

# Annual Report 2017 to the Chief Executive

by

The Commissioner on  
Interception of Communications  
and Surveillance

June 2018

# 截取通訊及監察事務專員辦公室

Office of the Commissioner on Interception of Communications and Surveillance

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The Honourable Carrie Lam, GBM, GBS  
The Chief Executive  
Hong Kong Special Administrative Region  
People's Republic of China  
Tamar  
Hong Kong

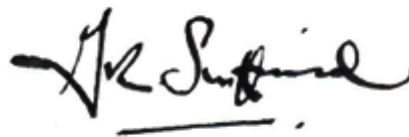
**CONFIDENTIAL**

Dear Madam,

## Annual Report for the Year 2017

I have the pleasure, pursuant to section 49 of the Interception of Communications and Surveillance Ordinance, in submitting to you the annual report for the year 2017, together with its Chinese translation.

Yours sincerely,



(A. R. Suffiad)  
Commissioner on Interception of  
Communications and Surveillance

Encl: Annual Report for 2017

# CONTENTS

<i>Chapter</i>		<b>Page</b>
	<i>Abbreviations</i>	<i>iv – vi</i>
1	Introduction	1 – 3
2	Interception	4 – 15
3	Covert Surveillance	16 – 29
4	Legal Professional Privilege and Journalistic Material	30 – 48
5	Application for Examination and Notification to Relevant Person	49 – 54
6	Non-compliance, Irregularities and Incidents	55 – 77
7	Recommendations to Heads of Law Enforcement Agencies	78 – 80
8	Statutory Tables	81 – 133
9	Review of Compliance by Law Enforcement Agencies	134 – 138
10	Acknowledgement and Way Forward	139 – 140

<b><i>Tables in Chapter 8</i></b>		<b>Page</b>
Table 1(a)	- interception - number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]	84
Table 1(b)	- surveillance - number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]	85
Table 2(a)	- interception - major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)]	86
Table 2(b)	- surveillance - major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)]	87
Table 3(a)	- interception - number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]	88
Table 3(b)	- surveillance - number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]	88
Table 4	- interception and surveillance - number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) and (ii)]	89

<b><i>Tables in Chapter 8</i></b>		<b>Page</b>
Table 5	- summary of reviews conducted by the Commissioner under section 41 [section 49(2)(d)(i)]	90 – 122
Table 6	- number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)]	123 – 127
Table 7	- number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)]	128
Table 8	- respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)]	128
Table 9	- number of cases in which a notice has been given by the Commissioner under section 48 [section 49(2)(d)(v)]	129
Table 10	- broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)]	130
Table 11	- number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]	131
Table 12	- number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such action [section 49(2)(d)(viii)]	132

## ***Abbreviations***

Unless the context otherwise requires:

affidavit/affirmation/ statement	affidavit or affirmation in support of an application to a panel judge for a prescribed authorization/statement in writing in support of an application to an authorizing officer for an executive authorization
ATR	audit trail report
Cap.	chapter in the Laws of Hong Kong
capable device	device capable of being used for covert surveillance
Code of Practice, COP	the Code of Practice issued by the Secretary for Security under section 63 of the Ordinance
Commissioner	Commissioner on Interception of Communications and Surveillance
CSP	communications services provider
discontinuance report	report on discontinuance of interception or covert surveillance submitted pursuant to section 57 of the Ordinance
DMS	device management system
fresh application	application for a prescribed authorization which is not a renewal
ICSO, Ordinance	Interception of Communications and Surveillance Ordinance (Cap. 589)
interception	interception of communications

JM	journalistic material
LEA	a law enforcement agency under the Ordinance, namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department or Independent Commission Against Corruption
LPP	legal professional privilege
LPP information	information protected by legal professional privilege
non-ICSO purpose	purpose which is not related to ICSO
panel judge	the panel judge appointed under section 6 of the Ordinance
PJO	Panel Judges' Office
QR Code	Quick Response Code
renewal application	application for renewal of a prescribed authorization
RSM	removable storage media
REP-1 report	report on arrest of subject of interception or covert surveillance made on form REP-1
REP-11 report/ REP-13 report	report on material change in circumstances or initial material inaccuracies under a prescribed authorization made on form REP-11 or form REP-13

Reported LPP Call	a call with LPP likelihood, heightened LPP likelihood or LPP information and is reported to the panel judge by way of an REP-11 report on such
Secretariat	Secretariat, Commissioner on Interception of Communications and Surveillance
section	section of the Ordinance
statutory activity	interception of communications and/or covert surveillance activity described in the Ordinance
the report period	the period from 1 January to 31 December 2017
the Team	a dedicated team comprising officers from the LEAs that operates independently of their investigative arms
weekly report form	the form designed for the LEAs and the PJO to provide information to the Commissioner once every week



# **CHAPTER 1**

## **INTRODUCTION**

1.1 Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance (Cap. 589) ('Ordinance' or 'ICSO'), the Commissioner on Interception of Communications and Surveillance ('Commissioner') is required to submit to the Chief Executive an annual report ending on 31 December in each year. This report covers the period 1 January to 31 December 2017.

1.2 The ICSO came into operation in August 2006 and was amended with the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016 in June 2016. The ICSO provides a statutory regime to regulate the conduct of interception of communications, through the post or through the use of telecommunications facilities, and covert surveillance by the use of surveillance devices (collectively called 'statutory activities') by public officers of the four law enforcement agencies ('LEAs'), namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption. The regulation is to ensure that these statutory activities cannot be lawfully and properly carried out unless the relevant requirements stipulated in the Ordinance are satisfied.

1.3 The first and foremost of the relevant requirements is that any statutory activity can only be lawfully and properly conducted by an officer of an LEA pursuant to a prescribed authorization granted by a relevant authority. The relevant authority includes a panel judge who is empowered to issue a prescribed authorization for interception or for Type 1 surveillance and an authorizing officer of the LEA concerned who can issue a prescribed authorization for Type 2 surveillance. After

obtaining a prescribed authorization, the LEA and its officers are required to comply with its terms in carrying out the statutory activity so authorized. They are also required to observe the provisions of the Code of Practice ('COP') issued by the Secretary for Security under section 63 of the ICSO and other relevant requirements.

1.4 Whether a prescribed authorization should be granted is expressly based on the necessity and proportionality principles, and the premise that the well-being of Hong Kong can be achieved by striking a fair and proper balance between the need for the prevention and detection of serious crime and the protection of public security on the one hand and safeguarding the privacy and other rights of persons in Hong Kong on the other.

1.5 An important function of the Commissioner is to oversee the compliance by the LEAs and their officers with the relevant requirements of the scheme of the ICSO. When this function is engaged, the objects and spirit of the Ordinance must be at the forefront of the oversight. Another function of the Commissioner is to make recommendations to the Secretary for Security on the COP and to the LEAs on their arrangements to better carry out the objects of the Ordinance and the provisions of the COP.

1.6 Various ways of checking the compliance of the LEAs with the relevant requirements continued to operate smoothly in 2017. In particular, the examination of the protected products <sup>Note 1</sup> was in full swing during the report period. Taking into account the actual experience in the first few months of implementation in 2016, I have fine-tuned the procedures for checking protected products and the LEAs have also made enhancement to the technical logistics concerned. As

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<sup>Note 1</sup> With the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016 in June 2016, the Commissioner and his delegated officers have the express power to examine the protected products obtained by LEAs under the Ordinance. The examination of protected products commenced in October 2016.

the examination of protected products was carried out on a regular basis in addition to the periodical visits to the LEAs on checking of files and documents, I have visited the LEAs for checking purpose more frequently in the report period.

1.7 An on-going commitment since I assumed the office of the Commissioner is to render my views to the Security Bureau on the arrangements for better operation of the ICSO and make recommendations to the LEAs for tackling existing and anticipated problems in relation to the ICSO. This engagement is significant for the benefits of the society in respect of protection of privacy and other rights of individuals.

1.8 In the report period, I also had correspondence and meetings with the panel judges on matters concerning cases involving information subject to legal professional privilege ('LPP') or journalistic material ('JM'), which were related to the conduct of the covert operations and the handling of the protected products. After several deliberations, revised arrangements were introduced to the ends of facilitating my review work and protecting LPP information and JM without undermining the investigations conducted by the LEAs.

1.9 In this annual report, I have continued the practice of providing the utmost transparency of my work as the Commissioner, while taking care not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security. I must point out that it is crucial not to reveal information that might be useful to individuals who may wish to cause harm to Hong Kong. In this regard, I have included as much information as possible insofar as its publication does not amount to contravention of the non-prejudice principle.

## **CHAPTER 2**

### **INTERCEPTION**

#### **Prescribed authorizations for interception**

2.1 Under section 29(1) of the Ordinance, a prescribed authorization for interception may –

- (a) in the case of a postal interception, authorize one or both of the following –
  - (i) the interception of communications made to or from any premises or address specified in the prescribed authorization;
  - (ii) the interception of communications made to or by any person specified in the prescribed authorization (whether by name or by description); or
- (b) in the case of a telecommunications interception, authorize one or both of the following –
  - (i) the interception of communications made to or from any telecommunications service specified in the prescribed authorization;
  - (ii) the interception of communications made to or from any telecommunications service that any person specified in the prescribed authorization (whether by name or by description) is using, or is reasonably expected to use.

## **Written applications**

2.2 Applications for the issue or renewal of a prescribed authorization should normally be made in writing to a panel judge unless it is not reasonably practicable to do so. During the report period, there were a total of 1,304 written applications for interception made by the LEAs, of which 1,303 were granted and one was refused by the panel judges. Among the successful applications, 661 were for authorizations for the first time ('fresh applications') and 642 were for renewals of authorizations that had been granted earlier ('renewal applications').

## **Reasons for refusal**

2.3 The refused application was a fresh application, which was refused because the materials provided to support the allegation put forth were insufficient.

## **Emergency authorizations**

2.4 An officer of an LEA may apply to the head of his department for the issue of an emergency authorization for any interception if he considers that there is immediate need for the interception to be carried out due to an imminent risk of death or serious bodily harm of any person, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances of the case that it is not reasonably practicable to apply to a panel judge for the issue of a judge's authorization. An emergency authorization shall not last for more than 48 hours and may not be renewed. As soon as reasonably practicable and in any event within the period of 48 hours from the issue of the emergency authorization, the head of the department shall cause an officer of the department to apply to a panel judge for confirmation of

the emergency authorization where any interception is carried out pursuant to the emergency authorization.

2.5 During the report period, no application for emergency authorization for interception was made by any of the LEAs.

### **Oral applications**

2.6 An application for the issue or renewal of a prescribed authorization may be made orally if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written application in accordance with the relevant written application provisions under the Ordinance. The relevant authority may orally deliver his determination to issue the prescribed authorization or give the reasons for refusing the application. The COP issued by the Secretary for Security provides that the oral application procedures should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedures cannot be followed. An oral application and the authorization granted as a result of such an application are regarded as having the same effect as a written application and authorization. Similar to emergency authorizations, the head of the department shall cause an officer of the department to apply in writing to the relevant authority for confirmation of the orally granted prescribed authorization as soon as reasonably practicable and in any event within 48 hours from the issue of the authorization, failing which the prescribed authorization is to be regarded as revoked upon the expiration of the 48 hours.

2.7 During the report period, no oral application for interception was made by any of the LEAs.

## **Duration of authorizations**

2.8 For over 78% of the cases (fresh authorizations as well as renewals) granted by the panel judges during the report period, the duration of the prescribed authorizations was for a period of one month or less, short of the maximum of three months allowed by the Ordinance. While the longest approved duration was about 38 days, the shortest one was for several days only. Overall, the average duration of all the authorizations was about 30 days. This indicates that the panel judges handled the applications carefully and applied a stringent control over the duration of the authorizations.

## **Offences**

2.9 Table 2(a) in Chapter 8 gives a list of the major categories of offences for the investigation of which prescribed authorizations for interception had been issued or renewed during the report period.

## **Revocation of authorizations**

2.10 Under section 57(1) of the Ordinance, an officer of an LEA, who conducts any regular review pursuant to the arrangements made under section 56 by his head of department, has a responsibility to discontinue an interception or a part of an interception (and also covert surveillance or a part of covert surveillance) if he is of the opinion that a ground for discontinuance of the prescribed authorization or a part of the prescribed authorization exists. A similar obligation also attaches to the officer who is for the time being in charge of the operation after he becomes aware that such a ground exists. The officer concerned shall then report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned or the relevant part of the prescribed authorization concerned.

2.11 The number of authorizations for interception revoked fully under section 57 during the report period was 590. Another 66 cases involved the cessation of a part, but not all, of the interception approved under a prescribed authorization, so that while the prescribed authorization was partially revoked, the remaining part of the interception approved continued to be in force.

2.12 The grounds for discontinuance were mainly that the interception operation was not or no longer productive, the subject had stopped using the telecommunications facility concerned for his criminal activities, or the subject was arrested.

2.13 Revocation of authorizations is also expressly provided for in section 58 of the Ordinance. Where the relevant authority (a panel judge) receives a report from an LEA that the subject of an interception has been arrested, with an assessment of the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the interception, he shall revoke the prescribed authorization if he considers that the conditions under the Ordinance for the continuance of the prescribed authorization are not met. The arrest of the subject may or may not relate to the offence(s) for which the interception is authorized to investigate, but all the same the officer of the LEA in charge of the interception who has become aware of the arrest is obliged by section 58 to make the report with the assessment to the panel judge. If the conditions for the continuance of the prescribed authorization are still met, the panel judge may decide not to revoke it. During the report period, the LEAs were aware of a total of 98 arrests but only four section 58 reports, which should be made through a prescribed form (i.e. REP-1 report), were made to the panel judge. The panel judge allowed the interception operations related to the four section 58 reports to continue subject to additional conditions to guard against the risk of obtaining LPP information. As regards the other arrest cases, not counting the case referred to in Case 6.7 of Chapter 6 where an REP-1



report should have been used, but instead an REP-11 report was mistakenly used to report the arrest of the subject and request continuance of the prescribed authorization, decisions were made by the LEAs concerned to discontinue the interception operations pursuant to section 57 instead of resorting to the section 58 procedure. This reflects the fact that the LEAs were appreciative of the risk of obtaining LPP information after an arrest.

2.14 Section 58A of the Ordinance provides that, where the relevant authority (a panel judge) receives a report from an LEA on material change in circumstances or material inaccuracies under a prescribed authorization, he shall revoke the prescribed authorization if he considers that the conditions under the Ordinance for the continuance of the prescribed authorization are not met. During the report period, there were two authorizations for interception which were revoked by the panel judge under this section of the Ordinance. In one case, the LEA concerned reported a material change in circumstances and the panel judge considered that the conditions for the continuance of the authorization were not met. For the other case, which was detailed in paragraphs 4.31 to 4.33 and related to Case 4.1 of Chapter 4, further heightened likelihood of obtaining LPP information on the tenth occasion was reported. After revocation of the prescribed authorizations by the panel judge, the LEAs took immediate action to successfully discontinue the interception operations within the benchmark timeframe of 60 minutes stipulated in paragraph 174 of the COP.

### **Authorizations with five or more previous renewals**

2.15 There were 29 authorizations for interception with five or more previous renewals within the report period. As these cases had lasted for quite a long period of time, particular attention was paid to see whether the renewals were granted properly and whether useful information had been obtained through the interception operations. All

the cases with six renewals and some of their further renewals were checked and found in order during periodical visits to the LEAs.

### **Arrests attributable to interception**

2.16 It is and continues to be the common view of the LEAs that interception is a very effective and valuable investigation tool in the prevention and detection of serious crime and the protection of public security. It has to be pointed out that under section 61 of the Ordinance, any telecommunications interception product shall not be admissible in evidence in any proceedings before any court other than to prove that a relevant offence has been committed. Therefore, whatever is obtained by way of interception can only be used by way of intelligence. The intelligence gathered from interception very often leads to a fruitful and successful conclusion of an investigation. During the report period, a total of 85 persons, who were subjects of prescribed authorizations, were arrested as a result of or further to interception operations. In addition, 72 non-subjects were also arrested consequent upon the interception operations.

### **Procedure of oversight for interception**

2.17 The LEAs' compliance with the requirements of the Ordinance in respect of the interception cases reported in 2017 was reviewed by the following ways:

- (a) checking of the weekly reports submitted by the LEAs and the Panel Judges' Office ('PJO');
- (b) examination of the contents of the LEAs' files and documents during periodical visits to the LEAs;

- (c) examination of interception products at the LEAs' offices; and
- (d) counter-checking the facilities intercepted with non-LEA parties such as communications services providers ('CSPs') and through other means.

The following paragraphs further explain how the above reviews were carried out.

### **Checking of weekly reports**

2.18 The LEAs were required to submit weekly reports to the Secretariat on their respective applications, successful or otherwise, and other relevant reports made to the panel judges/departmental authorizing officers by way of completing forms designed for the purpose ('weekly report forms'). Such weekly reports deal with all statutory activities, i.e. interception and covert surveillance. At the same time, the PJO was also requested to submit weekly report forms on the applications they received from all the LEAs, approved or refused, and the revocations of prescribed authorizations. A weekly report covers the statutory activities with related authorizations and refused applications in the entire week before the week of its submission to the Secretariat.

2.19 The weekly report forms only contain general information relating to cases of the related week such as whether the application was successful or rejected, the duration of the authorization, the offences involved, the assessment on the likelihood of obtaining LPP information and JM from the proposed operation, etc. Case background, progress of the investigation, identity and particulars of the subject and others as well as other sensitive information are not required and therefore obliterated or sanitised so that such information will always be kept confidential with minimal risk of leakage.

2.20 Upon receipt of the weekly report forms from the LEAs, the Secretariat would study the details of each weekly report form and, except those relating to Type 2 surveillance, counter-check against the PJO's returns. In case of discrepancies or doubts, clarification and explanation were sought from the LEAs and/or the PJO as and when necessary.

### **Examination of documents and information during periodical visits**

2.21 Should the Commissioner perceive a need, clarification and explanation on the weekly report forms would also be sought in the periodical visits to the offices of the LEAs. In the visits, the Commissioner would also select, on a random basis, some other cases for examination apart from those requiring clarification. Documents to be scrutinised by the Commissioner would include the originals of the applications, reports on discontinuance, reports on material change in circumstances, reports on material inaccuracies, case files and internal review documents, etc. Such visits were carried out so that secret or sensitive information contained in case files and documents that would otherwise be required to be sent to the Secretariat for checking would always remain in the safety of the LEAs' offices to avoid any possible leakage.

2.22 If questions or doubts still could not be resolved after the examination of such documents, the Commissioner would require the LEA to answer the queries or to explain the cases in greater detail.

2.23 In addition to matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 605 applications for interception, including granted authorizations and refused applications, and 344 related documents/matters had been checked during the Commissioner's periodical visits to the LEAs in the report period.

## **Examination of interception products**

2.24 Having the express power to examine the protected products after the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016, the Commissioner and his delegated officers have carried out the relevant examinations since October 2016. Each such examination was conducted at the LEAs' offices and only those parts of the interception products to which LEA officers had accessed previously would be examined by the Commissioner and his delegated officers.

2.25 Apart from some specific cases such as LPP and JM cases reported by the LEAs, the Commissioner would also select from the weekly reports, on the basis of the information provided therein or at random, interception products of other cases for examination with a view to checking if those other interception products may contain any LPP information, JM or any information that indicates heightened LPP/JM likelihood not reported by the LEAs. Such examination would also enable the Commissioner to identify whether there were any irregularities or concealment of unauthorized acts violating the ICSO, such as checking if the person using the telecommunications facilities as authorized by a prescribed authorization was actually the subject of the prescribed authorization and if any discontinuance of interception operation was to avoid exposure or detection of inadvertent mistakes or acts done without authority. If there were questions or doubts arising from the examination of the interception products, the Commissioner would require the LEA concerned to provide clarification or explanation.

