs covered by the Ordinance without a prescribed authorization. However, section 48(3) provides that the Commissioner shall only give a notice when he considers that doing so would not be prejudicial to the prevention or detection of crime or the protection of public security. During the report period, no notice pursuant to section 48 was issued.

13. On the applications for examination, section 45(2) sets out the grounds for the Commissioner not to carry out an examination because of any relevant criminal proceedings. The former Commissioner has made a recommendation in his Annual Report 2011 that consideration be given to have subsections (2) and (3) of section 45 repealed because it would be

difficult to gather the evidence for the application if the Commissioner's power of examination is suspended for a considerable time because of the criminal proceedings. In March 2013, the Administration advised the Commissioner that having examined the proposal carefully with the Department of Justice and the LEAs, it inclined to retain the relevant subsections of section 45. The reasoning given is that section 45(2) relates to the *sub judice* rule which essentially governs what public statements can be made about ongoing legal proceedings before the court. Given the further clarification on the definition of criminal proceedings in the relevant provision and its purpose, the Commissioner is content with the Administration's proposal. For details, please see paragraphs 5.15 to 5.18 of Chapter 5.

14. In 2013, the Commissioner received from LEAs reports of non-compliance/irregularities/incidents relating to ten ICSO cases. Except one case which was reported under section 54 of the Ordinance on non-compliance with a relevant requirement (i.e. Report 5 in Chapter 6), the other nine were submitted not under section 54 of the Ordinance. These are set out in Chapter 6 of the report. Another case that related to surveillance devices issued for a non-ICSO operation is covered in paragraphs 3.32 to 3.36 of Chapter 3.

15. During the report period, the LEAs have taken disciplinary actions against four officers in the form of verbal advice or verbal warning for cases mentioned in Chapters 5 and 7 of the Annual Report 2012.

Please see Table 12 in Chapter 8 for details.

16. To better carry out the objects of the Ordinance, the Commissioner made a number of recommendations to the LEAs under section 52 of the Ordinance during the report period. Please see Chapter 7 of the report for details.

17. The Commissioner has set out in Chapter 9 of the report an assessment on the overall compliance by the LEAs with the relevant requirements of the ICSO during the report period. The LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. The Commissioner considers that the LEAs should continue to adopt this cautious approach as it will ensure strict compliance with not only the actual requirements of the legislation but also the spirit of same.

18. In the report period, there was one case of inadvertent unauthorized interception which was revealed and reported by the LEA (i.e. Report 2 in Chapter 6). Apart from this case, there was no other wrong or unauthorized interception revealed by the various forms of checking. In respect of covert surveillance, cases checked during inspection visits were found to be in order while some areas for improvement were identified. There was no sign of abuse of surveillance devices for any unauthorized purposes. In the handling of LPP and JM cases, the LEAs continued to adopt a very cautious approach. Nevertheless, in the report period, there

was one case of an omission of an LPP/JM assessment in an application for interception operation (i.e. Report 5 in Chapter 6). Other than this, no irregularities were found.

19. Ten reports of non-compliance/irregularities/incidents were received from LEAs during the report period. Apart from the two cases mentioned above, there was one case on an omission of a subject's alias in the affirmation in support of an application for a Type 1 surveillance operation. The Commissioner concluded that paragraph 114 of the COP had not been complied with. In the report period, there is no finding that any of the other cases was due to deliberate disregard of the statutory provisions, the COP or the control of surveillance devices.

20. In conclusion, while the overall performance of the LEAs and their officers in their compliance with relevant requirements of the ICSO in 2013 was, in general, satisfactory, the Commissioner was naturally disappointed to learn of the non-compliance case where the applicant failed to make an assessment of the likelihood of LPP/JM in the application leading to refusal of the application by the panel judge. The failure to include such a fundamental statutory requirement in an application is a serious matter given the reasons why such an assessment is required to be made in any application. It was also disconcerting to note that the omission was not detected by the LEA throughout the checking process in the preparation of the application by the chain of officers. The LEAs need to look critically at their processes to prevent similar recurrence. The

Commissioner considers this a clear example of what he has highlighted in his last annual report; the LEAs need to develop a more focused and responsible mind set in officers at all levels responsible for the operation of the ICSO scheme, and there is 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.

21. The Administration has undertaken a comprehensive review of the Ordinance and in 2013, it has reported its findings and recommendations at a meeting of the Panel on Security of the Legislative Council. In brief, the Administration planned to take forward a number of legislative proposals to strengthen the power of the panel judges and the Commissioner as well as to enhance the clarity of a number of provisions. Amongst these recommendations, the Commissioner is pleased to note that the Administration has accepted the recommendation to empower the Commissioner to check the protected products. The Commissioner considers the proposed measure the primary tool which would expose any malpractices of the LEAs and their officers and likewise act as a forceful deterrent against such malpractices or their concealment. It would greatly assist the Commissioner in performing his statutory duties because it is no longer necessary for the Commissioner to rely solely on the voluntary reporting by the LEAs on any cases of non-compliance and irregularities.

22. In this report, the Commissioner expresses his gratitude to the panel judges, the Security Bureau, the LEAs and the communications

services providers for their co-operation and assistance in the performance of his functions as the Commissioner.

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