

# **Commissioner on Interception of Communications and Surveillance**

## **Annual Report 2023**

### **Executive Summary**

1. The Interception of Communications and Surveillance Ordinance (Cap. 589) ('the Ordinance' or 'ICSO') came into force on 9 August 2006 and was amended in June 2016. Pursuant to section 49 of the Ordinance, Mr Yeung Chun Kuen, GBS, the Commissioner on Interception of Communications and Surveillance ('Commissioner') submitted his third annual report, i.e. Annual Report 2023, to the Chief Executive on 27 June 2024. The report covers the period from 1 January to 31 December 2023. The following is a summary of the report.

2. The Commissioner's main functions are to oversee the compliance by the four law enforcement agencies ('LEAs') and their officers with the statutory requirements in relation to interception of communications and covert surveillance; and to conduct reviews to ensure full compliance by the LEAs with the relevant requirements of the Ordinance, the Code of Practice ('COP') issued by the Secretary for Security under section 63 of the Ordinance and the prescribed authorizations. The four LEAs are the Customs and Excise Department, the Hong Kong Police Force, the Immigration Department and the Independent Commission Against Corruption (Immigration Department

is entitled to conduct covert surveillance but not interception of communications under the Ordinance).

3. During the report period, of a total of 1,157 prescribed authorizations (including fresh and renewed authorizations) issued pursuant to written applications, 1,111 were panel judge's authorizations for interception, 41 were panel judge's authorizations for Type 1 surveillance and five were executive authorizations for Type 2 surveillance issued by designated authorizing officers of the LEAs concerned. These authorizations included eight cases that had been renewed more than five times.

4. During the report period, whilst all applications for interception, Type 1 surveillance and Type 2 surveillance were allowed, there was no application for emergency authorization and no oral application was made by the LEAs.

5. A total of 300 persons were arrested in 2023 as a result of or further to interception or covert surveillance carried out pursuant to prescribed authorizations.

6. 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. The Ordinance stipulates that no

interception of telecommunication service of a lawyer used to provide legal advice to clients and no covert surveillance at the office or residence of a lawyer may be authorized unless the lawyer or the premises concerned is involved in a serious crime or a threat to public security or that the communication concerned is for the furtherance of a criminal purpose. The COP also provides that the LEAs should notify the Commissioner of covert operations that are likely to involve LPP information or JM as well as other cases where LPP information or JM has been obtained.

7. 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 it subsequently transpires that there is anything 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 an LEA becomes aware that the subject of interception or covert surveillance has been arrested and the LEA considers that the operation should continue, the LEA shall submit to the relevant authority a section 58 report assessing the effect of the arrest on the likelihood that any LPP information would 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 order to apprise the Commissioner promptly with updated information on this important

matter.

8. For cases with assessment that there was likelihood of LPP information involvement, the panel judge would normally impose additional conditions if he granted the authorization or allowed it to continue. These additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice.

9. In the Commissioner's review of the cases that were likely to involve information protected by LPP ('LPP cases'), all the relevant documents and records including the prescribed authorizations, the REP-11 reports, section 58 reports, the determinations by the panel judge, the notes, the summaries, the communication data, the audit trail reports, etc. were checked and the protected products were examined.

10. 27 LPP cases reported in 2022 were on-going beyond 2022 and the authorized operations of 26 cases (including one case of obtaining LPP information, two of obtaining information suspected to be subject to LPP and 23 of heightened/assessed LPP likelihood) were discontinued in 2023. The Commissioner had completed the review of these 26 cases in the report period and nothing untoward was revealed. For the two cases of obtaining information suspected to be subject to LPP, the Commissioner confirmed that LPP information was obtained by the LEA inadvertently. Details of the Commissioner's reviews of these

cases are set out in Chapter 4 of the report. As for the remaining one case of heightened LPP likelihood, it is still on-going beyond the report period and it will be dealt with in the next annual report.

11. In the report period, LEAs submitted notifications, in accordance with the COP, on 76 new LPP cases, of which 19 cases were assessed at the time of application that the operations sought to be authorised would likely obtain information subject to LPP and there was no subsequent change of the assessment. For the remaining 57 cases, the LEAs submitted REP-11 or section 58 reports to the panel judge on the subsequent change in circumstances relating to LPP involvement or likelihood. These 57 cases included two cases of obtaining LPP information, one of suspected obtainment of LPP information and 54 of heightened likelihood of obtaining LPP information. For all the LPP cases where the operations were either assessed to have a likelihood of obtaining LPP information at the grant of the prescribed authorizations or allowed to continue after such likelihood was reported heightened, the panel judge had imposed additional conditions in the authorizations concerned.

