

Legislative Council Panel on Security

Results of study of matters raised in the Annual Report 2016 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 2016 (the Report) to the then Chief Executive in June 2017. This note sets out the Government'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 and amended in June 2016, 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 2016 to 31 December 2016 (the report period). The Chief Executive has caused a copy of the Report to be laid on the table of the Legislative Council on 29 November 2017.

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 balances to ensure that the LEAs' covert operations are carried out in accordance with the requirements of the

ICSO. With the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016 in June 2016, the Commissioner is provided with an express power to require the production of interception products and surveillance products obtained by the LEAs under the ICSO. The cases subject to the Commissioner's inspection include cases concerning non-compliance or irregularity, cases involving information subject to legal professional privilege (LPP) or journalistic material (JM) or a likelihood of obtaining such information, and cases chosen on a random basis. This express power has further facilitated the performance of the Commissioner's function in overseeing the compliance by the LEAs and their officers with the relevant requirements of the ICSO, including those for the protection of LPP information and JM.

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. Overall, the Commissioner was satisfied with the performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2016.

7. The Commissioner observed that the LEAs continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. Besides, the LEAs were observed to have recognised the importance of protecting LPP information or JM, and continued to adopt a very cautious approach in handling these cases, save for a few occasions where more vigilance from the LEA officers was expected. The Commissioner also observed that the panel judges handled LEAs' applications carefully and applied stringent control over the duration of the authorizations. When it was assessed that there was a likelihood of involving LPP information, the panel judges would impose additional conditions if they granted the authorization or allowed it to continue. 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, the head of an LEA is required to submit a report to the Commissioner if he considers that there may have been any case of failure to comply with any relevant requirement of the ICSO, irrespective of whether the failure is due to the fault of the LEA or its officers or not. Besides, the LEAs are required by the Commissioner to report to him cases of irregularity or even simply incidents. Hence, all cases of possible non-compliance can be brought to the attention of the Commissioner for examination and review without any delay. The

Commissioner stated in Chapter 6 of the Report that he received from the LEAs reports of irregularities/incidents relating to 11 ICSO cases in the report period. There was no non-compliance case during the report period.

9. As stated by the Commissioner, there was no finding that any of the cases of irregularities/incidents was due to deliberate disregard of the statutory provisions, the Code of Practice or the control of surveillance devices. There was no sign of abuse of surveillance devices for any unauthorized purposes during the report period. Noting that there were occasions where officers were not careful in dealing with documents relating to ICSO operations nor vigilant enough in discharging ICSO-related duties, the Commissioner stressed that the LEA officers should stay alert and exercise care in different stages of the operations under the ICSO.

The Commissioner's Recommendations to the Government

10. Under sections 51 and 52 of the ICSO, the Commissioner may make recommendations to the Secretary for Security and the 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 overseeing the LEAs' compliance with the requirements of the ICSO. The Commissioner was pleased to see that in the report period, LEAs were positive to his recommendations in regard to review of existing procedures or new arrangements for better operation of the ICSO regime and they were also active in implementing measures to facilitate the Commissioner's oversight work.

11. The Commissioner's recommendations are summarised in Chapter 7 of the Report and are all accepted by the LEAs. The key recommendations made by the Commissioner in the report period and the Government's response are set out at **Annex**.

Conclusion

12. The control regime under the ICSO has continued to operate smoothly during the report period. The Government will continue to closely monitor the operation of the ICSO 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 Government
to the key recommendations made in the Annual Report 2016
of the Commissioner on Interception of Communications and Surveillance (the Commissioner)**

	Recommendations by the Commissioner	The Government's response
1.	<i>Arrangement for better protection of LPP information (paragraphs 4.13 and 7.2(a))</i>	
	Not to state the contents of the LPP information or suspected LPP information in the main body of the REP-11/REP-13 report to the relevant authority, but to detail them in an annex placed in a separate sealed envelope: for better protection of LPP information and ensuring that the number of persons to whom LPP information will be disclosed is limited to the minimum.	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs.
2.	<i>Proper record of monitoring of interception to facilitate the Commissioner's checking (paragraph 7.2(b))</i>	
	To make a proper record of monitoring of interception in the transcripts for interception conducted each and every day even when nothing was intercepted on that day or all the interception products obtained on that day were assessed to have no intelligence value.	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the relevant LEAs.

	Recommendations by the Commissioner	The Government's response
3.	<i>Provision of a summary of suspects in application documents (paragraph 7.2(c))</i>	
	To provide in the application documents a summary of persons involved in the crime under investigation, including information on their role in the crime: for facilitating the relevant authority's understanding of cases involving a large number of suspects.	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs.
4.	<i>Sources of intelligence (paragraphs 3.25 and 7.2(d))</i>	
	To state clearly in the application how intelligence was made known to the applicant where the source of which may be of concern to the relevant authority: for the relevant authority to have knowledge of all relevant circumstances and factors before making a decision on the issue of an authorization.	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs.