

Commissioner on Interception of Communications and Surveillance

Annual Report 2010

Summary

1. The Interception of Communications and Surveillance Ordinance, Cap 589 ('the Ordinance' or 'ICSO') came into force on 9 August 2006. Mr Justice WOO Kwok-hing, Commissioner on Interception of Communications and Surveillance ('the Commissioner'), submitted his fourth full-year annual report, ie Annual Report 2010, to the Chief Executive on 30 June 2011. The report covers the period from 1 January 2010 to 31 December 2010. The following is a summary of the report.

2. The Commissioner's main function is to oversee the compliance by four law enforcement agencies ('LEAs'), as specified in the Ordinance, 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 issued by the Secretary for Security and the conditions prescribed in 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 1,490 prescribed authorizations (including fresh and renewed authorizations) were issued. Among them, 1,375 were judge's authorizations for interception, 75 were judge's authorizations for Type 1 surveillance (including seven cases in which Type 2 surveillance was elevated as Type 1 surveillance), and 40 were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs. These authorizations included 59 that had been renewed more than five times.

4. During the report period, a total of 11 applications were refused (including 10 applications for interception and one application for Type 2 surveillance). For the reasons for refusal, please see paragraph 2.6 of Chapter 2 and paragraph 4.3 of Chapter 4 of the report.

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

6. A total of 365 persons were arrested in 2010 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

7. 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. During the report period, the Commissioner did not receive any report on

obtaining of JM through interception or covert surveillance operations. However, there was a surge of the number of reports of cases that might involve information subject to LPP made to the Commissioner pursuant to paragraph 120 of the Code of Practice ('COP 120 reports'). Regarding each of such LPP cases, the LEA is obligated to state an assessment of LPP likelihood in its application for a prescribed authorization. Whenever there is anything that transpires which may affect such assessment, the LEA has to promptly notify the panel judge of the LPP involvement by way of an REP-11 report. The Commissioner directed the LEAs to give him a similar notification of each of such occurrences as if under paragraph 120 of the Code of Practice, thus resulting in the increase of the number of LPP reports. For the purpose of the report, a subject of an investigation is used as the basis for counting each LPP case. Applying this counting system, there were altogether 63 COP 120 reports that referred to only 27 LPP cases. All were interception cases. Among those 27 LPP cases, there were 21 cases with the submission of REP-11 reports to the panel judges on change of LPP risk, of which only one involved the actual obtaining of LPP information. Please refer to paragraphs 5.22 to 5.84 of Chapter 5 of the report for details of the Commissioner's reviews of these LPP cases.

8. In reviewing the LPP cases, the Commissioner and his staff have desisted from listening to the intercept product, for the reason that they fear that they might be treated as or criticised for operating above the law since there is no express power to do so given to them by the Ordinance. Thus any representation in the REP-11 report regarding the

content of the intercept product is not subject to their review and scrutiny with the assistance of the root material. The Commissioner urges that his recommendation of empowering him and his staff to inspect and listen to intercept products (set out in paragraphs 9.2 to 9.11 of Chapter 9 of the Annual Report 2008) be adopted and put into effect. The same power should similarly be given regarding the products of covert surveillance operations, the necessity of which is well demonstrated by the case cited in paragraphs 7.70 to 7.98 of Chapter 7. Please see paragraphs 5.90 to 5.93 of Chapter 5 of the report for details.

9. The Commissioner observed that the panel judges continued to be very cautious in dealing with cases which might possibly involve LPP information. When it was assessed that there was such likelihood, they would either refuse to grant the authorization sought or revoke the authorization already given, or if they granted the authorization or allowed it to continue, they would impose additional conditions. While the Commissioner will not disclose the details of these additional conditions for fear of prejudicing the prevention or detection of crime or the protection of public security, he can vouch that such additional conditions were stringent and effective in safeguarding this important right of individuals to confidential legal advice.

10. During the report period, a total of 23 applications for examination were received, among which two fell outside the ambit of the Commissioner's functions, two failed to follow proper application

procedures and six were subsequently not pursued by the applicants. Of the remaining 13 applications, four alleged interception, one suspected surveillance and eight claimed a combination of interception and surveillance. After carrying out examination, the Commissioner found all these 13 cases not in the applicants' favour and notified each of them in writing accordingly. Under the Ordinance, the Commissioner was not allowed to provide reasons for his determination. In addition, there were a total of seven applications brought forward from 2008 and in 2009 which were covered by section 45(2). During the report period, there were three cases (out of the related seven applications) in which the relevant criminal proceedings had been finally determined or finally disposed of, whereupon the examination of these three cases was carried out. The examination was duly concluded and a notice was issued to the legal representatives of the applicants concerned. As regards the remaining four applications brought forward from 2009, they were still pending at the time of the writing of the report.

11. During the report period, the Commissioner gave a notice to a relevant person pursuant to section 48(1) of the Ordinance for covert surveillance conducted by an LEA without the authority of a prescribed authorization. The Commissioner informed the relevant person of the right to apply for an examination in respect of the unauthorized covert surveillance. At the time of the writing of the report, the Commissioner has not yet received any response from the relevant person.

12. From the initial applications or letters of complaint made to the Commissioner in the past four and a half years, he found that a large number of applicants and complainants did not quite understand the basis of an application for examination under the Ordinance. Such lack of understanding would inevitably generate delay in the process of the application and suspicion on the part of the applicant that the Commissioner might not be dealing with the application or complaint in good faith. During the report period, the information about the relevant provisions of the Ordinance, application requirement and procedure as well as the consent form on the use of personal data were uploaded onto the website of the Commission to provide ready reference to the applicants or prospective applicants to facilitate their properly lodging an application for examination with the Commissioner under section 43 of the Ordinance.

13. During the report period, the Commissioner and his office received seven reports of non-compliance or irregularities from the LEAs. They related to four interception, two Type 1 surveillance and one Type 2 surveillance cases. While four of these reports were made under section 54 of the Ordinance on non-compliance with the relevant requirements, the remaining three reports were submitted not under section 54 of the Ordinance as the heads of the LEAs concerned did not consider that the irregularities were due to or constituted a non-compliance by the LEAs or any of their officers. Moreover, there were five outstanding cases brought forward from the Annual Report 2009 and the review of these cases has now been completed. In addition to the aforementioned irregularities and

non-compliance, there were four other interception cases (ie LPP Cases 1 to 4 referred to in Chapter 5) where the panel judge revoked the prescribed authorizations after considering REP-11 reports on obtaining or heightened likelihood of obtaining LPP information, resulting in unauthorized interception for a short while. Please see Chapter 7 of the report for details.

14. During the report period, disciplinary actions had been taken against 10 officers in the form of advice, warning, verbal warning, written warning or written warning of dismissal for the cases under Report 1 and Report 4 mentioned in Chapter 7 of the Annual Report 2009 and the cases under Outstanding Case (ii) and Report 3 in Chapter 7 of the report. Please see Table 12 in Chapter 10 of the report for details.

15. To better carry out the objects of the Ordinance, the Commissioner made a number of recommendations to the Secretary for Security and the heads of LEAs under sections 51 and 52 of the Ordinance during the report period. The Commissioner has also set out some other recommendations in Chapter 9 of the report. Please see Chapters 8 and 9 of the report for details of the Commissioner's recommendations.

16. Although there were cases of non-compliance and irregularity as described in Chapter 7, the Commissioner is satisfied with the overall performance of the LEAs and their officers in their compliance with the requirements of the ICSO. He has not made any finding that any of the

cases of non-compliance or irregularity was due to deliberate flouting or disregard of the statutory provisions or the law, nor could he find any of the officers committing the mistakes being actuated by ulterior motive or ill will. Indeed, from the analysis of the cases referred to in Chapter 7, it is obvious that apart from the defects caused by technical problems, the incidents, be they irregularities or more serious non-compliance, were mainly consequences of inadvertent or careless mistakes or unfamiliarity on the part of certain officers with the rules and procedures of the ICSO scheme.

17. The report or revelation of most cases of non-compliance or irregularity was done by the LEAs on a voluntary basis, albeit for complying with the statutory provision or the Code of Practice or the established practice. Without such voluntary assistance from the LEAs, it would be difficult, if not impossible, for the Commissioner and his staff to discover or unearth any contravention by the LEAs. The new initiative that the Commissioner has proposed, as detailed under the second heading in Chapter 9 of the Annual Report 2008, to check the audio intercept products, which is now recommended to extend to examination of surveillance products, may be a step in the right direction in providing the necessary deterrence against any contravention or abuse of the Ordinance or prescribed authorizations or its concealment. Such new initiative, if implemented, together with the idea of the effectiveness of the procedural requirements imposed by the Commissioner and the stringency and seriousness with which they were carried out, would go hand in hand to

pose as a powerful deterrence against possible abuse on the part of the LEAs or against concealment of such abuse.

18. The Commissioner expresses his gratitude to the panel judges, the LEAs, the Security Bureau and other parties like the communications services providers for their unstinting support and cooperation in the performance of his functions as the Commissioner. He also expresses his thanks to members of the public, notably the media and Legislative Council Members, for their views and even criticisms.

19. The Commissioner has two wishes. First and foremost, he wishes that all the LEAs under the Ordinance would carry out their interception and covert surveillance operations in total compliance with the law, and this is done of their own volition. His second wish is that the annual report that he has to submit to the Chief Executive would reduce in size year after year so that eventually what is contained in it will barely satisfy the requirement to provide the statutory tables, ie those set out in Chapter 10 of the report. There would be no need to explain anything done by the LEAs because they had done nothing wrong. The Commissioner is confident that the improvement measures proposed by him to enhance the review procedure will work in elevating compliance and reducing irregularities, stepping closer towards safeguarding the rights to privacy and communication of people in Hong Kong. He is eagerly awaiting the amendments to the Ordinance as he has suggested in these past years to be effected, and he hopes that when these necessary

improvements are implemented his two wishes mentioned above will be accomplished.

20. 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.