12. Of the 76 new LPP cases, the authorized operations for 42 cases were discontinued by the end of the report period and the Commissioner had completed their reviews. There was no case on actual obtainment of information subject to LPP. Details of the Commissioner's reviews of these 42 cases are given in Chapters 4

and 6 of the report.

13. As regards JM, one case with heightened likelihood of obtaining JM reported in 2022 was still on-going beyond 2022 and the authorized operation of the case was discontinued in 2023. The Commissioner had completed the review of the case in the report period and did not find any irregularity. In the report period, the Commissioner received notifications on two new cases with heightened likelihood of obtaining JM. The authorized operations for these two cases are still on-going beyond the report period and they will be dealt with in the next annual report.

14. The Commissioner selected from the weekly reports, on the basis of the information provided therein or at random, interception and surveillance products of other cases for examination. During the report period, with the said basis of selection, interception products of 625 selected authorizations and surveillance products of 15 selected authorizations were examined.

15. Various forms of checking, including examination of interception/ surveillance products in respect of the specific cases (such as LPP and JM cases) and selected authorizations and examination of all the relevant documents and records, were conducted in the report period. While no unauthorized interception or surveillance was found, four cases of irregularity/incident concerning interception were revealed as detailed

in Chapter 6 of the report. There was no sign of abuse of surveillance devices for any unauthorized purposes. Regarding surveillance devices for non-ICSO purposes, there was one case of loss of surveillance devices and their associated accessories during the year which is set out in Chapter 3 of the report.

16. For the four cases of irregularity/incident mentioned in Chapter 6 of the report, the Commissioner did not find any deliberate disregard of the statutory provisions or the COP, or any ulterior motive or ill will on the part of the officers involved. Officers of the LEAs were nevertheless reminded that they should always stay alert and exercise care at different stages of the operations conducted under the ICSO. It is obvious that the LEAs have taken great care in the performance of their ICSO-related duties and their enthusiasm and professionalism are highly appreciated. The number of rare and occasional cases of irregularities due to inadvertence, hopefully, will be further reduced in the future.

17. During the report period, no disciplinary action against any LEA officer was taken for cases mentioned in Chapter 6 of the report.

18. The Commissioner has set out in Chapter 8 of the report an assessment of the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2023. In general, the LEAs were observed to have continued to adopt a

cautious approach in preparing their applications for interception and covert surveillance operations. In applying for prescribed authorizations, they provided sound justifications for the proposed duration based on the operational requirement of individual case. The average duration of the prescribed authorizations, though longer than before, was justified and better reflected the operational requirement for the proper investigation of the serious crimes in question.

19. The LEAs were also observed to have recognised the importance of protecting information which might be subject to LPP and they continued to adopt a very cautious approach in handling these cases. They made realistic assessments of the likelihood of obtaining LPP information during covert operations as required by the Ordinance. The Commissioner appreciated the continued and tireless efforts of the LEAs concerned in reminding their officers to be vigilant when they encountered situations indicating heightened LPP likelihood in the course of performing interception monitoring duties, and in tightening up measures to minimise the risk of inadvertently obtaining information subject to LPP.

20. The Commissioner is pleased to see that in the report period, the LEAs took initiative to tighten up procedures and guidelines for better operation of the ICSO regime and implement system enhancements whenever necessary to prevent technical mistakes and to avoid human errors.



21. During the report period, five applications for examination were received. These applications alleged a combination of interception and covert surveillance operations. After making all necessary enquiries, the Commissioner found all the five cases not in the applicants' favour and accordingly notified each of the applicants of his findings in writing. Under the Ordinance, the Commissioner is not allowed to provide reasons for his determination. This 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 the utmost good faith and sincerity.

22. Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person when the Commissioner discovers any interception or covert surveillance 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 on the relevant person is negligible. During the

report period, no notice pursuant to section 48 of the Ordinance was issued.

23. In the report, the Commissioner expressed his sincere thanks to various parties including the panel judge, the Security Bureau, the LEAs and the communications services providers for the continuous support during the report period to enable him to properly discharge his oversight and reviewing functions under the ICSO. The Commissioner looks forward to the continuous support and cooperation of all the parties involved in facilitating his work under the ICSO.

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