2.26 During the report period, with the basis of selection as mentioned in paragraph 2.25 above, the interception products of 316 authorizations had been examined. Of these 316 authorizations, one involved an incident of delay in preservation of protected products and another two authorizations related to irregularities connected with

non-reporting of calls with information indicating heightened LPP likelihood. Reviews of these three cases are stated in Cases 6.3, 6.4 and 6.9 of Chapter 6 respectively. No irregularity was found for the remaining 313 authorizations selected for checking.

### **Counter-checking with non-LEA parties and through other means**

2.27 Apart from checking the weekly returns from the LEAs against those from the PJO, and examining case files, documents and interception products at the LEAs' offices, other measures have also been adopted for further checking the interceptions conducted by the LEAs.

2.28 Wherever necessary, counter-checks were conducted with non-LEA parties such as CSPs who have played a part in the interception process but are independent from the LEAs. The interception of telecommunications facilities by an LEA is made through a dedicated team ('the Team') that, whilst being part of the LEAs, operates independently of their investigative arms. While the CSPs are required to furnish the Commissioner with a four-weekly return to ensure that the facilities intercepted tally with those as reported by the respective LEAs and to notify the Commissioner at once upon discovery of any unauthorized interception, the Team has also archived in a confidential electronic record the status of all interceptions whenever they are effected, cancelled or discontinued. Arrangements have also been made for the archiving of the status of all interceptions being conducted at particular intervals as designated by the Commissioner from time to time. All these records are available to the Secretariat but only the Commissioner and his designated staff can access the confidentially archived information for the purpose of checking the intercepted facilities for their status of interception at various points of time and as at any reference point of time so designated by the Commissioner, ensuring that no unauthorized interception has taken place.

## **Results of various forms of checking**

2.29            During the report period, there was no case of wrong or unauthorized interception revealed by the various forms of checking.

## **CHAPTER 3**

### **COVERT SURVEILLANCE**

#### **Covert surveillance**

3.1 Pursuant to section 2 of the ICSO, covert surveillance means any surveillance carried out with the use of any surveillance device if the surveillance is carried out in circumstances where the subject of the surveillance is entitled to a reasonable expectation of privacy, that it is carried out in a manner calculated to ensure that the subject is unaware that the surveillance is or may be taking place, and that it is likely to result in the obtaining of any private information about the subject. Surveillance device means a data surveillance device, a listening device, an optical surveillance device or a tracking device or a device that is a combination of any two or more of such devices. Any surveillance which does not satisfy the above criteria is not covert surveillance under the Ordinance.

#### **Two types of covert surveillance**

3.2 There are two types of covert surveillance: Type 1 and Type 2. Type 1 surveillance has a higher degree of intrusiveness into the privacy of the subject and requires a panel judge's authorization whereas an authorization for Type 2 surveillance, termed an executive authorization, can be issued by an authorizing officer of the LEA to which the applicant belongs. An authorizing officer is an officer not below the rank equivalent to that of Senior Superintendent of Police designated by the head of department.



### **Written applications**

- 3.3 During the report period, there were a total of:
- (a) eight written applications for Type 1 surveillance including five fresh and three renewal applications; and
  - (b) three written applications for Type 2 surveillance including two fresh applications and one renewal application.
- 3.4 No application for Type 1 or Type 2 surveillance was refused.

### **Emergency authorizations**

3.5 An officer of an LEA may apply in writing to the head of the department for the issue of an emergency authorization for any Type 1 surveillance, if he considers that there is immediate need for the Type 1 surveillance to be carried out due to an imminent risk of death or serious bodily harm of any person, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances of the case that it is not reasonably practicable to apply for the issue of a judge's authorization. An emergency authorization shall not last longer than 48 hours and may not be renewed. Where any Type 1 surveillance is carried out pursuant to an emergency authorization, the head of the department shall cause an officer of the department to apply to a panel judge for confirmation of the emergency authorization as soon as reasonably practicable after, and in any event within the period of 48 hours beginning with, the time when the emergency authorization is issued. During the report period, no application for emergency authorization for Type 1 surveillance was made by the LEAs.

3.6 On the other hand, there is no provision in the Ordinance for application for emergency authorization for Type 2 surveillance.

## **Oral applications**

3.7 Applications for Type 1 and Type 2 surveillance, including those for emergency authorization, should be made in writing. Nonetheless, an application for the issue or renewal of a prescribed authorization may be made orally if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written application. The relevant authority may orally deliver his determination to issue the prescribed authorization or refuse the application.

3.8 The COP stipulates that the oral application procedure should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedure cannot be followed. For a prescribed authorization orally granted for Type 1 surveillance, the head of the department shall cause an officer of the department to apply in writing to the panel judge, and for such an authorization for Type 2 surveillance, the applicant shall apply in writing to the authorizing officer, for confirmation of the orally granted prescribed authorization as soon as reasonably practicable and in any event within 48 hours from the issue of the authorization. Failing to do so will cause that orally granted prescribed authorization to be regarded as revoked upon the expiration of the 48 hours.

3.9 During the report period, no oral application for Type 1 or Type 2 surveillance was made by the LEAs.

## **Duration of authorizations**

3.10 The maximum duration of prescribed authorizations (fresh authorizations as well as renewals) for Type 1 surveillance granted by the panel judges and Type 2 surveillance by the authorizing officers allowed under the Ordinance is three months. The longest approved duration of

Type 1 surveillance granted in the report period was 30 days whereas the shortest one was about nine days. Overall, the average duration for such authorizations was about 23 days. In the report period, the longest approved duration of Type 2 surveillance granted was seven days while the shortest one was less than one day. The overall average duration of Type 2 surveillance executive authorizations was about four days.

## **Offences**

3.11 The major categories of offences for the investigation of which prescribed authorizations were issued or renewed for surveillance (both Type 1 and Type 2) during the report period are set out in Table 2(b) in Chapter 8.

## **Revocation of authorizations**

3.12 During the report period, five Type 1 surveillance operations were discontinued under section 57 of the ICSO before the natural expiration of the prescribed authorizations. The grounds for discontinuance were mainly that the subject was arrested or the surveillance had been carried out. Section 57(3) requires the LEA to report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned upon receipt of the report on discontinuance. Of these reported discontinuance cases, four prescribed authorizations concerned were subsequently revoked fully by the panel judge under section 57. The remaining prescribed authorization had already expired by the time the panel judge received the discontinuance report. Thus, the panel judge could only note the discontinuance reported instead of revoking the prescribed authorization.

3.13 As regards Type 2 surveillance cases, during the report period, two Type 2 surveillance operations were discontinued under section 57 before their natural expiration. The ground for discontinuance of the two operations was that the subject was arrested. Both of the prescribed authorizations concerned were subsequently revoked by the authorizing officer.

3.14 Revocation of authorizations is expressly provided for in section 58 of the ICSO for covert surveillance when the subject(s) of the covert surveillance has been arrested. During the report period, there were two Type 1 surveillance operations involving LEAs being aware of the arrest of subjects. As regards Type 2 surveillance, during the report period, there were also two operations where the LEAs were aware of the arrest of the subjects of covert surveillance. The LEAs concerned were aware that six subjects of the Type 1 surveillance operations and four subjects of the Type 2 surveillance operations had been arrested but no report was made to the relevant authority under section 58 seeking continuation of prescribed authorizations. The covert surveillance operations concerned were discontinued pursuant to section 57.

3.15 The LEAs' voluntary selection of the section 57 procedure to discontinue the covert surveillance operation as soon as reasonably practicable instead of resorting to the section 58 process of reporting an arrest with a wish to continue with the operation, similar to the situation for interception, demonstrates that the LEAs were appreciative of the risk of obtaining LPP information after an arrest.

### **Authorizations with five or more previous renewals**

3.16 During the report period, no authorization for Type 1 or Type 2 surveillance had been renewed for more than five times.

### **Application for device retrieval warrant**

3.17 During the report period, there was no application for any device retrieval warrant for retrieving the devices used for Type 1 or Type 2 surveillance, the reported reason being that the devices were removed at the time of the completion of the surveillance operation, successful or otherwise.

### **Arrests attributable to covert surveillance**

3.18 As a result of or further to surveillance operations, be it Type 1 or Type 2, a total of 11 persons who were subjects of the prescribed authorizations were arrested. In addition, 15 non-subjects were arrested in consequence of such operations.

### **Procedure of oversight for covert surveillance**

3.19 The LEAs' compliance with the requirements of the Ordinance in respect of covert surveillance cases reported in 2017 was reviewed by the following ways:

- (a) checking of the weekly reports submitted by the LEAs and the PJO;
- (b) examination of the contents of the LEAs' files and documents during periodical visits to the LEAs;
- (c) examination of surveillance products at the LEAs' offices; and
- (d) checking of the records kept by the surveillance device recording system of the LEAs.

Details of the above reviews are set out in the ensuing paragraphs.

## **Checking of weekly reports**

3.20 Weekly reports submitted by the LEAs and the PJO cover all statutory activities, including both types of covert surveillance. The way of checking that has been described in Chapter 2 for interception equally applies to covert surveillance.

## **Examination of documents and information during periodical visits**

3.21 The mechanism of checking cases during periodical visits to the LEAs is described in Chapter 2.

3.22 During the year, 14 applications for Type 1 surveillance (including seven applications reported in 2016 and seven in 2017) and 19 related documents/matters had been checked.

3.23 Pursuant to the Ordinance, an application for Type 2 surveillance is submitted to and determined by a designated authorizing officer of the department concerned. Special attention has all along been paid to examine each and every application for Type 2 surveillance to ensure that all such applications correctly fall within the category of Type 2 surveillance and all executive authorizations are granted properly. During the periodical visits to the LEAs in the report period, apart from the clarification of matters relating to minor discrepancies in the weekly reports, a total of three applications for Type 2 surveillance (including one application reported in 2016 and two in 2017) and three related documents/matters had been checked.

3.24 For cases where surveillance devices have been withdrawn under a prescribed authorization but no surveillance operation is carried out, the Commissioner would examine the following matters:

- (a) whether the prescribed authorization should have been sought in the first place;

- (b) the reason for not carrying out any surveillance operation pursuant to the prescribed authorization;
- (c) whether the devices drawn were used during the period concerned for any purposes other than those specified in the prescribed authorization; and
- (d) the way in which the devices drawn were kept by officers before they were returned to the device store/registry.

Such cases are included for examination in the periodical visits, at which the relevant case documents are checked and the LEAs concerned are requested to answer queries where necessary. In the report period, the examination of these cases did not reveal any sign of use of surveillance devices for any unauthorized purposes.

3.25 All the covert surveillance cases checked were found to be in order.

3.26 In the course of checking of covert surveillance cases during the periodical visits, I gave my views to LEAs on improvement measures that could be implemented to facilitate my review of the cases. In particular, in reviewing a Type 1 surveillance operation, I noted that a surveillance device was issued every day during the validity of the authorization except for two days with no reason provided. The LEA concerned explained that whether a surveillance device would be issued for a covert surveillance operation depended on the circumstances of the investigation. I requested the LEA to study if any salient issues concerning a surveillance operation could be recorded in a document that was readily available for my examination. To enable me to check the deployment of surveillance devices in covert surveillance operations more effectively, the LEA concerned had made enhancement to the computerised device management system ('DMS') to facilitate input by the relevant officers the reasons for not conducting covert surveillance

operation or not using a device issued on each particular day in the Review Form for my examination.

### **Examination of surveillance products**

3.27 With the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016, the Commissioner and his delegated officers have the express power to check the protected products obtained by the LEAs through covert surveillance. The examination of surveillance products was conducted at the LEAs' offices.

3.28 Apart from some specific cases such as LPP and JM cases, the Commissioner would also select from the weekly reports, on the basis of the information provided therein or at random, other cases for examination with a view to checking if the surveillance products of these cases may contain any LPP information, JM or any information that indicates heightened LPP/JM likelihood not reported by the LEAs. Such examination would also enable the Commissioner to identify whether there were any irregularities or concealment of unauthorized acts violating the ICSO, such as checking if the person under covert surveillance as authorized by a prescribed authorization was actually the subject of the prescribed authorization, if any information subject to LPP in the surveillance products had been screened out by the dedicated units before the products were passed to the investigators, and if any discontinuance of surveillance operation was to avoid exposure or detection of inadvertent mistakes or acts done without authority. If there were questions or doubts arising from the examination of the surveillance products, the Commissioner would require the LEA concerned to provide clarification or explanation.

3.29 During the report period, the surveillance products of two selected authorizations were examined and nothing untoward was found. Besides, one authorization had been selected for examination of its



protected products but no checking was made as no surveillance operation had been conducted.

### **Checking of surveillance devices**

3.30 Having regard to the fact that covert surveillance, as defined by the Ordinance, is surveillance carried out with the use of one or more surveillance devices, the LEAs had been required to develop a comprehensive recording system of surveillance devices, so as to keep a close watch and control over the devices with a view to restricting their use only for authorized and lawful purposes. Not only is it necessary to keep track of surveillance devices used for ICSO purposes, but it is also necessary to keep track of devices capable of being used for covert surveillance ('capable devices') albeit they may allegedly only be used for non-ICSO purposes. Capable devices should be kept under close scrutiny and control because of the possibility that they might be used without authorization or unlawfully. The LEAs have to maintain a register of devices withdrawn based on loan requests supported by a prescribed authorization and a separate register of devices withdrawn for administrative or other purposes based on loan requests for surveillance devices in respect of which no prescribed authorization is required. Both types of register will also record the return of the devices so withdrawn. An inventory list of surveillance devices for each device registry is also maintained with a unique serial number assigned to each single surveillance device item for identification as well as for checking purposes.

3.31 The LEAs have established a control mechanism for issuing and collecting surveillance devices. All records of issue and return of surveillance devices should be properly documented in the device register. Copies of both the updated inventory lists and device registers are submitted to the Commissioner regularly. Where necessary, the LEAs are also required to provide copies of the device request forms for

examination. In case of discrepancies or doubts identified as a result of checking the contents of these copies and comparing with the information provided in the weekly report forms and other relevant documents, the LEA concerned will be asked to provide clarification and explanation.

### **Visits to device stores**

3.32 Apart from the checking of inventory lists and device registers of surveillance devices managed by the LEAs, the Commissioner would also make visits to the device stores of the LEAs for the following purposes:

- (a) to check the entries in the original registers against the entries in the copy of registers submitted to the Commissioner, with the aim to ensure that their contents are identical;
- (b) to check the procedures for the issue and return of surveillance devices for purposes under the Ordinance and for non-ICSO related usage;
- (c) to check whether any issue of device was appropriately supported by a request form;
- (d) to check the physical existence of items on the copy inventory entries provided to the Commissioner periodically;
- (e) to check the items of device shown in the copy registers to have been recently returned to ensure that they are being kept in the stores;
- (f) to make stock-check of items evidenced by the copy registers to be in the stores;

- (g) for the above purposes, to compare the unique number on each item as shown on the copy registers against the number assigned to the item as marked on it or attached to it; and
- (h) to see the items that were outside the knowledge of the Commissioner or his staff and seek explanation as to how they might be used for conducting covert surveillance operations.

3.33 During the report period, a total of four visits were made to the device stores of LEAs.

### **Removable storage media**

3.34 To better control the issue and return of surveillance devices, all the LEAs have adopted DMS in their device stores. In addition, the LEAs have adopted the use of tamper-proof labels to seal the removable storage media ('RSM') (e.g. memory cards, discs and tapes) inside the surveillance devices at the time of issue to avoid any possibility of these RSM being substituted, or in any way tampered with. I note that the LEAs have also adopted the use of QR Code to facilitate the issue and return of the RSM through DMS. In response to my views that information on whether RSM is issued or returned with a surveillance device and whether the tamper-proof label sealing the RSM inside the device is intact upon return of the device should be clearly documented in the device register, the LEAs have adopted or will adopt a revised format of device register to include the information.

### **Devices for non-ICSO purposes**

3.35 As a matter of practice, an authorized covert surveillance is always supported by a prescribed authorization issued by a relevant authority but a non-ICSO operation requiring issue of devices will not

have that support. Hence, in keeping track of issue of surveillance devices for non-ICSO purposes, the LEAs have accepted the requirements that a two-level approval by way of an endorsement of an officer and an approval of a senior officer is required. Both officers will sign with date on a device request memo to signify their endorsement and approval respectively. Each device request memo should have a unique memo reference. The withdrawing officer will bring along the device request memo to the device registry where the storekeeper on duty will issue the surveillance devices requested.

3.36 During the year, a report from an LEA on a case relating to surveillance devices for non-ICSO purposes was received. Details of this case are described below.

***Mistake in making retrospective records of the issue of seven surveillance devices in the DMS***

3.37 An LEA reported to me an incident in which a device storekeeper failed to use a proper function of the DMS to record the issue of seven surveillance devices retrospectively.

3.38 On a morning, the DMS of a device store was out of order and accordingly manual records had to be made for a total of four batches of surveillance devices issued. The surveillance devices were all issued for non-ICSO purposes. When they were returned later on the same day, the DMS was still under repair. Soon after the DMS resumed operation in the afternoon of the same day, the device storekeeper concerned proceeded to make retrospective issue and return records of the four batches of surveillance devices in the DMS. For the making of retrospective records, a special function of the DMS should be used ('retrospective function'). Instead of capturing the time of processing the issue or return of devices by the DMS automatically as the time of issue or return as processed by the normal function, the retrospective function required manual input of the time of issue or return. In the

incident, the device storekeeper made the retrospective records of the issue of all the surveillance devices concerned first and then their retrospective return records. While the issue of three batches of the surveillance devices was recorded properly in the DMS by using the retrospective function, the device storekeeper mistakenly used the normal function to make the retrospective issue record of one batch of the surveillance devices, which included a total of seven surveillance devices. As a result, the time of making the retrospective records of these seven surveillance devices was wrongly captured by the DMS as the time of their issue. The device storekeeper was aware of the mistake only when the DMS rejected the time of return which he entered for making the retrospective records of the return of the seven surveillance devices, since it was earlier than their time of issue recorded in the system. He informed his supervisor immediately and made a remark in the relevant entries in the DMS to explain and clarify the matters.

3.39 The LEA concluded that the incident was caused by a genuine careless mistake made by the device storekeeper without any foul play. It also considered that the careless mistake reflected the lack of vigilance at the time by the device storekeeper in performing his duties as a device storekeeper who should be well aware that special attention should be paid while making retrospective records in the DMS. The LEA proposed to issue a verbal advice (disciplinary) to the device storekeeper to remind him to be more vigilant in operating the DMS in the future. Besides, the officer's duties as a device storekeeper were removed until he was found suitable to resume the responsibility again.

3.40 I noted the LEA's findings and agreed to the proposed disciplinary action against the device storekeeper.

## **CHAPTER 4**

### **LEGAL PROFESSIONAL PRIVILEGE AND JOURNALISTIC MATERIAL**

#### **Obligations of LEAs regarding LPP cases**

4.1 The Ordinance requires that when making an application for a prescribed authorization, the applicant should state in the affidavit or statement in writing the likelihood that any information which may be subject to LPP will be obtained by carrying out the interception or covert surveillance.

4.2 The COP provides that the LEA should notify the Commissioner of interception/covert surveillance operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. On the basis of the LEA's notification, the Commissioner may review the information passed on to the investigators to check that it does not contain any information subject to LPP that should have been screened out.

4.3 For each of these cases, there are procedures to be followed at different stages of the operation. 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, which is considered as a material change in circumstances, the officer concerned has to promptly report to the relevant authority the altered LPP assessment. The reporting requirement regarding material change in circumstances is stipulated under section 58A of the ICSO. The report to the panel judge is made by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, by way of an REP-13 report to the authorizing officer. 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 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. In the report made under section 58A or section 58, the officer has to provide the details of all relevant circumstances, including why the assessment has altered, how it has come about to consider that LPP information has been obtained or may likely be obtained, the details of the likely LPP information that has been obtained, and what steps have been taken or are proposed to take to prevent infringement of the right to communications that are protected by LPP. In order to apprise the Commissioner promptly with timely information on this important matter, the concerned LEA is required to give the Commissioner a similar notification of each of such occurrences in accordance with the COP.

4.4           Regarding cases with assessment that there was likelihood of involving LPP information, the panel judge would impose additional conditions if he granted the authorization or allowed it to continue. These additional conditions obliged the LEA to report back when the likelihood was heightened or when there was any material change in circumstances so that the panel judge would reconsider the matter in the new light. These additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice.

4.5           There is a set of reporting and preservation requirements for cases involving LPP information. In particular, for interception operations involving telephone calls, when an LEA encounters a call with heightened LPP likelihood or LPP information, the LEA is required to submit an REP-11 report to the panel judge in respect of this call. This is named 'Reported LPP Call' irrespective of whether LPP information has indeed been obtained. The reporting officer has to disclose in the report

the number of times the Reported LPP Call has been listened or re-listened to, the respective date and time and duration of each such listening or re-listening and the identity of each of the listeners. In addition, in the report to the Commissioner, the reporting officer should also state whether there are any other calls between the telephone number involved in the Reported LPP Call and the subject's telephone number under interception, irrespective of whether such calls are intercepted before or after the Reported LPP Call. If there are such 'other calls', the reporting officer is also required to provide information on whether they have been listened to and if so, for how long and the identity of the listeners. In order to provide such information, the reporting officer should consult the relevant audit trail report ('ATR') that records accesses to the intercepted calls together with the corresponding call data when preparing the REP-11 report and the notification to the Commissioner. For all LPP cases involving interception, the LEA should preserve the interception products of all intercepted communications when such products are still available at the time of discovery of the communications with LPP likelihood, heightened LPP likelihood or LPP information, the transcripts, summaries, notes, ATRs, etc. The preserved records should not be destroyed without the prior consent of the Commissioner as stated under section 59(1)(c) of the Ordinance. LEAs are required to make similar reporting and preservation arrangements also for cases where JM is involved or likely to be involved.

4.6 In the event that LPP information has been inadvertently obtained in covert surveillance operations, the COP also provides that investigators monitoring the operations will be required to hand over the recording to a dedicated unit who will screen out any information subject to LPP before passing it to the investigators for their retention. The Commissioner should be notified. On the basis of the LEA's notification, the Commissioner may review the information passed on by the dedicated unit to the investigators to check that it does not contain any information subject to LPP that should have been screened out.



Similarly, the dedicated unit is required to screen out any JM that has been inadvertently obtained and withhold such materials from the investigators.

### **Outstanding LPP case in 2016**

4.7 It was reported in paragraphs 4.18 and 4.19 of the Annual Report 2016 that there was one heightened LPP likelihood case of which discrepancy concerning the contents of some calls mentioned in the REP-11 report had been found in the examination of protected products and the LEA concerned had submitted an investigation report to me. I completed the review in 2017 and details of which are provided in Outstanding case (ii) of Chapter 6. Other than the matters mentioned in Outstanding case (ii), nothing untoward was revealed by the other forms of checking of this LPP case.

### **LPP reports received in 2017**

4.8 In the report period, LEAs submitted notifications, in accordance with the COP, on 86 new LPP cases. In 80 of these 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 80 cases included:

- (a) seven cases of obtaining of LPP information;
- (b) two cases of suspected/possible obtaining of LPP information; and
- (c) 71 cases of heightened likelihood of obtaining LPP information:
  - (i) in 32 cases the panel judge allowed the continuation of the prescribed authorization subject to additional

conditions imposed to guard against the risk of obtaining LPP information;

- (ii) in 37 cases the concerned LEA discontinued the operations of its own accord;
- (iii) in one case the LEA's request for continuation of the prescribed authorization was refused by the panel judge and the prescribed authorization was revoked accordingly; and
- (iv) in one case which involved two operations, the prescribed authorization for the first operation was allowed by the panel judge to continue subject to additional conditions imposed to guard against the risk of obtaining LPP information while the second operation was discontinued by the LEA of its own accord.

For the remaining six LPP cases, at the grant of the prescribed authorizations, the operations authorized were assessed to have a likelihood of obtaining information which might be subject to LPP. For two of the cases, the LEA concerned assessed at the time of application that the operations sought to be authorized would not involve LPP information but the panel judge considered otherwise. For the other four cases, it was assessed by both the LEAs and the panel judge that the operations sought to be authorized would likely obtain information which might be subject to LPP. The panel judge imposed additional conditions in the prescribed authorizations in all these six cases.

4.9 In the review of these LPP cases, all the relevant documents and records including the prescribed authorization, the REP-11 report, section 58 report, the determination by the panel judge, the notes, the summaries, the communication data, the ATRs, etc. were checked by the

Commissioner and his staff. For cases where the panel judge allowed the prescribed authorizations to continue subject to additional conditions, we checked whether the LEAs had complied with the additional conditions imposed by the panel judge, whether the LPP information or likely LPP information had been screened out from the summaries passed on to investigators. In respect of interception of telephone calls, we also checked whether there were calls between the same telephone numbers preceding the Reported LPP Call that should have been but had not been reported, and whether there was any listening or re-listening to the interception products after the discontinuance or revocation of the prescribed authorizations.

4.10 The protected products of the 86 LPP cases were also examined by the Commissioner and his delegated officers. When examining these products (and also those for JM cases), we particularly checked the following:

- (a) whether the contents of the communications or information reported in the relevant REP-11 report and notification to the Commissioner tallied with what was listened to or viewed by the LEA officers; and
- (b) whether there was any other communication or information that was subject to LPP or indicated heightened LPP likelihood (or contained JM or indicated heightened JM likelihood) but had not been reported to the relevant authority.

#### ***Seven cases of obtaining of LPP information***

4.11 The seven cases where LPP information was obtained related to interception operations.

4.12 In the first case, the interception operation was not assessed to have a likelihood of obtaining LPP information at the grant of the prescribed authorization. One day, an officer of the LEA concerned listened to part of a call and found that the call contained information subject to LPP. The LEA submitted an REP-11 report and a discontinuance report to the panel judge who duly revoked the authorization.

4.13 As for the second case, at the grant of the prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. One day, an officer of the LEA concerned listened to part of a call and found that the call contained information subject to LPP. The LEA submitted an REP-11 report to the panel judge who allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information. The interception operation was later discontinued by the LEA when the conditions for the continuance of the operation were not met.

4.14 The interception operation involved in the third case was not assessed to have a likelihood of obtaining LPP information at the grant of the prescribed authorization. One day, an officer of the LEA concerned, when performing supervisory duty, listened to part of a call and found that the call contained information subject to LPP. The LEA submitted an REP-11 report and a discontinuance report to the panel judge who duly revoked the authorization. In the REP-11 report, the LEA also reported that before the officer's detection of the obtainment of LPP information, the Reported LPP Call was partially listened to by another officer when performing intercepting duties in the same operation. However, the part of the call this another officer listened to did not contain LPP information or indicate likelihood of obtaining LPP information.

4.15 In the fourth case, the interception operation concerned was not assessed to have a likelihood of obtaining LPP information at the grant of the prescribed authorization. One day, an officer of the LEA concerned listened to part of a call and found that the call contained information subject to LPP. The LEA submitted an REP-11 report and a discontinuance report to the panel judge who duly revoked the authorization.

4.16 For the fifth case, a prescribed authorization was issued for interception of a facility used by the subject and the interception operation concerned was not assessed to have a likelihood of obtaining LPP information. One day, an officer of the LEA concerned listened to part of a call and found that LPP information was contained in the call. The LEA submitted an REP-11 report to the panel judge, who allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information further. Subsequently, another prescribed authorization was also issued for interception of another facility used by the same subject. Some time after the discovery of the obtainment of LPP information mentioned above, another officer of the LEA, when listening to part of a call, detected that the call indicated heightened likelihood of obtaining LPP information. The LEA submitted REP-11 reports to the panel judge to report the heightened LPP likelihood. The panel judge allowed the authorizations to continue with additional conditions imposed. The interception of the two facilities used by the subject was later discontinued by the LEA when the conditions for the continuance of the operation were not met.

4.17 On the sixth case, at the grant of the prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. One day, an officer of the LEA concerned listened to part of a call and found that the call contained information subject to LPP. The LEA submitted an REP-11 report and a

discontinuance report to the panel judge who duly revoked the authorization.

4.18 In the REP-11 report, the LEA also reported three aliases of the subject whose identity was unknown at the time of application for the prescribed authorization. I noted that the first two aliases were detected by the LEA more than one week before the submission of the REP-11 report. In this connection, I reminded the LEA that new information on the identity of the subject uncovered during operation, which was a material change in circumstances, should be reported to the panel judge as soon as practicable.

4.19 For the seventh case, a prescribed authorization was renewed for interception of a facility used by the subject. Subsequently, another prescribed authorization was also issued for interception of another facility used by the same subject. For both authorizations, the interception operation was not assessed to have a likelihood of obtaining LPP information.

4.20 As the interception progressed, one day, an officer of the LEA concerned listened to part of a call and found that the call contained information subject to LPP. The LEA submitted to the panel judge REP-11 reports and discontinuance reports. As the two prescribed authorizations had already expired by the time the panel judge received the discontinuance reports, the panel judge noted the discontinuance reported instead of revoking the two prescribed authorizations.

4.21 Before the listening to the Reported LPP Call by the LEA officer, a renewal of the two prescribed authorizations had been granted for the interception of the two facilities. Thus, a discontinuance report in relation to the renewal was submitted concurrently with the REP-11 reports and discontinuance reports mentioned in paragraph 4.20 above. Upon receipt of the discontinuance report, the panel judge duly revoked the renewed authorization.

4.22 I have reviewed these seven cases with reported obtainment of LPP information, including examining the protected products. Except the fourth case which involved the incident reported under Case 6.11 of Chapter 6, no irregularity was found.

***Two cases of suspected/possible obtaining of LPP information***

4.23 In the first case where the LEA concerned reported the suspected obtainment of LPP information through interception, the operation was not assessed to have a likelihood of obtaining information which might be subject to LPP when the panel judge approved the fresh application for the prescribed authorization concerned.

4.24 On the second day after the commencement of the interception operation, the LEA encountered a call which indicated heightened LPP likelihood. The panel judge, having considered the REP-11 report concerned, allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.

4.25 As the interception progressed, on one occasion, an LEA officer listened to an intercepted call and at the end of the part of this LPP call that the LEA officer listened to, utterance which contained LPP information was made. The LEA officer was aware of the obtainment of LPP information and then reported the matter to her supervisor. The LEA assessed that LPP information might have been obtained and it reported the suspected obtainment of LPP information to the panel judge by way of an REP-11 report. After considering the REP-11 report, the panel judge allowed the prescribed authorization to continue subject to revised additional conditions. The LEA submitted to me a notification on the suspected obtainment of LPP information with a copy of the REP-11 report. The interception operation was later discontinued by the LEA and I conducted a review of the case. The record of the contents

of the LPP call stated in the REP-11 report was correct and LPP information was inadvertently obtained. I found no irregularity in this case.

4.26 When reporting to the panel judge and me on the suspected obtainment of LPP information, the LEA has adopted the arrangement that the possible LPP information was detailed in an annex to the REP-11 report/notification and the annex was placed in a separate sealed envelope for opening by the relevant authority and the Commissioner personally.

4.27 In the course of examination of this case, I considered that enhancement could be made to the record-keeping arrangement regarding obtainment of LPP information or possible LPP information. To provide further protection of LPP information and to ensure that the number of persons to whom LPP information will be disclosed is limited to the minimum, I recommended to the LEAs that, when the LEA concerned considered that LPP information or possible LPP information might have been obtained through interception, the part of the transcripts, summaries, notes, etc. containing the LPP information or possible LPP information should be removed and be sealed in a separate envelope. I also advised that access to the relevant transcripts, summaries, notes, etc. should be restricted to avoid any further disclosure of the LPP information or possible LPP information.

4.28 In the second case of possible obtaining of LPP information, at the grant of the prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception progressed, one day, the LEA concerned encountered a call which indicated heightened LPP likelihood. The panel judge, having considered the REP-11 report concerned, allowed the prescribed authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information. Subsequently, another



officer listened to part of a call and formed the view that possible LPP information was contained in this call. The LEA submitted an REP-11 report to the panel judge with the contents of the possible LPP information detailed separately in an annex to the REP-11 report, and sought approval to continue with the prescribed authorization. After considering the REP-11 report, the panel judge allowed the prescribed authorization to continue. The interception operation was later discontinued by the LEA when the conditions for the continuance of the operation were not met.

4.29 I reviewed the case and did not find any irregularity. As regards the Reported LPP Call which involved possible LPP information, I, having reviewed the contents of the call, considered that the information concerned was not LPP information. Nonetheless, I appreciated that the LEA had erred on the side of caution in handling information which might be subject to LPP.

***71 cases of heightened LPP likelihood  
and six cases of assessed LPP likelihood***

4.30 The review of the 77 heightened/assessed LPP likelihood cases had been conducted in accordance with the mechanism as stated in paragraphs 4.9 and 4.10 above. Of these 77 cases, five heightened LPP likelihood cases were related to the incidents referred to in Cases 6.5, 6.6, 6.7, 6.8 and 6.10 of Chapter 6 and two heightened LPP likelihood cases were found to have discrepancy concerning the contents of calls as stated in Cases 4.1 and 4.2 below. For the remaining 70 cases, nothing untoward was found.

4.31 In regard to the case where the panel judge revoked the prescribed authorization despite the LEA's request for continuation of the authorization, which was also related to Case 4.1 in paragraphs 4.34 to 4.37 below, the interception operation was not assessed to have a likelihood of obtaining LPP information at the grant of the prescribed

authorization. About ten days after the commencement of the interception, the LEA concerned encountered a call which indicated heightened LPP likelihood. The panel judge, having considered the REP-11 report concerned, allowed the prescribed authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.

4.32 The interception operation progressed and lasted for some time, during which the LEA concerned had discovered further heightened likelihood of obtaining LPP information on a total of ten occasions. On the tenth occasion, the panel judge revoked the prescribed authorization upon considering the information provided by the LEA in the relevant REP-11 report as the heightened risks of obtaining LPP information were disproportionate to the benefit of pursuing the interception.

4.33 After revocation of the prescribed authorization by the panel judge under section 58A of the Ordinance, the LEA took immediate action to cause the interception concerned to be discontinued as soon as reasonably practicable in accordance with paragraphs 172 to 174 of the COP. I reviewed the case and found that the time of discontinuance of the interception was well within the benchmark timeframe of 60 minutes counting from the time of revocation.

***Case 4.1 : Discrepancy concerning the contents of an LPP call in REP-11 report***

4.34 Checking of protected products of the case mentioned in paragraphs 4.31 to 4.33 above identified a discrepancy concerning the contents of an LPP call reported in one of the REP-11 reports submitted to the panel judge. In the LPP call concerned, the called party mentioned the time at which he would attend a meeting. However, the time reported in the REP-11 report was different from that revealed in the protected product.

4.35 In response to my request for explanation for the discrepancy, the LEA concerned gave a reply which I considered undesirable. The reply reflected a 'couldn't-care-less' attitude of the officer concerned. I wrote to the LEA stating my view and pointing out that what was stated in an REP-11 report as to what was said in an intercepted call was expected to be with the utmost accuracy. The LEA gave me a further reply with more details of their findings.

4.36 Regarding the discrepancy, the LEA explained that due to the circumstances of the call, the officer concerned misunderstood the contents of the conversation in the call and thus reported it inaccurately in the REP-11 report. Besides, the LEA had taken heed of my advice on reporting of contents of calls and reminded its officers responsible for interception duties of my advice.

4.37 I accepted the explanation provided by the LEA and considered that the mistake was relatively minor and should not affect the panel judge's decision on the REP-11 report.

***Case 4.2 : Discrepancy concerning the contents of calls mentioned in reports to the panel judge***

4.38 Checking of the protected products of another LPP case reported in 2017 revealed that there were discrepancies concerning the contents of calls mentioned in the REP-11 report/further report to REP-11 report. An enquiry was made to the relevant LEA and the LEA had arranged the officer concerned to re-listen to the calls.

4.39 To address the panel judge's comments made on an REP-11 report relating to an intercepted call that was initially considered to have heightened LPP likelihood, the LEA concerned submitted a further report to the panel judge. The contents of the call were elaborated in the further report. The panel judge noted the further report and allowed the authorization to continue. In checking the protected products, it was

found that there was a discrepancy in respect of the contents of the conversation between the subject and the caller. In the LEA's reply to me, the officer concerned explained that she failed to pick up some contents of the conversation due to the circumstances of the call.

4.40 In another REP-11 report of the same LPP case submitted to the panel judge, the contents of three 'other calls' were also provided. After checking the protected products, it was found that utterances indicating heightened LPP likelihood appeared in one of the 'other calls' which was listened to five minutes prior to the listening of the Reported LPP Call. According to the LEA's explanations, the same officer concerned failed to pick up the full conversation in the call and she jotted down her understanding of the contents of the call. She accepted that she should have considered re-listening to the call when she was not sure about the contents of a certain part of the call.

4.41 I considered the performance of the LEA officer concerned in her intercepting duties neither satisfactory nor professional. I relayed my view to the LEA that if the officer concerned had been more vigilant and prudent in performing her intercepting duties, the discrepancies could have been avoided. Notwithstanding the discrepancies, I opined that there was no material impact on the validity of the prescribed authorizations concerned. Regarding the LEA's proposal that the officer concerned be given two verbal advices (non-disciplinary), I considered it appropriate.

### **Obligations of LEAs regarding JM cases**

4.42 The Ordinance requires the LEA applicant to set out, at the time of applying for a prescribed authorization, the likelihood that any information which may be the contents of any JM will be obtained by carrying out the interception or covert surveillance sought to be authorized. The COP provides that the LEAs should notify the

Commissioner of cases where information which may be the contents of any JM has been obtained or will likely be obtained through interception or covert surveillance operations. The reporting, preservation and screening requirements for cases involving JM are as those set out in paragraphs 4.5 and 4.6 above.

### **JM reports received in 2017**

4.43 In 2017, I received notifications on three new JM cases submitted in accordance with the COP, for which REP-11 reports were submitted to the panel judge. The three cases included:

- (a) one case of obtaining of JM; and
- (b) two cases of heightened likelihood of obtaining JM.

4.44 I conducted a review of the JM cases in accordance with a mechanism which was similar to that of checking LPP cases as detailed at paragraphs 4.9 and 4.10 above.

### ***One case of obtaining of JM***

4.45 A prescribed authorization was issued for interception of a facility used by the subject. Subsequently, another prescribed authorization was also issued for interception of another two facilities used by the same subject. For both authorizations, the interception operation was not assessed to have a likelihood of obtaining information which might be the contents of any JM when the authorizations were granted.

4.46 As the interception progressed, one day, an officer of the LEA concerned listened to part of a call and found that the call contained information which might be the contents of JM. The LEA submitted REP-11 reports to the panel judge and sought approval to continue with

the prescribed authorizations. After considering the REP-11 reports, the panel judge allowed the prescribed authorizations to continue with additional conditions imposed to guard against the risk of obtaining information which might be the contents of any JM. The interception operation was later discontinued by the LEA when the conditions for the continuance of the operation were not met.

4.47 I reviewed the case and did not find any irregularity.

### ***Two cases of heightened JM likelihood***

4.48 For the two cases of heightened likelihood of obtaining JM, the panel judge imposed additional conditions for one case after receipt of the REP-11 report while the operation was discontinued for the other case.

4.49 Checking of the relevant documents and records of these two heightened JM likelihood cases did not reveal any irregularity. The protected products were also checked and nothing untoward was found.

### **Examination of the protected products in past cases**

4.50 Apart from cases reported in the report period, since October 2016, the Commissioner and his delegated officers have also examined the protected products of LPP/JM cases that were reported before 2016. Regarding the two past LPP cases mentioned in paragraphs 4.35 and 4.37 of Annual Report 2016, which were reported in 2012 and 2014 respectively, the protected products had been examined in 2016 and my review was completed in 2017. The results of my review of these two cases are reported in Outstanding cases (iii) and (iv) of Chapter 6. Besides, in the report period, preserved protected products of 74 LPP and five JM cases that were reported before 2016 had been checked. Among these 79 cases, nothing untoward was found for

75 cases while LEAs were required to provide explanation for four cases. Of these four cases, one is detailed in Case 6.2 of Chapter 6 and three are reported in paragraphs 4.51 to 4.54 below.

4.51 One of the past cases for which explanation was sought after the checking of the protected products related to a case with heightened LPP likelihood in 2014. It was noticed from the protected products that prior to a Reported LPP Call, there was also a call containing some information which indicated heightened LPP likelihood but this call was not reported to the panel judge.

4.52 The LEA replied to me that the officer concerned was unaware of the heightened LPP likelihood arising from the call. The officer apologized for not being attentive enough in detecting the heightened LPP likelihood.

4.53 I accepted the explanation provided by the LEA. However, I pointed out that had the officer concerned been aware of the heightened LPP likelihood arising from the earlier call and reported it to the panel judge, it could help minimize the risk of inadvertently obtaining LPP information in the ensuing period of the interception operation concerned.

4.54 The other two past cases for which explanation was sought after checking the protected products related to two cases of interception operations with heightened LPP likelihood reported in 2011 and 2013 respectively. Checking of the protected products of the cases revealed that for each case, there were two calls with information indicating possible heightened LPP likelihood but they were not reported to the panel judge. For each case, the LEA concerned was required to provide clarification on the non-reporting of the calls. According to the replies, the two officers concerned had left the service and no record on the contents of the calls in question was documented. Other than the matter mentioned, I did not find anything untoward. Having taken into

consideration the relevant factors, I concluded the reviews pertaining to the two cases with no further investigation.



## **CHAPTER 5**

### **APPLICATION FOR EXAMINATION AND NOTIFICATION TO RELEVANT PERSON**

#### **Application for examination**

5.1 Pursuant to section 43 of the Ordinance, a person may apply in writing to the Commissioner for an examination if he suspects that he is the subject of any interception or covert surveillance activity carried out by officers of the LEAs. Upon receiving an application, the Commissioner shall carry out an examination to determine:

- (a) whether or not the suspected interception or covert surveillance has taken place; and
- (b) if so, whether or not such interception or covert surveillance has been carried out by an officer of an LEA without the authority of a prescribed authorization,

unless the Commissioner refuses to carry out an examination by reason of section 45(1) of the Ordinance. After the examination, if the Commissioner finds the case in the applicant's favour, he shall notify the applicant and initiate the procedure for awarding payment of compensation to him by the Government.

5.2 The circumstances provided in section 45(1) that justify the Commissioner not carrying out an examination are that, in the opinion of the Commissioner, the application is received by him more than one year after the last occasion on which the suspected interception or covert surveillance is alleged to have taken place, that the application is made anonymously, that the applicant cannot be identified or traced after the use of reasonable efforts, and that the application is frivolous or vexatious or is not made in good faith. Section 45(2) of the Ordinance mandates

the Commissioner not to carry out an examination or proceed with the examination where, before or in the course of the examination, he is satisfied that any relevant criminal proceedings are pending or are likely to be instituted, until the criminal proceedings have been finally determined or finally disposed of or until they are no longer likely to be instituted. Section 45(3) of the Ordinance defines relevant criminal proceedings as those where the interception or covert surveillance alleged in the application for examination is or may be relevant to the determination of any question concerning any evidence which has been or may be adduced in those proceedings.

### **The procedure**

5.3 The procedure involved in an examination can be briefly described below. Enquiries will be made with the particular LEA which, the applicant alleges, has carried out either interception or covert surveillance or a combination of both against him as to whether any such statutory activity has taken place, and if so the reason why. Enquiries will also be made with the PJO as to whether any authorization had been granted by any panel judge for the particular LEA to carry out any such activity, and if so the grounds for so doing. Enquiries with other parties will be pursued if that may help obtain evidence regarding the existence or otherwise of any such alleged statutory activity. The results obtained from the various channels will be compared and counter-checked to ensure correctness. Apart from the information given above, it is considered undesirable to disclose more details about the methods used for the examination of applications or about the examinations undertaken, because that would possibly divulge information that may prejudice the prevention or detection of crime or the protection of public security.

5.4 The applications for examination will have to satisfy the following requirements, namely:

- (a) there is suspicion of interception of communications or covert surveillance that has been carried out against the applicant; and
- (b) the suspected interception or covert surveillance is suspected to have been carried out by one or more of the officers of the LEAs under the Ordinance, namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption.

5.5 Some applicants alleged that they had been surreptitiously or openly followed or stalked by officers of an LEA. This normally would not satisfy the proper basis for an application for examination because there was no suspicion of any surveillance device being used. There have been cases previously where the applicants said devices suspected to be used included those which could directly read or control their minds. These again did not form a proper basis for an application to initiate an examination, the reason being that the devices suspected to be used do not fall within the kind or type of devices under the Ordinance the use of which would constitute a covert surveillance.

5.6 Some applicants described how a particular person, as opposed to an LEA officer, carried out the suspected interception or covert surveillance. This failed to satisfy the second requirement to entertain an application or to engage in an examination.

5.7 The above information concerning the relevant provisions of the Ordinance, application requirements and procedure as well as the consent form on the use of personal data have been provided on the website of the Secretariat. In addition, leaflets containing the necessary information for making an application are available to prospective applicants.

## **Applications received in 2017**

5.8 During the report period, there were five applications for examination. One application was subsequently not pursued by the applicant. The remaining four applications all claimed a combination of interception and covert surveillance. Since none of the four applications came within the ambit of the exceptions covered by section 45(1) or section 45(2), I carried out an examination provided for in section 44 of the Ordinance in respect of each case.

5.9 After making all necessary enquiries, I found all the four cases not in the applicants' favour and accordingly notified each of the applicants in writing of the findings, with two of such notices issued during the report period and two thereafter. By virtue of section 46(4) of the Ordinance, the Commissioner is not allowed to provide reasons for his determination or to inform the applicants whether or not the alleged or suspected interception or covert surveillance had indeed taken place.

## **Notification to relevant person**

5.10 Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person whenever, during the performance of the functions under the Ordinance, the Commissioner discovers any interception or covert surveillance carried out by an officer of any one 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.

5.11 Consideration of the application of section 48 may arise under a number of situations. For example, the interception of telephone communications through the use of a telephone number other than that permitted by a prescribed authorization issued by a panel judge, however that error is made, constitutes an unauthorized interception. It gives rise to the necessity of considering whether the Commissioner should, as obliged by section 48 of the Ordinance, give a notice to the relevant person of the wrong interception. He will be invited to make written submissions in relation to the assessment of reasonable compensation to be paid to him by the Government.

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

### **Prohibition against disclosure of reasons for determination**

5.13 Section 46(4) expressly provides that in relation to an application for examination, the Commissioner is not allowed to provide reasons for his determination, or give details of any interception or covert surveillance concerned, or in a case where he has not found in the applicant's favour, indicate whether or not the suspected interception or covert surveillance has taken place.

5.14 During the year, I have observed that there were occasions where the applicants expressed strong discontent at not being given the details of the reasons for my determinations. It is hoped that the public will understand that 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, preventing any advantage from being obtained by criminals or possible criminals over the LEAs in the latter's efforts in fighting crimes and in protecting the safety of the community in Hong Kong. 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.

## **CHAPTER 6**

### **NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS**

#### **Reporting of non-compliance, irregularities and incidents**

6.1 By virtue of section 54 of the Ordinance, where the head of any LEA considers that there may have been any case of failure by the LEA or any of its officers to comply with any relevant requirement, he is obliged to submit to the Commissioner a report with details of the case (including any disciplinary action taken in respect of any officer). The head of any LEA is also required to submit to the Commissioner a report with details of the case even if the failure to comply with any relevant requirement is not due to the fault of the LEA or any of its officers. Relevant requirement is defined in the Ordinance to mean any applicable requirement under any provision of the ICSO, the COP, or any prescribed authorization or device retrieval warrant concerned.

6.2 Besides, there is a mechanism on reporting and monitoring of covert operations in place whereby the LEAs are required by the Commissioner to report cases of irregularity or even simply incidents which are not covered by section 54 of the Ordinance for his consideration and scrutiny so that any possible non-compliance will not escape his attention.

6.3 For cases of non-compliance, irregularity or incident discovered upon examination of documents, information and protected products during visits to LEAs, the LEA concerned is required to investigate the matter and submit a report or provide explanation to the Commissioner.

6.4 When reporting, normally the LEAs would adopt a two-step approach. They would first submit an initial report upon discovery of the event, to be followed by a full investigation report after an in-depth investigation into the case.

### **Outstanding cases brought forward from Annual Report 2016**

6.5 In my Annual Report 2016, there were four outstanding cases. They are dealt with in the ensuing paragraphs.

***Outstanding case (i) : An incident report relating to section 61 of the ICSO  
[Paragraph 6.6 of Annual Report 2016]***

6.6 This incident was first reported by an LEA in late 2014. Similar to the situation stated in the last annual report, the court proceedings that were relevant to the incident were still ongoing at the time of writing this annual report. To avoid the risk of prejudicing the administration of justice, it is inappropriate to report on the review of the case in this report. The reporting of this case can only be made when the relevant court proceedings have concluded.

***Outstanding case (ii) : Discrepancy concerning the contents of calls in the REP-11 report  
[Paragraphs 4.18 and 4.19 of Annual Report 2016]***

6.7 The case concerned an LPP case involving interception in 2016. As mentioned in paragraphs 4.18 and 4.19 of my Annual Report 2016, checking of the protected products in 2016 revealed that three calls between the subject's telephone number and another telephone number of the other party involved in the Reported LPP Call contained some information indicating heightened LPP likelihood but the calls were not so regarded in the relevant REP-11 report submitted to the



panel judge. The LEA concerned had given explanations for two of the calls in 2016 and also submitted an incident report and an investigation report for the third call in 2017. My review of the entire case is given in paragraphs 6.8 to 6.10 below.

6.8 The LEA had made enquiries with the officers concerned and arranged re-listening of the calls. For two of the calls, the LEA explained that the utterances indicating heightened LPP likelihood were made at the junctures the officers concerned paused the listening. The non-detection of the heightened LPP likelihood in the third call was due to the circumstances of the call. In fact, the officer concerned had immediately reported to her supervisor an LPP call (i.e. the Reported LPP Call) that was detected later in the afternoon of the same day the third call mentioned above was listened to.

6.9 The LEA concerned concluded that there was no evidence of any deliberate neglect or any sinister motive on the part of the officers concerned. The LEA had also made enhancement to the reporting and assessment mechanism relating to communications with indication of possible heightened LPP likelihood.

6.10 I considered the LEA's explanations acceptable having regard to the actual circumstances when the calls concerned were listened to and the findings of my checking of the relevant ATRs. I agreed to the LEA's conclusion as I could not find any evidence to disagree with it. Nonetheless, the LEA officers were reminded that they should be more vigilant in performing intercepting duties.

***Outstanding case (iii) : Discrepancy in the reporting of a Reported LPP Call  
[Paragraph 4.35 of Annual Report 2016]***

6.11 The case concerned an LPP case involving interception in 2012. Checking of the protected products in 2016 revealed a

discrepancy relating to the time of interception of an LPP call reported in the relevant REP-11 report submitted to the panel judge. In response to my request for explanation on the discrepancy identified, the LEA submitted a detailed report to me in March 2017. The LEA clarified that the actual LPP call that contained the information reported in the REP-11 report should be another call, which was accessed to immediately prior to the Reported LPP Call. My subsequent checking of the data of the case confirmed that the actual LPP call had been listened to only by the officer concerned and none of the 'other calls' relating to the actual LPP call had been listened to under the prescribed authorization.

6.12 The LEA opined that the mistake made in the REP-11 report was due to the lack of sensitivity and vigilance of the officer concerned in the reporting of an LPP call. The LEA did not consider that there was any ulterior motive of the officer. While the officer concerned had already been transferred out from the interception unit, the LEA proposed that the officer be issued a verbal warning that she should be more vigilant when performing important and sensitive duties in the future.

6.13 I agreed to the LEA's assessment and conclusion. The LEA's proposed disciplinary action of a verbal warning against the officer concerned was considered appropriate.

***Outstanding case (iv) : Reporting of an earlier call with LPP likelihood  
[Paragraph 4.37 of Annual Report 2016]***

6.14 The fourth outstanding case related to an LPP case involving interception in 2014, in which a call with information indicating heightened LPP likelihood was not reported to the panel judge. As mentioned in paragraph 4.37 of my Annual Report 2016, in response to my request for explanation for not reporting the call to the panel judge, the LEA concerned first submitted an incident report and then an investigation report in March 2017.

6.15 After making enquiries with the officers involved and arranging re-listening of the call, the LEA explained that due to the circumstances of the call, the officer concerned had misinterpreted the conversation. The officer concerned recalled that as the call contained information that might affect the assessment on likelihood of obtaining LPP information, she had reported the call to her supervisor while her supervisor could not recall if the officer had done so. There was no record about the contents of the call in question as the matter discussed in the call was not relevant to the investigation of the crime concerned. Neither was the reporting of the call to the supervisor recorded. The LEA also indicated that the officer concerned and her supervisor both considered that, based on their hitherto understanding of what circumstances amounted to heightened LPP likelihood, heightened LPP likelihood did not arise from the contents of the call.

6.16 The LEA concluded that there was no evidence of any deliberate neglect or any sinister motive on the part of the officer concerned and her supervisor in not reporting the call as an LPP call. Nevertheless, the LEA has implemented a new measure since January 2017 to enhance the reporting and assessment mechanism regarding communications with contents that may indicate heightened LPP likelihood.

6.17 After reviewing this case and having considered the circumstances of the call and other relevant factors, I agreed to the LEA's conclusion as I could neither find any evidence of deliberate neglect or sinister motive of the two officers concerned. However, I had indicated to the LEA that I did not consider its reporting and assessment on calls with information indicating heightened LPP likelihood as well as the related recording arrangement desirable. Yet, the LEA's initiative in implementing new measure for enhancing the reporting and assessment mechanism was considered appropriate.

## **Cases occurring in 2017**

6.18 In 2017, there were 18 cases of non-compliance/irregularity/incident while none of them involved report submitted under section 54 of the Ordinance. The review of these 18 cases had been completed and details of the review are set out below.

### ***Case 6.1 : Incomplete removal of access right to interception products***

6.19 An LEA reported an incident where the access right to the interception products in respect of an interception operation was not removed completely as required.

6.20 In an early morning, an officer was informed of the arrest of the subject of an interception operation. Pending a decision to discontinue the interception operation, the officer took action to remove the access right to the interception products concerned. However, only part of the access right was removed and part of the access right was still valid.

6.21 Subsequently, the interception operation was discontinued because of the arrest of the subject and the officer, during preparation of a record of access right, discovered that part of the access right in question had not been removed. She reported the matter to her supervisor immediately and then removed the rest of the access right.

6.22 The investigation by the LEA revealed that in the late evening of the day preceding the incident, the officer was required to rush to the office for an urgent operation. At the time when she was informed of the arrest of the subject, the officer had worked overnight for long hours. The investigation concluded that the failure to remove the access right completely was attributed to the officer's careless mistake. However,

the LEA considered that the officer's carelessness was due to a momentary lapse of concentration when she had worked overnight for the urgent operation for long hours. Taking into account this mitigating factor and the fact that the incomplete removal of access right did not result in any subsequent access to the interception products concerned, the LEA considered that for this incident it would suffice to remind the officer and all other officers who might be involved in the removal of access right to ensure that the access right was removed completely as required.

6.23 I checked the relevant ATRs, which confirmed that there was no access to the relevant interception products after the officer was informed of the arrest of the subject. Having reviewed the case, I agreed with the LEA's findings and considered the proposed action appropriate.

***Case 6.2 : Non-Reporting of an earlier call that already indicated the arrest status of the subject***

6.24 The case concerned an LPP case involving interception in 2013. When the LEA concerned detected an intercepted call indicating heightened LPP likelihood and subsequently, on the same day, found out that the subject had been arrested for an offence unrelated to the crime under investigation, it submitted an REP-11 report and a section 58 report to the panel judge.

6.25 Checking of the protected products in 2017 revealed that an earlier call indicating the arrest of the subject, which was listened to on the day preceding the day on which the Reported LPP Call was detected, was not reported to the panel judge. According to the LEA's explanation in reply to my request for explanation on the non-reporting identified, the officer concerned had noted that arrest matters were mentioned in the earlier call but since the subject and the caller bore some resemblance of voice, she misinterpreted that those matters were related to the caller instead of the subject. Hence, the call was not reported to the panel

judge. To remind the officer concerned to adopt a more vigilant approach in carrying out her duties, the LEA had given the officer a verbal advice (non-disciplinary).

6.26 In informing the LEA of the result of my review, I showed my disappointment about the lack of vigilance of the officer concerned in handling the earlier call which revealed heightened LPP likelihood. While there was only a lapse of one day between the non-reported LPP call and the Reported LPP Call, the officer concerned failed to relate the contents of the two calls. I further pointed out that had the officer been more vigilant in handling this earlier LPP call, the panel judge would have been informed of the arrest status of the subject earlier. I requested the LEA to review the action taken against the officer. In response to my views, the LEA reviewed the appropriateness of the action taken. The LEA subsequently proposed that a verbal warning be given to the officer concerned for her lack of vigilance and inadequate performance in handling the call indicating heightened LPP likelihood that should have been reported to the panel judge and mentioned in the relevant REP-11 and section 58 reports. I agreed with the LEA's review result.

***Case 6.3 : Mistake in preservation of interception products of a case randomly selected for examination of protected products***

6.27 An LEA reported to me an incident involving a mistake in arranging preservation of interception products.

6.28 For interception cases selected from the weekly reports of the LEAs and the PJO for checking of the protected products, the LEAs should arrange for preservation of the interception products that are available at the time of receipt of the notification of preservation requirement from the Secretariat.

6.29 A prescribed authorization was selected by me as a random case for checking its protected products and the LEA was informed of the

preservation requirement on a particular day. Upon receipt of the notification of my preservation requirement, the officer concerned arranged for preservation of the relevant interception products on the same day. However, she input a piece of wrong information in the system for preserving the interception products. The mistake was discovered on the following day, and consequently the interception products obtained on one day, which should have been preserved, were not retained.

6.30 The investigation by the LEA concluded that the incident was due to the genuine mistake of the officer concerned and she should be held accountable for the fault. There was no foul play or ulterior motive involved. The LEA proposed to give a verbal advice (disciplinary) to the officer concerned for her failure to preserve the interception products as requested by the Commissioner. To prevent recurrence of similar incidents, the LEA also proposed an enhancement measure to the system involved.

6.31 I have reviewed the case. There was no evidence to contradict the findings of the LEA that there was no foul play or ulterior motive involved in this incident. The proposed disciplinary action against the officer concerned and the enhancement measure on the technical side of the system were appropriate. The checking of the protected products of this case did not reveal any irregularity.

***Case 6.4 : Non-reporting of two calls with heightened LPP likelihood***

6.32 A prescribed authorization was selected on a random basis for checking its protected products. At the grant of the authorization, the identity of the subject was unknown and the interception operation was not assessed to have a likelihood of obtaining LPP information.

6.33           Checking of the protected products of this case revealed that there were two intercepted calls with information indicating heightened LPP likelihood but they were not reported to the panel judge. The LEA concerned was requested to provide explanation on the non-reporting of the two calls.

6.34           According to the LEA's explanations, the officer concerned, based on his judgements on the contents of the two calls, considered that no LPP likelihood was involved.

6.35           The LEA concluded that the non-reporting of the two calls to the panel judge was an irregularity, which was the result of a combination of a series of misjudgement by the officer concerned and his lack of alertness in carrying out intercepting duties. However, there was no foul play or ulterior motive involved in the case. The LEA proposed to give a verbal advice (disciplinary) to the officer concerned.

6.36           After reviewing the case, I considered that the non-reporting of the two calls to the panel judge was an irregularity though I shared the LEA's view that there was no foul play or ulterior motive involved. Considering the case background and the implications of not reporting the two calls as having heightened LPP likelihood to the panel judge, I requested the LEA to review the proposed disciplinary action against the officer concerned. In response to my remark, the LEA reviewed the appropriateness of the proposed disciplinary action and subsequently proposed that a verbal warning be given to the officer concerned. I agreed with the LEA's review result.

6.37           To prevent recurrence of incidents of similar kind, the LEA concerned had reminded its officers involved in interception operations to handle calls with indication of possible heightened LPP likelihood with care and professional judgement, report relevant calls to the supervisory officers and make a proper written record.



6.38 Other than the matter mentioned above, no irregularity was revealed from the checking of the protected products of this case.

***Case 6.5 : Non-reporting of an alias of the subject surfaced during interception***

6.39 The case concerned a heightened LPP likelihood case of 2017. It involved interception and an unidentified subject. Checking of the protected products revealed that an alias of the subject, which appeared in three of the reported 'other calls', was not reported as a material change in circumstances to the panel judge vide an REP-11 report.

6.40 As stipulated under paragraph 116 of the COP, if the identity of the subject of interception/surveillance or any alias that he uses which is relevant to the investigation is made known to the LEA after the authorization has been granted and the authorization or its renewal is still valid, the identity or alias of the subject should be reported to the relevant authority as a material change in circumstances under section 58A of the Ordinance as soon as practicable.

6.41 In response to my request for explanation for not reporting the alias, the LEA concerned made enquiries with the relevant officers and gave me a detailed reply. According to the LEA's reply, the alias first surfaced in a call which was intercepted earlier than the three 'other calls' mentioned above. It was brought to the attention of the supervisor of the officer who listened to the call ('Supervisor') and Supervisor also reported the matter to her senior ('Senior Supervisor'). The alias was later mentioned in the three 'other calls', which were listened to by another two officers. Supervisor and Senior Supervisor assessed that the alias was irrelevant to the investigation.

6.42 In its reply to me, the LEA considered that Senior Supervisor's assessments and decision not to report the alias to panel judge were incorrect and this was a result of misjudgement. Yet, there

was not any foul play or ulterior motive. As regards Supervisor, the LEA considered that she failed to exercise judgement independently and make suitable recommendation to Senior Supervisor when the latter erred in her decision.

6.43 The LEA proposed that Senior Supervisor and Supervisor each be given a verbal advice (disciplinary). Besides, all officers responsible for interception duties would be briefed of the correct understanding of the relevant COP provision and reminded to exercise more vigilance in performing their duties.

6.44 I have reviewed the case. Although I agreed that no foul play or ulterior motive was involved in not reporting the alias, I showed my disappointment to the LEA that officers holding supervisory positions in interception units did not have a proper understanding of the COP provision. While the omission was due to misjudgement of Senior Supervisor, I am of the view that paragraph 116 of the COP had not been complied with. Nevertheless, by virtue of sections 63(5) and 64(1) of the ICSO, the non-reporting of the alias did not affect the validity of the prescribed authorization in the case. Regarding the LEA's proposed actions, including the disciplinary actions against the two supervisors, I considered them appropriate.

***Case 6.6 : Mistake in preservation of interception products of an LPP case***

6.45 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.46 In the afternoon of a Friday, a heightened likelihood of obtaining information subject to LPP was detected from a call made to a facility ('Facility A') intercepted under a prescribed authorization. As required by the preservation requirement for LPP cases, the LEA should preserve, amongst others, the relevant interception products available at

the time of discovery of the relevant LPP call for the Commissioner's examination. In addition to the interception products obtained from Facility A, preservation of the interception products obtained from another facility ('Facility B') used by the same subject was also required. The interception of Facility B was authorized by another prescribed authorization and was discontinued in the morning of the same day when the heightened LPP likelihood was discovered because the subject had stopped using the facility.

6.47 While preservation of the interception products for Facility A was done properly, the officer concerned input a piece of wrong information in the relevant system for preservation of the interception products in respect of Facility B. The mistake was discovered by another officer on the following Monday when he was preparing an REP-11 report to be submitted to the panel judge for reporting the heightened LPP likelihood. As a result of the mistake, interception products obtained from Facility B for three days, which should have been preserved, were not retained.

6.48 The investigation by the LEA concluded that the incident was due to the genuine mistake of the officer concerned without any foul play or ulterior motive. There was no indication that the mistake was a deliberate act. In the incident report submitted to me, the LEA proposed that a verbal advice (disciplinary) be given to the officer concerned to remind her to be more vigilant in performing ICSO related duties. To prevent recurrence of similar mistakes in future, the administrative arrangement for preservation of interception products was enhanced immediately after the incident.

6.49 I noted that it was the second time during the report period that a mistake in preservation of interception products was made in the same interception unit. In response to my concern, the LEA submitted to me a further report, providing more detailed information regarding the

operation of the system for preservation of interception products and informing me of a further enhancement to the system to prevent recurrence of similar mistakes in future. As regards accountability of the mistake, apart from the disciplinary action against the officer concerned, the LEA proposed to give a verbal advice (disciplinary) to the officer who was second in command of the interception unit and also the supervisor of the officer concerned to tighten up supervision and ensure that officers responsible for preservation of protected products were vigilant enough for the duty and the arrangement for the preservation of interception products was made properly.

6.50 I have reviewed the case. There was no evidence by which I could disagree with the finding of the LEA that there was no foul play, ulterior motive or deliberate act involved in the mistake. The proposed disciplinary actions against the officer concerned and her supervisor as well as the improvement measures were appropriate.

***Case 6.7 : Reporting of arrest of the subject by a wrong prescribed form***

6.51 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.52 At the grant of the prescribed authorization concerned, the subject of the interception was an unidentified person and the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception progressed, one day, an officer of the LEA concerned listened to part of a call in which the identity of the subject was disclosed. In addition, the contents of the call indicated possible arrest of the subject. Subsequent checking by the LEA confirmed the identity of the subject and revealed two previous arrests of the subject for offences unrelated to the crime under investigation. The LEA submitted an REP-11 report to the panel judge to report the identification of the subject, the subject's previous arrests and the

heightened LPP likelihood arising from the arrests. The panel judge allowed the prescribed authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information. The interception operation was later discontinued by the LEA when the conditions for the continuance of the operation were not met.

6.53 To avoid ambiguity as to whether the reporting requirement under section 58(1) of the ICSO has been complied with, reports to the relevant authority under this section on arrest of the subject should be made through a prescribed form (i.e. REP-1 report). In this case, in reporting the identification of the subject through the REP-11 report, the officer concerned used the same report instead of an REP-1 report to notify the panel judge of the subject's previous arrests and the assessment on the LPP likelihood. The LEA notified me of the incident when reporting to me the LPP case in accordance with COP. The LEA considered that the mistake was an administrative oversight and it was made by the officer concerned unintentionally and merely due to carelessness without any foul play. The LEA proposed to issue a verbal advice (disciplinary) to the officer on her oversight. To prevent recurrence of similar mistakes in future, the LEA reminded all the officers involved in interception duties of the need to report arrest of the subject through the prescribed form.

6.54 Having reviewed the case, I agreed to the LEA's conclusion that the misuse of the REP-11 report to report the arrests of the subject was due to carelessness and oversight of the officer concerned. The LEA's proposed disciplinary action against the officer was appropriate.

***Case 6.8 : An officer's failure to report to his supervisor a call indicating heightened LPP likelihood***

6.55 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.56 At the grant of the prescribed authorization concerned, the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception progressed, one day, a supervisory officer, when performing supervisory duty, listened to part of a call and found that the call contained information which indicated heightened LPP likelihood. When checking the relevant ATR, the supervisory officer discovered that the call had also been listened to partially by another officer two days before her listening to it. In response to the supervisor's enquiry, the officer explained that he had thought that the matter mentioned in the call was not subject to LPP nor did it give rise to heightened LPP likelihood. Therefore, he did not report the call to his supervisor. A gist of the contents of the call was recorded by the officer in the transcripts.

6.57 Later on the same day of the discovery of the heightened LPP likelihood, the LEA submitted an REP-11 report and a discontinuance report to the panel judge. In the REP-11 report, the officer's failure to report the LPP call was also mentioned with the officer's explanation. The panel judge noted the REP-11 report and duly revoked the prescribed authorization concerned.

6.58 The LEA reported the irregularity to me through an incident report. The LEA considered that the non-reporting of the LPP call by the officer was a combined result of misjudgement on the part of the officer and his lack of the required alertness in performing intercepting duties. There was nothing that indicated any foul play or ulterior motive. The LEA proposed to issue a verbal advice (disciplinary) to the officer on the need to adopt a more cautious approach in dealing with all possible indication of heightened LPP likelihood. A remedial training for the understanding of the definition of LPP information and heightened LPP likelihood had been given to the officer shortly after the incident. Officers of the LEA involved in interception duties were reminded of the

need to handle calls with care and professional judgement and seek advice from their supervisors whenever there was doubt.

6.59 Having reviewed the case, I agreed that there was no foul play or ulterior motive involved in this case. The LEA's proposed disciplinary action against the officer as well as other actions mentioned above were considered appropriate.

***Case 6.9 : Non-reporting of an LPP call indicating heightened LPP likelihood***

6.60 This case concerned a fresh authorization randomly selected from the weekly reports for the examination of the protected products. Checking of its protected products revealed that information indicating heightened LPP likelihood appeared in two segments of a conversation contained in a call but the call was not reported to the panel judge as an LPP call. The two segments of the conversation or only a part of the two segments were listened to by three officers ('Officer A', 'Officer B' and 'Officer C'). The LEA concerned was requested to provide explanation on the non-reporting of the call to the panel judge.

6.61 According to the LEA's reply, Officer A, who had accessed partially one of the two segments of the conversation, considered that the information indicating heightened LPP likelihood was not relevant to the subject and the investigation. Hence, he did not regard that the call amounted to a call indicating heightened LPP likelihood. He had neither made any records in the transcripts nor reported to his supervisor about the contents of the call. As for Officer B, though he had accessed both segments, he was not aware of the information that indicated heightened LPP likelihood from the call due to the circumstances of the call. He did not record any details about the contents of the call. Officer C had accessed one of the two segments for only one second and could not make out anything from the second he accessed.

6.62 The LEA concluded that having taken into consideration the circumstances of the call, the explanations by Officer B and Officer C were plausible. As regards Officer A, he had made a less than accurate assessment in respect of likelihood of obtaining LPP information. Nevertheless, the LEA considered that there was no foul play or ulterior motive involved in the case. The LEA proposed that Officer A be reminded to exercise care and vigilance in performing intercepting duties and be provided with enhanced training and guidance in handling LPP cases.

6.63 Having regard to the circumstances of the call and other relevant factors, I accepted the LEA's conclusions and considered the proposed actions against Officer A appropriate. However, I had tendered my views to the LEA on the assessment on information indicating heightened LPP likelihood and advised the head of the LEA to provide adequate training and guidance to its officers concerned in this respect. Other than the matter mentioned above, no irregularity was revealed from the checking of the protected products of this case.

***Case 6.10 : Further mistake in preservation of interception products***

6.64 This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.65 A prescribed authorization was granted for interception of a facility ('Facility C'). As the interception progressed, one day, an officer of the LEA concerned detected that an intercepted call contained information indicating heightened LPP likelihood. The LEA submitted an REP-11 report to the panel judge to report the heightened LPP likelihood and request continuation of the prescribed authorization. The panel judge allowed the prescribed authorization to continue subject to additional conditions imposed to guard against the risk of obtaining LPP information.



6.66 As regards preservation of the relevant interception products for my review of the LPP case, in addition to the interception products obtained from Facility C, the LEA also needed to preserve the interception products obtained from another two facilities ('Facility D' and 'Facility E') used by the same subject. Interception of Facility D and Facility E was authorized by another two prescribed authorizations respectively and had already been discontinued less than a month before the discovery of the heightened LPP likelihood as the subject had stopped using those two facilities.

6.67 For Facility D, about three months before the discovery of the heightened LPP likelihood, I had selected, on a random basis, the related fresh authorization for examination of interception products. Subsequently, the authorization was renewed twice before the interception operation was discontinued. As far as preservation of the interception products in respect of a prescribed authorization selected randomly for examination was concerned, LEAs were normally required to preserve the interception products obtained during the authorized period of that particular authorization selected. Preservation of the interception products obtained under any subsequent renewal of that particular authorization was not required. For this random case, the LEA duly preserved the interception products obtained during the authorized period of the fresh authorization and my examination of the case did not reveal any irregularity. The LEA was notified of the examination result about a week after the discovery of the heightened LPP likelihood.

6.68 At the time of discovery of the heightened LPP likelihood, some of the interception products obtained from Facility D within the authorized period of the second renewal were still available and the officer concerned should have arranged for preserving them together with the interception products for Facility C and Facility E for my examination. However, the officer concerned had a misconception that

all the interception products obtained from Facility D under the fresh authorization as well as the two subsequent renewals were already preserved in connection with the random case, and therefore stated the same on the prescribed form for preservation of interception products for the LPP case. Before the required preservation was executed, the prescribed form completed by the officer concerned was required to be checked by the supervisor of the officer concerned who was also the second in command of the interception unit involved ('Senior Officer'). The Senior Officer did not detect the mistake and signed on the prescribed form. As a result, while preservation of the interception products for Facility C and Facility E was done properly, no action was taken to preserve the interception products in respect of Facility D for the LPP case. It was not until the next day when the officer concerned reviewed the interception products preserved for the LPP case that she discovered that for Facility D, only the interception products obtained under the fresh authorization was preserved. She then took action for preservation of the interception products for Facility D, but interception products obtained from Facility D on one day, which should have been preserved, were not retained. When reporting to me the LPP case in accordance with the COP, the LEA also notified me of the mistake in preservation of the interception products.

6.69 Subsequently, the LEA submitted an incident report to me, detailing the results of its investigation into the mistake and setting out its proposed disciplinary actions and improvement measures. The investigation by the LEA concluded that the mistake was due to misconception and oversight of the officer concerned and the failure of the Senior Officer to cross-check the accuracy of the information stated in the relevant prescribed form for preservation of interception products. There was no indication of any foul play or ulterior motive involved. The LEA pointed out that according to the ATRs concerned, there was no access to any interception products obtained from Facility D for the day for which preservation was missed. The officer concerned and the

Senior Officer were the same officers involved in Case 6.6 referred to in paragraphs 6.45 to 6.50 above. Given the two officers' repeated mistakes and/or negligence in connection with preservation of interception products, the LEA considered that a heavier punishment should be handed out on this occasion and casted doubt on their suitability in continuing to perform ICSO-related duties. The LEA proposed that a written admonishment and a verbal warning be given to the officer concerned and the Senior Officer respectively. The two officers were transferred out from the interception unit before my review of this case was completed. To prevent recurrence of similar mistakes in future, the LEA required an additional officer to cross-check the accuracy of the information stated in the prescribed form for preservation of interception products and to countersign on the form. In addition, preservation of all the relevant interception products should be conducted on each occasion irrespective of whether or not they had been preserved previously for other purposes.

6.70 In reviewing the case, I checked the relevant ATRs, which confirmed that there was no access to any interception products obtained from Facility D on the day preservation was missed. There was no evidence by which I could disagree with the finding of the LEA that there was no foul play or ulterior motive involved in the mistake. The proposed disciplinary actions against the officer concerned and the Senior Officer as well as the improvement measures were appropriate.

***Case 6.11 : Continuous listening to a call involving obtainment of LPP information***

6.71 This incident was related to the LPP case involving obtainment of LPP information mentioned in paragraph 4.15 of Chapter 4. After checking the protected products and relevant documents of the case, it was noted that the Reported LPP Call in which LPP information was obtained was listened to by an LEA officer in three segments. In

response to my enquiry relating to the obtainment of the LPP information, the LEA concerned submitted an investigation report.

6.72 According to the LEA's investigation report, it was the first time the officer concerned handled an LPP call when she encountered the Reported LPP Call. She believed that LPP information had been obtained in the second segment of the call. After being aware of the obtainment of the LPP information, she accidentally listened to the call for a few more seconds. While she had reported the call to her supervisor, including the LPP information in full, she had not reported the full details of the circumstances relating to her listening to the call for a few more seconds. The supervisor, who did not listen to the call, prepared the REP-11 report for submission to the panel judge based on what had been reported by the officer concerned and the relevant ATR, without providing the full details of the circumstances surrounding the listening to the LPP information.

6.73 The LEA considered that there was no foul play or ulterior motive involved in this incident. It attributed the incident to the accidental listening to the call for a few more seconds and inadequate knowledge of the details of the requirement on reporting of LPP calls of the officer concerned as well as the carelessness of the supervisor when compiling the REP-11 report. The officer concerned was recommended to be given a verbal advice (disciplinary) to advise her to stay vigilant when performing intercepting duties and be accurate in reporting LPP calls. The supervisor was proposed to be reminded to be more vigilant, cautious and sensitive when performing supervisory duties and compiling REP-11 reports. Besides, the LEA would explore enhancement to procedures to avoid recurrence of similar incidents.

6.74 I agreed that there was no foul play or ulterior motive involved in this case. The proposed actions against the two officers concerned as well as the enhancement initiative were considered

appropriate. Nevertheless, I reminded the LEA concerned that their officers responsible for ICSO duties must stay vigilant when performing their duties and be acquainted with the requirements on reporting an LPP call.

### ***Other reports***

6.75 For the other seven cases, they were reports on incidents of technical problems of the computerised systems. These cases had been reviewed and nothing untoward was found. The LEAs concerned had also taken appropriate actions to remedy the problems.

### **Examination of protected products of past cases of non-compliance, irregularity or incident**

6.76 For cases of non-compliance, irregularity or incident that did not involve the obtainment of LPP information or JM or such likelihood, depending on the nature of the cases, the Commissioner might request the LEAs to preserve the related protected products for his examination or the LEAs might preserve the related protected products of their own accord for the possible examination by the Commissioner. In the report period, I had selected four such cases involving covert surveillance for examination of the protected products, including one case reported in 2015 and three in 2016 <sup>Note 2</sup>. For all the four cases, I did not find anything that deviated from what had been reported to the relevant authority and/or the Commissioner.

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<sup>Note 2</sup> For the three cases reported in 2016, the Commissioner was informed of the preservation of protected products in the second half of 2017, i.e. after the conclusion of the review of the cases. To facilitate the Commissioner's review, LEAs were advised to inform the Commissioner of the preservation at the time of submission of the initial report of the case if they have preserved the protected products of their own accord (item (e) of Chapter 7 is relevant).

## CHAPTER 7

### RECOMMENDATIONS TO HEADS OF LAW ENFORCEMENT AGENCIES

7.1 Section 52(1) of the Ordinance provides that if the Commissioner considers that any arrangements made by any LEA should be changed to better carry out the objects of the Ordinance or the provisions of the COP, the Commissioner may make such recommendations to the head of the LEA as he thinks fit.

