

Commissioner on Interception of Communications and Surveillance
Annual Report 2014

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 third annual report, i.e. Annual Report 2014, to the Chief Executive on 30 June 2015. The report covers the period from 1 January 2014 to 31 December 2014. 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 1,561 prescribed authorizations (including fresh and renewed authorizations) were issued.

Among them, 1,518 were judge's authorizations for interception, 36 were judge's authorizations for Type 1 surveillance, and seven were executive authorizations for Type 2 surveillance (two of which consequent on oral applications) issued by designated authorizing officers of the LEAs. These authorizations included 47 cases that had been renewed more than five times.

4. During the report period, a total of five applications were refused (including four applications for interception and one application for Type 1 surveillance). Reasons for refusal are stated in 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 222 persons were arrested in 2014 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. As a consequence of the Commissioner's recommendation, the LEAs have adopted or are making arrangements for the use of tamper-proof labels to seal the removable storage media ('RSM') inside the devices at the time of issue and the use of Quick Response Code to facilitate the issue and return of the RSM through the computerised device management system.

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 31 LPP cases. In 24 of these cases, the LEAs submitted REP-11, REP-13 or section 58 reports to the relevant authorities on the subsequent change of

circumstances relating to LPP involvement or likelihood. These 24 cases included two cases of obtaining of LPP information and 22 cases of heightened LPP likelihood. For the remaining seven LPP cases, it was assessed at the time of application that the operations sought to be authorized would likely obtain LPP information and the panel judges had imposed additional conditions in the prescribed authorizations. As regards JM cases, in the report period, two reports on heightened likelihood of obtaining JM were received. Details of the Commissioner's reviews of the LPP and JM cases are given in Chapter 4 of the report.

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 the important right of individuals to confidential legal advice.

11. During the report period, a total of 15 applications for examination were received, three of which were subsequently not pursued by the applicants. Of the remaining 12 applications, one alleged interception, one alleged covert surveillance and 10 claimed a combination of interception and covert surveillance. After making all necessary enquiries, the Commissioner found all these 12 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. Section 48(6) also exempts the Commissioner from his obligation if the relevant person cannot, after the use of reasonable efforts, be identified or traced, or where he considers that the intrusiveness of the interception or covert surveillance of the relevant person is negligible. During the report period, no notice pursuant to section 48 was issued.

13. In 2014, the Commissioner received from LEAs reports of non-compliance/irregularities/incidents relating to 12 ICSO cases. Except one case which was reported under section 54 of the Ordinance on interception of a wrong facility (i.e. Report 1 in Chapter 6), the other 11 were submitted not under section 54 of the Ordinance. These are set out in Chapter 6 of the report. During the year, no report was received from the LEAs on cases relating to surveillance devices for non-ICSO purposes.

14. During the report period, disciplinary actions were taken against seven officers in the form of verbal advice or verbal warning for a case mentioned in Chapter 6 of the Annual Report 2013. Table 12 in Chapter 8 of the report sets out the details.

15. 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. Details of the recommendations are given in Chapter 7 of the report.

16. 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. In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. Apart from the cases referred to in Chapter 6 of the report, there was no other case of wrong or unauthorized interception revealed by the various

forms of checking during the year. In respect of covert surveillance, cases checked during inspection visits were found to be generally in order and 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. A review of the LPP/JM cases revealed that nothing untoward was found except the inadvertent unauthorized interception cases in Report 3 and Report 4 in Chapter 6 and the two cases mentioned in paragraphs 4.15 to 4.19 in Chapter 4 of the report.

17. While the Commissioner is generally satisfied with the performance of the LEAs and their officers in their compliance with the requirements of the ICSO in 2014, he was disappointed by the LEA officers' performance in the non-compliance case as detailed in Report 1 of Chapter 6 of the report. The mistakes committed ranged from ineffectual verification of a facility before making the application for interception to inclusion of misleading information in the affirmation. Relevant information was also missing in the affirmation. These mistakes have resulted in unauthorized interception of an individual's facility for about four days. The Commissioner regards this to be unacceptable. He considers it of utmost importance that all LEAs and their officers who are tasked to carry out duties under the ICSO regime must make every effort to ensure that similar mistakes would not be made again and the privacy of citizens must be better protected. He has specifically asked for a further investigation to ascertain clearly whether the non-compliance was the

consequence of inadvertent/careless mistakes or otherwise. His review of the findings of this further investigation has not been completed at the time of compiling the annual report.

18. 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. Nonetheless, there were occasions when officers were careless for example using an outdated version of document templates in preparing the REP-11 report to the panel judge. This and other careless conduct continue to concern the Commissioner. He considers that there is a need for constant vigilance at all levels in the LEAs in the preparation and processing of ICSO regime materials so as to ensure strict compliance with the requirements of the legislation and that a failure to adhere to these requirements is unacceptable.

19. The Commissioner is delighted to note that the Government has introduced the Interception of Communications and Surveillance (Amendment) Bill 2015 into the Legislative Council. The Bill aims to make legislative amendments to the ICSO so as to strengthen the power of the panel judges and the Commissioner as well as to enhance the clarity of a number of provisions in the ICSO. The Commissioner looks forward to the early implementation of the new proposals so as to enhance the effectiveness of the ICSO regime.

20. In this report, the Commissioner expresses his gratitude to the

panel judges, the Security Bureau, the LEAs and the communications services providers for their assistance in the performance of his functions as the Commissioner.

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