

Legislative Council Panel on Security

Results of study of matters raised in the Annual Report 2017 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 2017 (the Report) to the Chief Executive in June 2018. 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 2017 to 31 December 2017 (the report period). The Chief Executive has caused a copy of the Report to be laid on the table of the Legislative Council on 28 November 2018.

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 provision 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 the basis of the information provided by the Panel Judges' Office and the LEAs in the weekly reports or at random. 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 2017.

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 some occasions where more vigilance and care 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 there were 18 cases of non-compliance/irregularity/incident in the report period while none of them involved reports submitted under section 54 of the ICSO. The Commissioner also reported in Chapter 6 the follow-up of the four outstanding cases brought forward from the Annual Report 2016.

9. There was one non-compliance case (Case 6.5) during the report period, in which an LEA did not report an alias of the subject surfaced during interception and hence failed to comply with the Code of Practice. The non-compliance was the result of misjudgement but not foul play. There was no finding that any of the cases of non-compliance/irregularity/incident was due to deliberate disregard of the statutory provisions or the Code of Practice, or any ulterior motive or ill will on the part of the officers involved. 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 vigilant and cautious enough in discharging ICSO duties and a few cases in which the officers were not conversant with the operating procedures of the systems concerned or the requirements on handling of ICSO cases, the Commissioner advised that LEAs should endeavour to provide their officers with sufficient training to facilitate them to better perform the ICSO duties, and their 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 continued to be positive to his recommendations in regard to new arrangements for better operation of the ICSO regime and took initiative to implement system enhancements to prevent recurrence of technical mistakes or to avoid human errors.

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.

Security Bureau
November 2018

**Response of the Government
to the key recommendations made in the Annual Report 2017
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 4.27 and 7.2(a))</i>	
	For record-keeping, to remove and seal in a separate envelope the part of the transcripts, summaries, notes, etc. containing LPP information or possible LPP information and to restrict access to the relevant transcripts, summaries, notes, etc. to avoid any further disclosure of the LPP information or possible LPP information for better protection of LPP information and to ensure 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>Handling of JM (paragraphs 4.6 and 7.2(b))</i>	
	To adopt the same arrangement as obtainment of LPP information, whereby LEAs should screen out JM and withhold the material from investigators in the event that JM has been inadvertently obtained in covert operations.	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs.

	Recommendations by the Commissioner	The Government's response
3.	<i>Stating the time of checking previous applications in application documents (paragraph 7.2(c))</i>	
	<p>The LEA applicant is obligated to make a declaration in the application document to state, if known, whether there has been any previous application in the preceding two years against the subject of the interception or covert surveillance concerned and/or the telecommunications facility concerned and if so, particulars of such application.</p> <p>To make it clear that the declaration is accurate at a particular point in time, the time of checking the previous application should also be provided in the application document.</p>	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the LEAs.
4.	<i>Proper record for interception work in transcripts (paragraph 7.2(d))</i>	
	<p>To facilitate the checking of the transcripts by the Commissioner, a remark should be made in the transcripts to account for the absence of record if no record is made in respect of interception work for a certain day(s).</p>	<ul style="list-style-type: none">● Recommendation accepted. The recommendation has been adopted by the relevant LEAs.

	<p style="text-align: center;">Recommendations by the Commissioner</p>	<p style="text-align: center;">The Government's response</p>
<p>5.</p>	<p style="text-align: center;"><i>Notification of preservation of protected products for cases of non-compliance, irregularity or incident (paragraphs 7.2(e))</i></p>	
	<p>To inform the Commissioner of the preservation of the relevant protected products for cases of non-compliance, irregularity or incident when an initial report of the case is submitted, if the LEAs have preserved the protected products of their own accord for the Commissioner's possible examination.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. The recommendation has been adopted by the LEAs.
<p>6.</p>	<p style="text-align: center;"><i>Detailed description of the reason and relevant circumstances for discontinuance (paragraph 7.2(f))</i></p>	
	<p>To give in the discontinuance report detailed description of the reason and relevant circumstances for discontinuance of a statutory activity.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. The recommendation has been adopted by the LEAs.