7.2 Through discussions with the LEAs during the visits to the LEAs, and the exchange of correspondence with them in the review of their compliance with the relevant requirements of the Ordinance, a number of recommendations were made in the report period to the LEAs to better carry out the objects of the Ordinance. The recommendations made are set out below:

*(a) Arrangements for better protection of 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, the part of the transcripts, summaries, notes, etc. containing LPP information or possible LPP information should be removed and be sealed in a separate envelope. In addition, access to the relevant transcripts, summaries, notes, etc. should be restricted to avoid any further disclosure of the LPP information or possible LPP information.

*(b) Handling of JM*

In the event that JM has been inadvertently obtained in covert operations, the LEAs should adopt the same

arrangement as for obtainment of LPP information, in which dedicated units of the LEAs should screen out JM and withhold the material from the investigators.

*(c) Stating the time of checking previous applications in application documents*

When making an application for a prescribed authorization, 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. 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.

*(d) Proper record of intercepting work*

If no record is made in the transcripts in respect of intercepting work for a certain day(s), a remark should be made in the transcripts to account for the absence of record. This will facilitate the checking of the transcripts by the Commissioner.

*(e) Notification of preservation of protected products for cases of non-compliance, irregularity or incident*

For cases of non-compliance, irregularity or incident, if the LEAs have preserved the relevant protected products of their own accord for the Commissioner's possible examination, they should inform the Commissioner of the preservation when an initial report of the case is submitted.

*(f) Detailed description of the reason and relevant circumstances for discontinuance*

Detailed description of the reason and relevant circumstances for discontinuance of a statutory activity should be given in the discontinuance report.



## **CHAPTER 8**

### **STATUTORY TABLES**

8.1 In accordance with section 49(2) of the Ordinance, this chapter provides separate statistical information in relation to the statutory activities in the report period. The information is set out in table form and comprises the following tables:

- (a) Table 1(a) – interception – number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];
- (b) Table 1(b) – surveillance – number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];
- (c) Table 2(a) – interception – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];
- (d) Table 2(b) – surveillance – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];
- (e) Table 3(a) – interception – number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)];

- (f) Table 3(b) – surveillance – number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)];
- (g) Table 4 – interception and surveillance – number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) and (ii)];
- (h) Table 5 – summary of reviews conducted by the Commissioner under section 41 [section 49(2)(d)(i)];
- (i) Table 6 – number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)];
- (j) Table 7 – number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)];
- (k) Table 8 – respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)];
- (l) Table 9 – number of cases in which a notice has been given by the Commissioner under section 48 [section 49(2)(d)(v)];
- (m) Table 10 – broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)];
- (n) Table 11 – number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]; and

- (o) Table 12 – number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such action [section 49(2)(d)(viii)].

**Table 1(a)**

**Interception - Number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]**

		<b>Judge's Authorization</b>	<b>Emergency Authorization</b>
(i)	Number of authorizations issued	661	0
	Average duration	29 days	—
(ii)	Number of authorizations renewed	642	Not applicable
	Average duration of renewals	31 days	—
(iii)	Number of authorizations issued as a result of an oral application	0	0
	Average duration	—	—
(iv)	Number of authorizations renewed as a result of an oral application	0	Not applicable
	Average duration of renewals	—	—
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	29	Not applicable
(vi)	Number of applications for the issue of authorizations refused	1	0
(vii)	Number of applications for the renewal of authorizations refused	0	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	Not applicable

**Table 1(b)**

**Surveillance – Number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]**

		<b>Judge's Authorization</b>	<b>Executive Authorization</b>	<b>Emergency Authorization</b>
(i)	Number of authorizations issued	5	2	0
	Average duration	21 days	2 days	—
(ii)	Number of authorizations renewed	3	1	Not applicable
	Average duration of renewals	26 days	7 days	—
(iii)	Number of authorizations issued as a result of an oral application	0	0	0
	Average duration	—	—	—
(iv)	Number of authorizations renewed as a result of an oral application	0	0	Not applicable
	Average duration of renewals	—	—	—
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	0	0	Not applicable
(vi)	Number of applications for the issue of authorizations refused	0	0	0
(vii)	Number of applications for the renewal of authorizations refused	0	0	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	0	Not applicable

**Table 2(a)**

**Interception – Major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)]**

<b>Offence</b>	<b>Chapter No. of Laws of Hong Kong</b>	<b>Ordinance and Section</b>
Trafficking in dangerous drug	Cap. 134	Section 4, Dangerous Drugs Ordinance
Manufacture of dangerous drug	Cap. 134	Section 6, Dangerous Drugs Ordinance
Bookmaking	Cap. 148	Section 7, Gambling Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Robbery	Cap. 210	Section 10, Theft Ordinance
Burglary	Cap. 210	Section 11, Theft Ordinance
Handling stolen property/goods	Cap. 210	Section 24, Theft Ordinance
Conspiracy to inflict grievous bodily harm/shooting with intent/wounding with intent	Cap. 212	Section 17, Offences against the Person Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance

**Table 2(b)**

**Surveillance – Major categories of offences for the investigation of  
which prescribed authorizations have been issued or renewed  
[section 49(2)(b)(i)]**

<b>Offence</b>	<b>Chapter No. of Laws of Hong Kong</b>	<b>Ordinance and Section</b>
Making false statements, forgery of documents and use and possession of forged documents	Cap. 115	Section 42, Immigration Ordinance
Trafficking in dangerous drug	Cap. 134	Section 4, Dangerous Drugs Ordinance
Offering advantage to public servant and accepting advantage by public servant	Cap. 201	Section 4, Prevention of Bribery Ordinance
Agent accepting advantage and offering advantage to agent	Cap. 201	Section 9, Prevention of Bribery Ordinance
Burglary	Cap. 210	Section 11, Theft Ordinance
Conspiracy to defraud	—	Common Law
Misconduct in public office	—	Common Law

**Table 3(a)**

**Interception – Number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]**

	Number of persons arrested <sup>Note 3</sup>		
	Subject	Non-subject	Total
Interception	85	72	157

**Table 3(b)**

**Surveillance – Number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]**

	Number of persons arrested <sup>Note 4</sup>		
	Subject	Non-subject	Total
Surveillance	11	15	26

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Note 3 Of the 157 persons arrested, 13 were attributable to both interception and surveillance operations that had been carried out.

Note 4 Of the 26 persons arrested, 13 were attributable to both interception and surveillance operations that had been carried out. The total number of persons arrested under all statutory activities was in fact 170.



**Table 4**

**Interception and surveillance – Number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) & (ii)]**

(i)	Number of device retrieval warrants issued	0
	Average duration	—
(ii)	Number of applications for device retrieval warrants refused	0

**Table 5**

**Summary of reviews conducted by the Commissioner under section 41  
[section 49(2)(d)(i)]**

**Section 41(1)**

Reviews on compliance by departments and their officers with relevant requirements, as the Commissioner considers necessary

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
(a) Regular reviews on weekly reports	212	Interception & Surveillance	LEAs are required to submit weekly reports to the Secretariat providing relevant information on authorizations obtained, applications refused and operations discontinued in the preceding week, for checking and review purposes. During the report period, a total of 212 weekly reports were submitted by the LEAs.
(b) Periodical visits to LEAs	26	Interception & Surveillance	In addition to the checking of weekly reports, 26 visits had been made to LEAs during the report period for detailed checking of the application files of doubtful cases as identified from the weekly reports. Moreover, random inspection of other cases and checking of surveillance devices would also be made during the visits. Whenever he considered necessary, the Commissioner would seek clarification or explanation from LEAs directly. From the said visits, a total of 622 applications and 366 related documents/matters had been checked.  (See paragraph 2.23 of Chapter 2 and paragraphs 3.22 and 3.23 of Chapter 3.)
(c) Examination of protected products at the LEAs' offices	49	Interception & Surveillance	With the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016, the Commissioner

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>and his delegated officers have the express power to examine the protected products. In 2017, 49 visits had been made to LEAs for the examination of protected products. Specific cases such as LPP and JM cases reported by the LEAs, interception products of 316 selected authorizations and surveillance products of two selected authorizations had been examined.</p> <p>(See paragraph 2.26 of Chapter 2 and paragraph 3.29 of Chapter 3.)</p>
(d) LPP cases reviewed by the Commissioner	87	Interception	<p><u>Outstanding LPP case in 2016</u> This case was brought forward from paragraphs 4.18 and 4.19 of Annual Report 2016. The review of this case had been completed and details of which are provided in Outstanding case (ii) of Chapter 6.</p> <p>(See paragraph 4.7 of Chapter 4 and item (g) below.)</p>
		Interception	<p><u>First case of obtaining of LPP information</u> One day, an officer of the LEA concerned listened to part of a call and found that the call contained LPP information. The LEA submitted an REP-11 report and a discontinuance report to the panel judge who duly revoked the authorization.</p> <p>The case had been reviewed and no irregularity was found.</p> <p>(See paragraphs 4.12 and 4.22 of Chapter 4.)</p>
		Interception	<p><u>Second case of obtaining of LPP information</u> One day, an officer of the LEA concerned listened to part of a call</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>and found that the call contained LPP information. The LEA submitted an REP-11 report to the panel judge who allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information. The interception operation was later discontinued by the LEA when the conditions for the continuance of the operation were not met.</p> <p>The case had been reviewed and no irregularity was found.</p> <p>(See paragraphs 4.13 and 4.22 of Chapter 4.)</p>
	Interception	<p><u>Third case of obtaining of LPP information</u></p> <p>One day, an officer of the LEA concerned, when performing supervisory duty, listened to part of a call and found that the call contained LPP information. The LEA submitted an REP-11 report and a discontinuance report to the panel judge who duly revoked the authorization. In the REP-11 report, the LEA also reported that before the officer's detection of the obtainment of LPP information, the Reported LPP Call was partially listened to by another officer when performing intercepting duties in the same operation. However, the part of the call this another officer listened to did not contain LPP information or indicate likelihood of obtaining LPP information.</p> <p>The case had been reviewed and no irregularity was found.</p> <p>(See paragraphs 4.14 and 4.22 of Chapter 4.)</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p><u>Fourth case of obtaining of LPP information</u></p> <p>An officer found that LPP information was contained in a call she partially listened to. The LEA submitted an REP-11 report and a discontinuance report to the panel judge who duly revoked the authorization.</p> <p>This LPP case involved an incident as mentioned in Case 6.11 of Chapter 6.</p> <p>(See paragraphs 4.15 and 4.22 of Chapter 4.)</p>
	Interception	<p><u>Fifth case of obtaining of LPP information</u></p> <p>A prescribed authorization was issued for interception of a facility used by the subject. One day, an officer of the LEA concerned listened to part of a call and found that LPP information was contained in the call. The LEA submitted an REP-11 report to the panel judge, who allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information further. Subsequently, another prescribed authorization was also issued for interception of another facility used by the same subject. Some time after the discovery of the obtainment of LPP information mentioned above, the LEA submitted REP-11 reports to the panel judge to report further heightened LPP likelihood as detected in another call. The panel judge allowed the authorizations to continue with additional conditions imposed. The interception of the two facilities used by the subject was later discontinued by the LEA when the conditions for continuance of the operation were not met.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>The case had been reviewed and no irregularity was found.</p> <p>(See paragraphs 4.16 and 4.22 of Chapter 4.)</p>
	Interception	<p><u>Sixth case of obtaining of LPP information</u></p> <p>One day, an officer of the LEA concerned listened to part of a call and found that the call contained LPP information. The LEA submitted an REP-11 report and a discontinuance report to the panel judge who duly revoked the authorization.</p> <p>In the REP-11 report, the LEA also reported three aliases of the subject whose identity was unknown at the time of application for the prescribed authorization. The Commissioner noted that the first two aliases were detected by the LEA more than one week before the submission of the REP-11 report. In this connection, the Commissioner reminded the LEA that new information on the identity of the subject uncovered during operation should be reported to the panel judge as a material change in circumstances as soon as practicable.</p> <p>No irregularity was found in this case.</p> <p>(See paragraphs 4.17, 4.18 and 4.22 of Chapter 4.)</p>
	Interception	<p><u>Seventh case of obtaining of LPP information</u></p> <p>Two prescribed authorizations for interception, each for one facility used by the subject, were issued. One day, an officer of the LEA concerned listened to part of a call and found that the call contained information subject to LPP. The</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>LEA submitted to the panel judge REP-11 reports and discontinuance reports. The two prescribed authorizations had already expired by the time the panel judge received the discontinuance reports and thus the panel judge noted the discontinuance reported.</p> <p>Before the listening to the Reported LPP Call by the LEA officer, a renewal of the two prescribed authorizations had been granted. Thus, a discontinuance report in relation to the renewal was submitted concurrently with the REP-11 reports and discontinuance reports mentioned above. The panel judge duly revoked the renewed authorization upon receipt of the discontinuance report.</p> <p>The case had been reviewed and no irregularity was found.</p> <p>(See paragraphs 4.19 to 4.22 of Chapter 4.)</p>
	Interception	<p><u>First case of suspected/possible obtaining of LPP information</u></p> <p>On the second day after the commencement of the interception operation, the LEA encountered a call which indicated heightened LPP likelihood. The panel judge, having considered the REP-11 report concerned, allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.</p> <p>On one occasion, an LEA officer listened to an intercepted call and the end of the part of this LPP call that the LEA officer listened to contained LPP information. The LEA assessed that LPP information</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>might have been obtained and it reported the suspected obtainment of LPP information to the panel judge by way of an REP-11 report. The panel judge allowed the prescribed authorization to continue subject to revised additional conditions. The interception operation was later discontinued by the LEA and the Commissioner, after reviewing the case, concluded that the record of the contents of the LPP call stated in the REP-11 report was correct and LPP information was inadvertently obtained. No irregularity was found in this case.</p> <p>When reporting to the panel judge and the Commissioner on the suspected obtainment of LPP information, the LEA has adopted the arrangement that the possible LPP information was detailed in an annex to the REP-11 report/notification and the annex was placed in a separate sealed envelope for opening by the relevant authority and the Commissioner personally.</p> <p>To provide further protection of LPP information and to ensure that the number of persons to whom LPP information will be disclosed is limited to the minimum, the Commissioner recommended to the LEAs that the part of the transcripts, summaries, notes, etc. containing the LPP information or possible LPP information should be removed and be sealed in a separate envelope and access to the relevant materials mentioned should be restricted.</p> <p>(See paragraphs 4.23 to 4.27 of Chapter 4.)</p>



Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p><u>Second case of suspected/possible obtaining of LPP information</u>  Subsequent to a report of heightened LPP likelihood arising from a call, an officer listened to part of another call and formed the view that possible LPP information was contained in this call. The LEA submitted an REP-11 report to the panel judge with the contents of the possible LPP information detailed separately in an annex to the REP-11 report, and sought approval to continue with the prescribed authorization. The panel judge allowed the prescribed authorization to continue.</p> <p>The Commissioner reviewed the case and did not find any irregularity. As regards the Reported LPP Call which involved possible LPP information, the Commissioner considered that the information concerned was not LPP information. Nonetheless, the Commissioner appreciated that the LEA had erred on the side of caution in handling information which might be subject to LPP.</p> <p>(See paragraphs 4.28 and 4.29 of Chapter 4.)</p>
	Interception	<p><u>One case of heightened LPP likelihood</u>  About ten days after the commencement of the interception operation, the LEA concerned encountered a call which indicated heightened LPP likelihood. The panel judge, having considered the REP-11 report concerned, allowed the prescribed authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.</p> <p>The interception operation</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>progressed and lasted for some time, during which the LEA concerned had discovered further heightened LPP likelihood on a total of ten occasions. On the tenth occasion, upon considering the relevant REP-11 report, the panel judge revoked the prescribed authorization, despite the LEA's request for continuation of the authorization, as the heightened risks of obtaining LPP information were disproportionate to the benefit of pursuing the interception.</p> <p>After revocation of the prescribed authorization by the panel judge, the LEA took immediate action to cause the interception concerned to be discontinued as soon as reasonably practicable in accordance with paragraphs 172 to 174 of the COP. The Commissioner reviewed the case and found that the time of discontinuance of the interception was well within the benchmark timeframe of 60 minutes counting from the time of revocation.</p> <p>This LPP case was also related to Case 4.1 of Chapter 4.</p> <p>(See paragraphs 4.31 to 4.33 of Chapter 4.)</p>
	Interception	<p><u>Case 4.1</u> Regarding one of the LPP calls reported to the panel judge, the called party mentioned the time at which he would attend a meeting. However, the time reported in the relevant REP-11 report was different from that revealed in the protected product.</p> <p>The LEA's reply to the Commissioner's request for explanation for the discrepancy reflected a 'couldn't-care-less'</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>attitude of the officer concerned. The Commissioner wrote to the LEA stating his view that the reply was undesirable and pointing out that what was stated in an REP-11 report as to what was said in an intercepted call was expected to be with the utmost accuracy.</p> <p>In its further reply to the Commissioner, the LEA explained that due to the circumstances of the call, the officer concerned misunderstood the contents of the conversation in the call and thus reported it inaccurately in the REP-11 report. Besides, the LEA had taken heed of the advice of the Commissioner on reporting of contents of calls and reminded its officers responsible for interception duties of his advice.</p> <p>The Commissioner accepted the explanation provided by the LEA and considered that the mistake was relatively minor and should not affect the panel judge's decision on the REP-11 report.</p> <p>This is the one case of heightened LPP likelihood referred to above.</p> <p>(See paragraphs 4.34 to 4.37 of Chapter 4.)</p>
	Interception	<p><u>Case 4.2</u></p> <p>To address the panel judge's comments made on an REP-11 report relating to an intercepted call that was initially considered to have heightened LPP likelihood, the LEA concerned submitted a further report to the panel judge. The contents of the call were elaborated in the further report. The panel judge noted the further report and allowed the authorization to</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>continue. Checking of the protected products revealed that there was a discrepancy in respect of the contents of the conversation between the subject and the caller. The officer concerned explained that she failed to pick up some contents of the conversation due to the circumstances of the call.</p> <p>In another REP-11 report of the same LPP case submitted to the panel judge, the contents of three 'other calls' were also provided. After checking the protected products, it was found that utterances indicating heightened LPP likelihood appeared in one of the 'other calls'. The LEA explained that the same officer concerned failed to pick up the full conversation in the call and she jotted down her understanding of the contents of the call.</p> <p>The Commissioner considered the performance of the LEA officer concerned in her intercepting duties neither satisfactory nor professional. The LEA proposed and the Commissioner considered it appropriate that the officer concerned be given two verbal advices (non-disciplinary).</p> <p>Notwithstanding the discrepancies, the Commissioner opined that there was no material impact on the validity of the prescribed authorizations concerned.</p> <p>(See paragraphs 4.38 to 4.41 of Chapter 4.)</p>
	Interception (75 reviews)	<p><u>Other cases of heightened/assessed LPP likelihood</u></p> <p>All the relevant documents and records were checked and the</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>protected products were examined. Except for the five cases of heightened LPP likelihood mentioned in Cases 6.5, 6.6, 6.7, 6.8 and 6.10 of Chapter 6 respectively, nothing untoward was found.</p> <p>(See paragraph 4.30 of Chapter 4.)</p>
(e) JM cases reviewed by the Commissioner	3	Interception	<p><u>One case of obtaining JM</u> This case involved two prescribed authorizations for interception of a total of three facilities used by a subject. As the interception progressed, an officer of the LEA concerned listened to part of a call and found that the call contained information which might be the contents of JM. The LEA submitted REP-11 reports to the panel judge who allowed the prescribed authorizations to continue with additional conditions imposed to guard against the risk of obtaining information which might be the contents of any JM. The interception operation was later discontinued by the LEA when the conditions for the continuance of the operation were not met.</p> <p>The Commissioner reviewed the case and did not find any irregularity.</p> <p>(See paragraphs 4.45 to 4.47 of Chapter 4.)</p>
		Interception (2 reviews)	<p><u>Two cases of heightened JM likelihood</u> The relevant documents and records of the two heightened JM likelihood cases were checked and no irregularity was found. The protected products were also checked and nothing untoward was found.</p> <p>(See paragraphs 4.48 and 4.49 of Chapter 4.)</p>

<b>Number of reviews conducted under section 41(1)</b>		<b>Interception/ Surveillance</b>	<b>Summary of reviews</b>
(f) Examination of protected products of past LPP/JM cases that were reported before 2016	81	Interception (2 reviews)	<p><u>Two outstanding past cases in Annual Report 2016</u> Review of the two past LPP cases mentioned in paragraphs 4.35 and 4.37 of Annual Report 2016 had been completed and the results are reported in Outstanding cases (iii) and (iv) of Chapter 6.</p> <p>(See paragraph 4.50 of Chapter 4 and item (g) below.)</p>
		Interception	<p><u>One past case</u> This case related to a case with heightened LPP likelihood in 2014. It was noticed from the protected products that, prior to a Reported LPP Call, there was also a call containing some information which indicated heightened LPP likelihood but this call was not reported to the panel judge.</p> <p>The LEA replied that the officer concerned was unaware of the heightened LPP likelihood. The Commissioner accepted the explanation provided by the LEA.</p> <p>(See paragraphs 4.51 to 4.53 of Chapter 4.)</p>
		Interception (2 reviews)	<p><u>Two past cases</u> These two past cases related to two cases of interception operations with heightened LPP likelihood reported in 2011 and 2013 respectively. Checking of the protected products of the cases revealed that for each case, there were two calls with information indicating possible heightened LPP likelihood but they were not reported to the panel judge.</p> <p>For each case, the LEA concerned was required to provide clarification on the non-reporting of the calls.</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>According to the replies, the two officers concerned had left the service and no record on the contents of the calls in question was documented. Other than the matter mentioned, the Commissioner did not find anything untoward. Having taken into consideration the relevant factors, the Commissioner concluded the reviews pertaining to the two cases with no further investigation.</p> <p>(See paragraph 4.54 of Chapter 4.)</p>
		Interception & Surveillance (76 reviews)	<p><u>Other past cases</u> An LEA was required to provide explanation for one past case with preserved protected products checked in the report period. The case is detailed in Case 6.2 of Chapter 6.</p> <p>The preserved protected products for the remaining 75 cases were checked and nothing untoward was found.</p> <p>(See paragraph 4.50 of Chapter 4.)</p>
(g) Non-compliance/ irregularities/ incidents reviewed by the Commissioner	21	Interception	<p><u>Outstanding case (ii)</u> Checking of the protected products in respect of an LPP case involving interception in 2016 revealed that three calls between the subject's telephone number and another telephone number of the other party involved in the Reported LPP Call contained some information indicating heightened LPP likelihood but the calls were not so regarded in the relevant REP-11 report.</p> <p>For two of the calls, the LEA explained that the utterances indicating heightened LPP likelihood were made at the junctures the officers concerned paused the</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>listening. The non-detection of the heightened LPP likelihood in the third call was due to the circumstances of the call.</p> <p>The LEA concluded that there was no evidence of any deliberate neglect or any sinister motive on the part of the officers concerned. The LEA had also made enhancement to the reporting and assessment mechanism relating to communications with indication of possible heightened LPP likelihood.</p> <p>The Commissioner considered the LEA's explanations acceptable having regard to the actual circumstances when the calls concerned were listened to and the findings of his checking of the relevant ATRs. Nonetheless, the LEA officers were reminded that they should be more vigilant in performing intercepting duties.</p> <p>(See paragraphs 6.7 to 6.10 of Chapter 6.)</p>
	Interception	<p><u>Outstanding case (iii)</u></p> <p>The case concerned an LPP case involving interception in 2012 and the checking of its protected products in 2016 revealed a discrepancy relating to the time of interception of an LPP call reported in the relevant REP-11 report submitted to the panel judge.</p> <p>The LEA explained to the Commissioner that the actual LPP call that contained the information reported in the REP-11 report should be another call, which was accessed to immediately prior to the Reported LPP Call.</p> <p>Subsequent checking of the data of the case by the Commissioner</p>



Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>confirmed that the actual LPP call had been listened to only by the officer concerned and none of the 'other calls' relating to the actual LPP call had been listened to under the prescribed authorization.</p> <p>The LEA opined that the mistake made in the REP-11 report was due to the lack of sensitivity and vigilance of the officer concerned in the reporting of an LPP call. The LEA did not consider that there was any ulterior motive of the officer. The LEA proposed that the officer be issued a verbal warning.</p> <p>The Commissioner agreed to the LEA's assessment and conclusion. The LEA's proposed disciplinary action was considered appropriate.</p> <p>(See paragraphs 6.11 to 6.13 of Chapter 6.)</p>
	Interception	<p><u>Outstanding case (iv)</u></p> <p>In an LPP case involving interception in 2014, a call with information indicating heightened LPP likelihood was not reported to the panel judge.</p> <p>The LEA explained to the Commissioner that the officer concerned had misinterpreted the conversation due to the circumstances of the call. The officer concerned recalled that she had reported the call to her supervisor as the call might affect the assessment on likelihood of obtaining LPP information. However, her supervisor could not recall if the officer had done so. There was no record about the contents of the call in question nor the reporting of the call to the supervisor. The LEA also indicated</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>that the officer concerned and her supervisor both considered that, based on their hitherto understanding of what circumstances amounted to heightened LPP likelihood, heightened LPP likelihood did not arise from the contents of the call.</p> <p>The LEA concluded that there was no evidence of any deliberate neglect or any sinister motive on the part of the officer concerned and her supervisor in not reporting the call as an LPP call. Nevertheless, the LEA has implemented a new measure since January 2017 to enhance the reporting and assessment mechanism regarding communications with contents that may indicate heightened LPP likelihood.</p> <p>The Commissioner agreed to the LEA's conclusion as he could neither find any evidence of deliberate neglect or sinister motive of the two officers concerned. However, the Commissioner had indicated to the LEA that he did not consider its reporting and assessment on calls with information indicating heightened LPP likelihood as well as the related recording arrangement desirable. Yet, the LEA's initiative in implementing the enhancement measure was considered appropriate.</p> <p>(See paragraphs 6.14 to 6.17 of Chapter 6.)</p>
	Interception	<p><u>Case 6.1</u> An LEA reported an incident where an officer concerned removed only part of the access right to the interception products after being informed of the arrest of the subject.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>The interception operation was subsequently discontinued and the officer, during preparation of a record of access right, discovered that part of the access right in question had not been removed. She reported the matter to her supervisor immediately and then removed the rest of the access right. The incomplete removal of access right did not result in any subsequent access to the interception products concerned.</p> <p>The LEA's investigation revealed that in the late evening of the day preceding the incident, the officer was required to rush to the office for an urgent operation and when she was informed of the arrest of the subject, she had worked overnight for long hours.</p> <p>The investigation concluded that the failure to remove the access right completely was attributed to the officer's careless mistake. However, the LEA considered that the officer's carelessness was due to a momentary lapse of concentration.</p> <p>As agreed by the Commissioner, the LEA reminded the officer and all other officers who might be involved in the removal of access right to ensure that the access right was removed completely as required.</p> <p>(See paragraphs 6.19 to 6.23 of Chapter 6.)</p>
	Interception	<p><u>Case 6.2</u></p> <p>The LEA concerned detected an intercepted call indicating heightened LPP likelihood and subsequently, on the same day, found out that the subject had been arrested for an offence unrelated to</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>the crime under investigation. The LEA submitted an REP-11 report and a section 58 report to the panel judge.</p> <p>Checking of protected products revealed that there was an earlier call indicating the arrest of the subject and it was listened to by an officer of the LEA on the day preceding the day on which the Reported LPP Call was detected. However, that earlier call was not reported to the panel judge.</p> <p>As stated in the LEA's explanation, the officer concerned had noted that arrest matters were mentioned in the earlier call but since the subject and the caller bore some resemblance of voice, she misinterpreted that those matters were related to the caller instead of the subject. The LEA gave the officer concerned a verbal advice (non-disciplinary) to remind her to adopt a more vigilant approach in carrying out her duties.</p> <p>The Commissioner showed his disappointment about the lack of vigilance of the officer concerned in handling the earlier call which revealed heightened LPP likelihood. The Commissioner further pointed out that had the officer been more vigilant in handling this earlier LPP call, the panel judge would have been informed of the arrest status of the subject earlier. The Commissioner requested the LEA to review the action taken against the officer. The LEA reviewed the appropriateness of the action taken and proposed that a verbal warning be given to the officer concerned. The Commissioner agreed with the LEA's review result.</p> <p>(See paragraphs 6.24 to 6.26 of Chapter 6.)</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p><u>Case 6.3</u></p> <p>An LEA reported to the Commissioner an incident involving a mistake in arranging preservation of interception products. The mistake was due to the input of wrong information in the system for preserving the interception products, and consequently interception products obtained on one day had not been preserved.</p> <p>The LEA concluded that the incident was due to the genuine mistake of the officer concerned and there was no foul play or ulterior motive involved. The LEA proposed to give a verbal advice (disciplinary) to the officer concerned. The LEA also proposed an enhancement measure to the system involved.</p> <p>The Commissioner found no evidence to contradict the findings of the LEA and considered the proposed disciplinary action against the officer concerned and the enhancement measure appropriate.</p> <p>(See paragraphs 6.27 to 6.31 of Chapter 6.)</p>
	Interception	<p><u>Case 6.4</u></p> <p>Checking of the protected products of a prescribed authorization revealed that there were two intercepted calls with information indicating heightened LPP likelihood but they were not reported to the panel judge.</p> <p>According to the LEA's explanations, the officer concerned, based on his judgements on the contents of the two calls, considered that no LPP likelihood was involved.</p> <p>The LEA concluded that the non-reporting of the two calls to the</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>panel judge was an irregularity, which was the result of a combination of a series of misjudgement by the officer concerned and his lack of alertness in carrying out intercepting duties. However, there was no foul play or ulterior motive. The LEA proposed to give a verbal advice (disciplinary) to the officer concerned.</p> <p>The Commissioner considered that an irregularity was involved. Considering the case background and the implications of not reporting the two calls as having heightened LPP likelihood to the panel judge, the Commissioner requested the LEA to review the proposed disciplinary action against the officer concerned. After review, the LEA proposed that a verbal warning be given to the officer concerned. The Commissioner agreed with the LEA's review result.</p> <p>The LEA concerned had also reminded its officers involved in interception operations to handle calls with indication of possible heightened LPP likelihood with care and professional judgement, report relevant calls to the supervisory officers and make a proper written record.</p> <p>(See paragraphs 6.32 to 6.38 of Chapter 6.)</p>
	Interception	<p><u>Case 6.5</u> In checking the protected products of a heightened LPP likelihood case which involved an unidentified subject, it was found that an alias of the subject appeared in three of the reported 'other calls' but it was not reported as a material change in circumstances to the panel judge.</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>The LEA explained that the alias first surfaced in a call which was intercepted earlier than the three reported 'other calls' and it was brought to the attention of the supervisor of the officer who listened to the call ('Supervisor') and Supervisor also reported the matter to her senior ('Senior Supervisor'). The alias was later mentioned in the three 'other calls' which were listened by another two officers. Supervisor and Senior Supervisor assessed that the alias was irrelevant to the investigation.</p> <p>The LEA regarded that Senior Supervisor's assessments and decision not to report the alias to panel judge were incorrect and this was a result of misjudgement. As regards Supervisor, the LEA considered that she failed to exercise judgement independently and make suitable recommendation to Senior Supervisor when the latter erred in her decision.</p> <p>The LEA proposed that Senior Supervisor and Supervisor each be given a verbal advice (disciplinary). Besides, all officers responsible for interception duties would be briefed of the correct understanding of the relevant COP provision and reminded to exercise more vigilance in performing their duties.</p> <p>The Commissioner is of the view that paragraph 116 of the COP had not been complied with. Nevertheless, by virtue of sections 63(5) and 64(1) of the ICSO, the non-reporting of the alias did not affect the validity of the relevant prescribed authorization. The Commissioner also showed his disappointment to the LEA that officers holding supervisory</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>positions in interception units did not have a proper understanding of the COP provision. Regarding the LEA's proposed actions, including the disciplinary actions against the two supervisors, the Commissioner considered them appropriate.</p> <p>(See paragraphs 6.39 to 6.44 of Chapter 6.)</p>
	Interception	<p><u>Case 6.6</u></p> <p>According to the preservation requirement for LPP cases, interception products of two facilities relating to the subject ('Facility A' and 'Facility B') available at the time of discovery of the Reported LPP Call should be preserved for the Commissioner's examination. While preservation of the interception products for Facility A was done properly, the officer concerned input a piece of wrong information in the relevant system for preservation of the interception products in respect of Facility B. As a result of the mistake, interception products obtained from Facility B for three days were not retained.</p> <p>The LEA proposed that a verbal advice (disciplinary) be given to the officer concerned. In addition, administrative arrangement for preservation of interception products was enhanced immediately after the incident.</p> <p>The Commissioner noted that it was the second time during the report period that a mistake in preservation of interception products was made in the same interception unit. In response to the concern of the Commissioner, the LEA submitted a further report to provide more</p>



Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>detailed information regarding the operation of the system for preservation of interception products and inform the Commissioner of a further enhancement to the system to prevent recurrence of similar mistakes. As regards accountability of the mistake, apart from the disciplinary action against the officer concerned, the LEA proposed to give a verbal advice (disciplinary) to the officer who was second in command of the interception unit and also the supervisor of the officer concerned.</p> <p>The Commissioner agreed that there was no foul play, ulterior motive or deliberate act involved in the mistake. The Commissioner also considered that the proposed disciplinary actions as well as the improvement measures appropriate.</p> <p>(See paragraphs 6.45 to 6.50 of Chapter 6.)</p>
	Interception	<p><u>Case 6.7</u>  One day, an officer of the LEA concerned listened to part of a call which disclosed the subject's identity and indicated possible arrest of the subject. Subsequent checking by the LEA revealed two previous arrests of the subject. The LEA submitted an REP-11 report to the panel judge to report the identification of the subject, the subject's previous arrests and the heightened LPP likelihood arising from the arrests.</p> <p>Reports to the relevant authority on arrest of the subject should be made through a prescribed form (i.e. REP-1 report). However, the officer concerned used an REP-11 report instead of an REP-1 report to notify</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>the panel judge of the subject's previous arrests and the LPP assessment. The LEA notified the Commissioner of the incident and considered that the mistake was an administrative oversight and it was made by the officer concerned unintentionally and merely due to carelessness without any foul play. To prevent recurrence of similar mistakes in future, the LEA reminded all the officers involved in interception duties of the need to report arrest of the subject through the prescribed form.</p> <p>The Commissioner agreed to the LEA's conclusion and considered the disciplinary action against the officer as proposed by the LEA (i.e. verbal advice (disciplinary)) appropriate.</p> <p>(See paragraphs 6.51 to 6.54 of Chapter 6.)</p>
	Interception	<p><u>Case 6.8</u> One day, a supervisory officer, when performing supervisory duty, listened to part of a call and found that the call contained information which indicated heightened LPP likelihood. The supervisory officer checked the ATR and discovered that the call had also been listened to partially by another officer two days before her listening to it. The officer explained that he had thought that the matter mentioned in the call was not subject to LPP nor did it give rise to heightened LPP likelihood. Therefore, he did not report the call to his supervisor.</p> <p>The LEA reported the irregularity to the Commissioner through an incident report. The LEA considered that the non-reporting of the LPP call by the officer was a</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>combined result of misjudgement on the part of the officer and his lack of the required alertness in performing intercepting duties. A remedial training for the understanding of the definition of LPP information and heightened LPP likelihood had been given to the officer shortly after the incident. Officers of the LEA involved in interception duties were reminded of the need to handle calls with care and professional judgement and seek advice from their supervisors whenever there was doubt.</p> <p>The Commissioner agreed to the LEA's assessment that there was no foul play or ulterior motive involved in this case. The LEA's proposed disciplinary action against the officer (i.e. verbal advice (disciplinary)) and other remedial actions taken by the LEA were considered appropriate.</p> <p>(See paragraphs 6.55 to 6.59 of Chapter 6.)</p>
	Interception	<p><u>Case 6.9</u></p> <p>Checking of protected products of an authorization revealed that information indicating heightened LPP likelihood appeared in two segments of a conversation contained in a call but the call was not reported to the panel judge as an LPP call. The two segments of the conversation or a part of the two segments were listened to by three officers ('Officer A', 'Officer B' and 'Officer C').</p> <p>The LEA explained to the Commissioner that Officer A did not regard that the call amounted to heightened LPP likelihood as he considered that the information indicating heightened LPP likelihood</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>was not relevant to the subject and the investigation. He had neither made any records in the transcripts nor reported to his supervisor about the contents of the call. As for Officer B, he was not aware of the information that indicated heightened LPP likelihood due to the circumstances of the call. He did not record any details about the contents of the call. Officer C had accessed one of the two segments for only one second and could not make out anything from the second he accessed.</p> <p>The LEA considered the explanations by Officer B and Officer C plausible. Officer A had made a less than accurate assessment in respect of likelihood of obtaining LPP information. Nevertheless, the LEA considered that there was no foul play or ulterior motive involved in the case.</p> <p>The Commissioner accepted the LEA's conclusions and considered the proposed actions against Officer A (i.e. reminder on exercising care and vigilance and provision of enhanced training and guidance) appropriate. However, the Commissioner had tendered his views to the LEA on the assessment on information indicating heightened LPP likelihood and advised the head of the LEA to provide adequate training and guidance to its officers concerned in this respect.</p> <p>(See paragraphs 6.60 to 6.63 of Chapter 6.)</p>
	Interception	<p><u>Case 6.10</u> A prescribed authorization was granted for interception of a facility ('Facility C'). One day, an officer of</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>the LEA concerned detected heightened LPP likelihood in a call. The LEA submitted an REP-11 report to the panel judge and the panel judge allowed the authorization to continue.</p> <p>In addition to the interception products obtained from Facility C, the LEA was also required to preserve the interception products obtained from another two facilities ('Facility D' and 'Facility E') used by the same subject. For Facility D, the Commissioner had selected earlier on a random basis the related fresh authorization for examination of interception products.</p> <p>At the time of discovery of the heightened LPP likelihood, some of the interception products obtained from Facility D within the authorized period of the second renewal were still available and the officer concerned should have arranged for preserving them together with the interception products for Facility C and Facility E. However, the officer concerned had a misconception that all the interception products obtained from Facility D under the fresh authorization as well as the two subsequent renewals were already preserved in connection with the random case, and therefore stated the same on the prescribed form for preservation of interception products for the LPP case. Before the required preservation was executed, the prescribed form was required to be checked by the supervisor of the officer concerned who was also the second in command of the interception unit ('Senior Officer'). The Senior Officer did not detect the mistake and signed on the prescribed form. As a result,</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>while preservation of the interception products for Facility C and Facility E was done properly, no action was taken to preserve the interception products in respect of Facility D. It was not until the next day when the officer concerned reviewed the interception products preserved for the LPP case she discovered that for Facility D, only the interception products obtained under the fresh authorization was preserved. She then took action for preservation of the interception products for Facility D, but interception products obtained on one day were not retained.</p> <p>In the incident report on the mistake submitted to the Commissioner, the LEA concluded that the mistake was due to misconception and oversight of the officer concerned and the failure of the Senior Officer to cross-check the accuracy of the information stated in the relevant prescribed form. The officer concerned and the Senior Officer were the same officers involved in Case 6.6 of Chapter 6. Given the two officers' repeated mistakes and/or negligence in connection with preservation of interception products, the LEA considered that a heavier punishment should be handed out on this occasion. The LEA proposed that a written admonishment and a verbal warning be given to the officer concerned and the Senior Officer respectively. The LEA also required an additional officer to cross-check the accuracy of the information stated in the prescribed form for preservation of interception products and to countersign on the form. In addition, preservation of all the relevant interception products</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>should be conducted on each occasion irrespective of whether or not they had been preserved previously for other purposes.</p> <p>The Commissioner checked the relevant ATRs and confirmed that there was no access to any interception products obtained from Facility D on the day preservation was missed. There was no evidence by which the Commissioner could disagree with the LEA's finding that there was no foul play or ulterior motive involved in the mistake. The proposed disciplinary actions against the officer concerned and the Senior Officer as well as the improvement measures were appropriate.</p> <p>(See paragraphs 6.64 to 6.70 of Chapter 6.)</p>
	Interception	<p><u>Case 6.11</u></p> <p>This incident was related to the LPP case mentioned in paragraph 4.15 of Chapter 4. The Commissioner made an enquiry about the listening to the Reported LPP Call in which LPP information was obtained (the call was listened to in three segments).</p> <p>The LEA explained that the officer concerned believed that LPP information had been obtained in the second segment of the call . After being aware of the obtainment of LPP information, she accidentally listened to the call for a few more seconds. While she had reported the call to her supervisor, including the LPP information in full, she had not reported the full details of the circumstances relating to her listening to the call for a few more seconds. The supervisor, who did not listen to the call, prepared the REP-11 report for submission to the</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>panel judge based on what had been reported by the officer concerned and the relevant ATR, without providing the full details of the circumstances surrounding the listening to the LPP information.</p> <p>The LEA attributed the incident to the accidental listening to the call for a few more seconds and inadequate knowledge of the details of the requirement on reporting of LPP calls of the officer concerned as well as the carelessness of the supervisor when compiling the REP-11 report. The LEA would explore enhancement to procedures to avoid recurrence of similar incidents.</p> <p>The Commissioner agreed to the LEA's assessment that there was no foul play or ulterior motive involved in this case. The proposed actions against the two officers concerned (i.e. issuing a verbal advice (disciplinary) to the officer and reminding the supervisor to be more vigilant) and the enhancement initiative were considered appropriate. Nevertheless, The Commissioner reminded the LEA concerned that their officers responsible for ICSO duties must stay vigilant when performing their duties and be acquainted with the requirements on reporting an LPP call.</p> <p>(See paragraphs 6.71 to 6.74 of Chapter 6.)</p>
	Interception (7 reviews)	<p><u>Other cases</u> They were concerned with incidents of technical problems of the computerised systems. Nothing untoward was found. The LEAs concerned had taken appropriate</p>



Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			actions to remedy the problems.  (See paragraph 6.75 of Chapter 6.)
(h)	Examination of protected products of past cases of non-compliance, irregularity or incident	4	Surveillance  <u>Four past cases</u> The preserved protected products for four past cases, including one case reported in 2015 and three in 2016, were checked in the report period. The Commissioner did not find anything that deviated from what had been reported to the relevant authority and/or the Commissioner.  (See paragraph 6.76 of Chapter 6.)

**Section 41(2)**

The Commissioner shall conduct reviews on cases in respect of which a report has been submitted to him under section 23(3)(b), 26(3)(b)(ii) or 54

<b>Number of reviews conducted under section 41(2)</b>		<b>Interception/ Surveillance</b>	<b>Summary of reviews</b>
(a) Report submitted under section 23(3)(b) by the head of department on cases in default of application being made for confirmation of emergency authorization within 48 hours of issue	Nil	Not applicable	For the report period, there was no report submitted under this category.
(b) Report submitted under section 26(3)(b)(ii) by the head of department on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours of issue	Nil	Not applicable	For the report period, there was no report submitted under this category.
(c) Report submitted under section 54 by the head of department on any case of failure by the department or any of its officers to comply with any relevant requirement	1	Interception	<u>Outstanding case (i)</u> This case was first reported by an LEA in late 2014. Similar to the last three annual reports, as the relevant court proceedings were still ongoing, it is inappropriate to report on the review of the case in this report. The reporting of this case can only be made when the said proceedings have concluded.  (See Outstanding case (i) at paragraph 6.6 of Chapter 6.)

**Table 6**

**Number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)]**

**Section 41(1)**

<b>Number of cases of irregularities or errors identified in the reviews under section 41(1)</b>		<b>Interception/ Surveillance</b>	<b>Broad nature of irregularities or errors identified</b>
(a) Reviews of LPP cases	9	Interception	<p><u>Outstanding case (ii)</u> Three calls between the subject's telephone number and another telephone number of the other party involved in the Reported LPP Call contained some information indicating heightened LPP likelihood but the calls were not so regarded in the relevant REP-11 report submitted to the panel judge.</p>
			<p><u>Case 4.1</u> Discrepancy concerning the contents of an LPP call in REP-11 report.</p>
			<p><u>Case 4.2</u> Discrepancy concerning the contents of calls mentioned in reports to the panel judge.</p>
			<p><u>Case 6.5</u> Non-reporting of an alias of the subject of an interception operation, which appeared in three of the reported 'other calls', as a material change in circumstances to the panel judge.</p>
			<p><u>Case 6.6</u> The interception products obtained from a facility for three days have not been</p>

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
			<p>preserved for examination by the Commissioner due to the input of wrong information by an officer of the LEA concerned in the relevant system for preservation of interception products.</p> <p><u>Case 6.7</u> The officer concerned used an REP-11 report instead of an REP-1 report (the prescribed form) to notify the panel judge of the subject's previous arrests and the heightened LPP likelihood arising from the arrests.</p> <p><u>Case 6.8</u> An officer failed to report to his supervisor a call which indicated a heightened LPP likelihood.</p> <p><u>Case 6.10</u> Mistake in preservation of the interception products obtained from another facility used by the same subject of an LPP case, resulting in interception products obtained from that particular facility on one day being not preserved for the Commissioner.</p> <p><u>Case 6.11</u> The Reported LPP Call was listened to by an LEA officer in three segments. LPP information had been obtained in the second segment of the Reported LPP Call but the officer concerned continued listening to the call.</p>

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
			(For details, see items (d) and (g) under section 41(1) in Table 5, Chapter 4 and Chapter 6.)
(b) Examination of protected products of past LPP/JM cases that were reported before 2016	6	Interception	<p><u>Outstanding case (iii)</u> Discrepancy relating to the time of interception of an LPP call reported in the relevant REP-11 report submitted to the panel judge.</p> <p><u>Outstanding case (iv)</u> Non-reporting of a call with information indicating heightened LPP likelihood to the panel judge.</p> <p><u>One past case</u> A call indicating heightened LPP likelihood not reported to the panel judge.</p> <p><u>Two past cases</u> Calls with information indicating possible heightened LPP likelihood not reported to the panel judge.</p> <p><u>Case 6.2</u> An earlier call indicating the arrest of the subject, which was listened to on the day preceding the day on which the Reported LPP Call was detected, was not reported to the panel judge.</p> <p>(For details, see item (f) and (g) under section 41(1) in Table 5, Chapter 4 and Chapter 6.)</p>
(c) Other reviews	11	Interception	<u>Case 6.1</u> The access right to the

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
			interception products in respect of an interception operation was not removed completely as required.
			<p><u>Case 6.3</u> Interception products obtained on one day had not been preserved for the Commissioner due to the input of wrong information in the system for preserving the interception products.</p>
			<p><u>Case 6.4</u> In an interception operation which was not assessed to have a likelihood of obtaining LPP information, there were two intercepted calls with information indicating heightened LPP likelihood but they were not reported to the panel judge.</p>
			<p><u>Case 6.9</u> Information indicating heightened LPP likelihood appeared in two segments of a conversation contained in a call, which were listened or partially listened to by three officers of the LEA, but the call was not reported to the panel judge as an LPP call.</p>
			<p><u>Seven other cases</u> These are cases involving technical problems of the computerised systems.</p>
			<p>(For details, see item (g) under section 41(1) in Table 5 and Chapter 6.)</p>

**Section 41(2)**

<b>Number of cases of irregularities or errors identified in the reviews under section 41(2)</b>		<b>Interception/ Surveillance</b>	<b>Broad nature of irregularities or errors identified</b>
(a) Reviews on cases in default of application being made for confirmation of emergency authorization within 48 hours as reported by the head of department under section 23(3)(b)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(b) Reviews on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours as reported by the head of department under section 26(3)(b)(ii)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(c) Reviews on non-compliance cases as reported by the head of department under section 54	Nil	Not applicable	As mentioned in Table 5 above, there was only one case brought forward from the previous annual report under this category and it is inappropriate to report on the review of the case in this report due to ongoing court proceedings.

**Table 7**

**Number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)]**

Number of applications received	Applications for examination in respect of			
	Interception	Surveillance	Both Interception and Surveillance	Cases that could not be processed
5	0	0	4	1

**Table 8**

**Respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)]**

Number of notices to applicants given by the Commissioner		Nature of applications for examination		
		Interception	Surveillance	Both Interception and Surveillance
Number of cases that the Commissioner had found in the applicant's favour [section 44(2)]	0	—	—	—
Number of cases that the Commissioner had not found in the applicant's favour [section 44(5)] <sup>Note 5</sup>	4	0	0	4

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Note 5 Of the four notices, two were issued during the report period and two thereafter.



**Table 9**

**Number of cases in which a notice has been given by  
the Commissioner under section 48 [section 49(2)(d)(v)]**

	Number of cases in which a notice has been given in relation to	
	Interception	Surveillance
Notice to the relevant person by the Commissioner stating that he considers that there has been a case of interception or surveillance carried out by an officer of a department without the authority of a prescribed authorization and informing the relevant person of his right to apply for an examination [section 48(1)]	0	0

**Table 10**

**Broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)]**

Recommendations made by the Commissioner		Interception/ Surveillance	Broad nature of recommendations
Reports to the Chief Executive on any matter relating to the performance of the Commissioner's functions [section 50]	Nil	Not applicable	Not applicable
Recommendations to the Secretary for Security on the Code of Practice [section 51]	Nil	Not applicable	Not applicable
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the Code of Practice [section 52]	6	Interception & Surveillance	<p>(a) Arrangements for better protection of LPP information.</p> <p>(b) Adopting same arrangement as for obtainment of LPP information when JM has been inadvertently obtained in covert operations.</p> <p>(c) Stating the time of checking previous applications in application documents.</p> <p>(d) Proper record of intercepting work in the transcripts.</p> <p>(e) Notifying the Commissioner of preservation of protected products for cases of non-compliance, irregularity or incident.</p> <p>(f) Providing detailed description of the reason and relevant circumstances for discontinuance of a statutory activity in the discontinuance report.</p> <p>(See paragraph 7.2 of Chapter 7.)</p>

**Table 11**

**Number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]**

	<b>Number of cases</b>
Interception	8
Surveillance	0

**Table 12**

**Number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such action [section 49(2)(d)(viii)]**

<b>Case number and nature of operation</b>	<b>Brief facts of case</b>	<b>Broad nature of the disciplinary action</b>
<p align="center"><u>Case 1</u></p> <p>Interception</p>	<p>An officer failed to report the time of interception of an LPP call accurately in the REP-11 report.</p> <p>(See paragraphs 6.11 to 6.13 of Chapter 6.)</p>	<p>Verbal warning</p>
<p align="center"><u>Case 2</u></p> <p>Interception</p>	<p>An officer failed to preserve part of the interception products in accordance with the preservation requirement for a non-LPP/non-JM case selected for checking.</p> <p>(See paragraphs 6.27 to 6.31 of Chapter 6.)</p>	<p>Verbal advice</p>
<p align="center"><u>Case 3</u></p> <p>Interception</p>	<p>An officer failed to detect heightened LPP likelihood in a call which was thus not reported to the panel judge.</p> <p>(See paragraphs 6.24 to 6.26 of Chapter 6.)</p>	<p>Verbal warning</p>

8.2 In accordance with section 49(2)(e) of the Ordinance, the Commissioner is required to give an assessment on the overall compliance with the relevant requirements during the report period. Such assessment and the reasons in support can be found in Chapter 9.

## **CHAPTER 9**

### **REVIEW OF COMPLIANCE BY LAW ENFORCEMENT AGENCIES**

#### **Overall compliance**

9.1 As set out in section 40 of the Ordinance, the functions of the Commissioner are to oversee the compliance by the LEAs and their officers with the relevant requirements and to conduct reviews, etc. It is stipulated under section 49(2)(e) of the Ordinance that the Commissioner shall set out in the annual report an assessment on the overall compliance with the relevant requirements during the report period. My assessment of the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2017 is set out below.

#### **Preparation of applications**

9.2 The first and foremost of the requirements under the Ordinance is that any statutory activity can only be lawfully and properly conducted by an officer of an LEA pursuant to a prescribed authorization granted by a relevant authority. Whether a prescribed authorization should be granted is expressly based on the necessity and proportionality principles i.e. the interception or covert surveillance is necessary for, and proportionate to, the purpose sought to be furthered by carrying it out upon balancing the relevant factors against the intrusiveness of the interception or covert surveillance on any person who is to be the subject of or may be affected by the interception or covert surveillance; and considering whether the purpose sought to be furthered by carrying out the interception or covert surveillance can reasonably be furthered by other less intrusive means.

9.3 During the report period, only one of the 1,304 applications for interception was refused and the reason for refusal was that the materials to support the allegation put forth were insufficient. As regards covert surveillance, all the 11 applications were granted by the panel judges/authorizing officers.

9.4 In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations.

### **Reviews by the Commissioner**

9.5 There were different ways to review the LEAs' compliance with the requirements of the Ordinance in respect of interception and covert surveillance as set out in paragraph 2.17 of Chapter 2 and paragraph 3.19 of Chapter 3. These included checking of the weekly reports submitted by the LEAs and the PJO, examination of the contents of the LEA files and documents as well as the protected products during visits to the LEAs. Where necessary, the LEA concerned would be requested to respond to queries. For interception operations, counter-checking the facilities intercepted with non-LEA parties such as CSPs and through other means would be done. For covert surveillance operations, the records kept by the surveillance device recording system of the LEAs would be checked.

9.6 In the report period, various forms of checking did not reveal any case of wrong or unauthorized interception/covert surveillance nor any sign of abuse of surveillance devices for any unauthorized purposes.

### **Handling of LPP and JM cases**

9.7 The COP obliges the concerned LEA to notify the Commissioner of cases that are likely to involve LPP information or JM.

The Commissioner is also timeously alerted to cases involving or possibly involving LPP information or JM through the examination of the weekly reports submitted by the LEAs, with sanitised copies of the relevant REP-11/REP-13 reports reporting on any material change in circumstances after the issue of a prescribed authorization including changed LPP and JM risks.

9.8 With the implementation of examination of protected products since October 2016, I am able to check the veracity of the gist of the communications or information stated in the REP-11/REP-13 reports and whether there were any communications or information subject to LPP or with JM that had been accessed by the LEA officers but not reported to the relevant authority.

9.9 A total of 89 LPP and JM cases that were reported in 2017 had been reviewed. Of the 86 LPP cases, except for those specifically mentioned in Cases 4.1 and 4.2 of Chapter 4 and Cases 6.5, 6.6, 6.7, 6.8, 6.10 and 6.11 of Chapter 6, nothing untoward was found for these cases. As for the three JM cases, they were all found in order. While the LEAs were observed to have recognised the importance of protecting information which might be subject to LPP or JM and have continued to adopt a very cautious approach in handling these cases, some of their officers still failed to exercise enough vigilance and care on some occasions as revealed in various cases reported in Chapters 4 and 6. I also noted that there was a marked increase in the number of cases involving obtainment of LPP information in 2017. While I did not find any of the obtainment being intentional or deliberate, I am of the view that a high level of alertness maintained by LEA officers in performing their intercepting duties is important for guarding against the risk of obtaining information subject to LPP. The LEAs concerned had been reminded that their officers should be vigilant when they encounter situations indicating heightened LPP likelihood in the course of performing intercepting duties.



9.10 During the report period, the protected products of 79 LPP cases reported before 2016 were also examined. While explanation was required for four cases as detailed in paragraphs 4.51 to 4.54 of Chapter 4 and Case 6.2 of Chapter 6, the examination of the protected products of these 79 cases did not reveal anything to justify deviation from the assessments given by my predecessors or myself on the handling of LPP cases reported in the past years.

### **Non-compliance, irregularities or incidents**

9.11 Under section 54 of the Ordinance, 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 Ordinance, irrespective of whether the failure is due to the fault of the LEA or its officers or not. LEAs are also required to report to the Commissioner cases of irregularity or even simply incidents. Hence, all cases of possible non-compliance are brought to the attention of the Commissioner for examination and review without any delay. Furthermore, whenever necessary, the LEAs are required to provide a report, clarification or explanation for anything unusual detected in the course of examination of documents and protected products by the Commissioner. In 2017, there were 18 cases of non-compliance/irregularity/incident.

9.12 Overall, I am satisfied with the performance of the LEAs and their officers in their compliance with the requirements of the ICSO in 2017. For all the cases reported in Chapter 6, I have not made any finding that there was deliberate disregard of the statutory provisions or the COP nor have I found any ulterior motive or ill will on the part of the officers involved. Most of the cases mentioned under Cases 6.1 to 6.11 were consequences of inadvertence or carelessness of the officers concerned, reflecting that some of the officers were still not vigilant and cautious enough in discharging ICSO duties. In a few cases, I noted that

the officers were not conversant with the operating procedures of the systems concerned or the requirements on handling of ICSO cases. The heads of LEAs should endeavour to provide their officers with sufficient training to facilitate them to better perform the ICSO duties. Furthermore, as stated in my last annual report, officers of the LEAs should stay alert and exercise care in different stages of the operations conducted under the ICSO.

### **Response from LEAs**

9.13 I am pleased to see that in the report period, LEAs continued to be positive to my 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.

## **CHAPTER 10**

### **ACKNOWLEDGEMENT AND WAY FORWARD**

#### **Acknowledgement**

10.1 I would like to express my gratitude to the panel judges, the Security Bureau, the LEAs as well as the CSPs for their assistance and co-operation they have rendered to me. In the report period, relevant parties continued with their prompt and effective support without which I could not have performed my functions smoothly and efficiently.

#### **Way forward**

10.2 The ICSO aims to strike a balance between the need for the prevention and detection of serious crime 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. To this end, the concerted efforts of all involved parties in observing the spirit of the Ordinance and complying with the relevant requirements are of paramount importance. The endeavour of various parties in this respect should be sustained at all times.

10.3 I am glad to say that the control regime under the ICSO has been operating smoothly and its effectiveness has been enhanced after the implementation of the legislative amendments that were enacted in 2016. I understand that the Security Bureau will closely keep in view the application of the Ordinance. With the rapid changes in the technological environment, the LEAs are facing challenges in the pursuit of covert operations. Oversight of the compliance by LEAs with the Ordinance thus also needs to keep pace with the developments in order that the checks and balances are appropriate and the oversight

mechanisms are effective. I look forward to the continuous support and cooperation of all the parties involved for any new arrangement that will facilitate the oversight work of the Commissioner.



1 November 2018

Mr LEE Ka Chiu, John, SBS, PDSM, PMSM, JP  
Secretary for Security  
10th Floor, East Wing,  
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2 Tim Mei Avenue,  
Tamar,  
Hong Kong

Dear Mr Lee,

**Interception of Communications and Surveillance Ordinance  
(Cap. 589)**

**Annual Report 2017 to the Chief Executive  
by the Commissioner on Interception of Communications  
and Surveillance**

The Chief Executive has, pursuant to section 49(4) of the Interception of Communications and Surveillance Ordinance (Cap. 589), instructed that the enclosed copy of the Annual Report 2017 by the Commissioner on Interception of Communications and Surveillance be laid on the table of the Legislative Council at its sitting on 28 November 2018, together with a copy of this letter. The Chief Executive has not excluded any matter from that copy under section 49(5) of the Ordinance without the agreement of the Commissioner.

I should be grateful if you would follow up with the Legislative Council Secretariat accordingly.

Yours sincerely,

( Sidney Chan )

Private Secretary to the Chief Executive

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