

Legislative Council Panel on Security

Results of study of matters raised in the Annual Report 2009 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance

PURPOSE

Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance (the Ordinance), the Commissioner on Interception of Communications and Surveillance (the Commissioner) submitted his Annual Report 2009 (the Report) to the Chief Executive in June 2010. This note sets out the Administration's views on the matters raised in the Report.

BACKGROUND

2. Interception of communications and covert surveillance operations are critical to the capability of our law enforcement agencies (LEAs) in combating serious crimes and protecting public security. The Ordinance, enacted in August 2006, provides for a statutory regime for the conduct of interception of communications and covert surveillance by the LEAs. The Commissioner, appointed by the Chief Executive on the recommendation of the Chief Justice pursuant to section 39 of the Ordinance, is responsible for overseeing the compliance by the LEAs with the relevant requirements of the Ordinance.

3. The Report covers the period from 1 January 2009 to 31 December 2009 (the report period). The Chief Executive has caused a copy of the Report to be laid on the table of the Legislative Council on 24 November 2010.

4. The Security Bureau, in consultation with the LEAs concerned, has studied the matters raised in the Report.

GENERAL OBSERVATIONS

5. The Commissioner is satisfied with the overall performance of the LEAs and their officers in their compliance with the requirements of the Ordinance. The LEAs, panel judges, and relevant parties have provided the assistance that the Commissioner needed to perform his

oversight and review functions under the Ordinance. The Commissioner has pointed out that the heads of the LEAs are determined to improve control over the matters relating to the Ordinance and facilitate the Commissioner's checking and scrutiny of the same. With regard to interception operations, the Commissioner has observed that the LEAs acted in a responsible manner and vigilantly complied with the requirements and spirit of the Ordinance, as interception operations were discontinued as soon as the conditions for the continuance of the prescribed authorization under section 3 of the Ordinance were no longer met.

6. The Commissioner has also observed that the panel judges continued to be very careful and stringent in considering applications for prescribed authorizations submitted by the LEAs. For example, they exercised stringent control over the granting of "subject-based" authorizations and adopted a cautious approach in determining the duration of authorizations. They also continued to take a stringent and careful approach in dealing with cases which were assessed to have the likelihood of obtaining legal professional privilege information or journalistic material.

7. The Commissioner has continued to make recommendations and suggestions on various procedural matters in the course of discharging his duties in overseeing the performance of the LEAs over their compliance with the requirements of the Ordinance. We agree with the Commissioner's observation that the enhancement in procedure is more significant than it may seem in that it provides better ways of exposing inadequacies and of improving checking and control. In this regard, the Commissioner notes that the Security Bureau and the LEAs have taken steps in apparent earnest in tackling the adverse effect of the defects or deficiencies intended to be addressed by his recommendations and suggestions through practical means, and most of his recommendations have been given effect to.

THE COMMISSIONER'S FINDINGS ON IRREGULARITIES AND INCIDENTS

8. The Commissioner stated in Chapter 7 of his Report that he had received 12 reports of non-compliance or irregularities from the LEAs. Five of these reports were submitted by the LEAs under section 54 of the Ordinance.¹ The Commissioner also discussed in Chapter 7 of the

¹ Under section 54 of the Ordinance, where the head of the 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 of the Ordinance, he shall submit to the Commissioner a report with details of the case.

Report two outstanding cases brought forward from the Annual Report 2008.

9. We note that the Commissioner has not made any finding that any non-compliance or irregularity was due to deliberate flouting or disregard of the law, nor did he find any of the officers committing the mistakes actuated by ulterior motives. Apart from the defects caused by technical problems, the incidents were consequences of inadvertent or careless mistakes or unfamiliarity with the rules and procedures of the scheme under the Ordinance. The LEAs concerned have taken on board the Commissioner's recommendations, and have either implemented them or are taking actions to address the issues identified in the Commissioner's findings. For those issues that may require legislative amendments, the Administration will address them in the comprehensive review of the Ordinance.

THE COMMISSIONER'S RECOMMENDATIONS TO THE ADMINISTRATION

10. Through discussions with the LEAs during his inspection visits and the exchanges of correspondence with the LEAs in his review of their compliance with the relevant requirements of the Ordinance, the Commissioner made a number of recommendations to the LEAs to enable them to better carry out the objects of the Ordinance. Some of the recommendations, which had implications across the LEAs, were made to the Security Bureau. The recommendations to the LEAs and the Security Bureau are summarized in Chapter 8 of the Report. The Commissioner also set out in Chapter 9 of the Report his views and recommendations on certain provisions of the Ordinance.

11. For those recommendations set out in Chapter 8 of the Report, the Security Bureau and the LEAs have accepted them in full and either have implemented them or are taking actions to implement them. The Code of Practice has also been amended to implement the Commissioner's recommendations as appropriate. A summary of the Administration's responses to the key recommendations made by the Commissioner in the Report is set out at **Annex A**. A copy of the revised Code of Practice, issued by the Secretary for Security pursuant to section 63 of the Ordinance on 22 November 2010, is at **Annex B**. For those recommendations that would require legislative amendments for implementation, we shall consider them in detail in the context of the comprehensive review of the Ordinance.

CONCLUSION

12. With the efforts of all parties concerned, the regime under the Ordinance has continued to operate smoothly during the report period. The Administration will continue to work closely with the Commissioner and the panel judges with a view to better carrying out the objects of the Ordinance.

13. A comprehensive review of the Ordinance is ongoing. We briefed Members on the proposed scope of the review at the Panel meeting in July 2010. We shall take into account the advice and comments of the Commissioner, panel judges and Members in working out the review recommendations and legislative proposals. While we are committed to maintaining the effectiveness of the LEAs in combating serious crimes and protecting public security, we shall continue to strive for improvement in the operation of the Ordinance. On current plans, we will report to Members the findings of the review and the legislative proposals in early half of 2011, with a view to introducing an amendment bill to the Ordinance within the same year.

Security Bureau
November 2010

**Response of the Administration
to the key comments and recommendations made in the Annual Report 2009
of the Commissioner on Interception of Communications and Surveillance (the Commissioner)**

	Comments and recommendations made by the Commissioner	The Administration's response
A. Recommendations to Secretary for Security (see Chapter 8)		
1.	Duration of executive authorization for Type 2 surveillance (paragraphs 8.4-8.5)	
	The Commissioner recommends that the forms REC-5, REC-6, STA-1 and STA-2 should be amended to remind the applicant that the duration of the prescribed authorization applied for should not be longer than three months, and the form STA-3 should be amended to remind the applicant that an emergency authorization must be confirmed no more than 48 hours beginning with the time when the emergency authorization is issued.	<ul style="list-style-type: none">● Recommendation accepted. REC-5, REC-6, STA-1, STA-2 and STA-3 have been amended as recommended by the Commissioner.
B. Recommendations to LEAs (see Chapter 8)		
2.	Designation of authorizing officer (paragraphs 8.7 - 8.11)	

	<p style="text-align: center;">Comments and recommendations made by the Commissioner</p>	<p style="text-align: center;">The Administration’s response</p>
	<p>Noting the personnel changes in ICAC which resulted in the appointment of a Chief Investigator acting as Principal Investigator to be the new authorizing officer for granting Type 2 surveillance operations, the Commissioner recommends to ICAC that the rank of the authorizing officer should not be lower than that of a substantive Principal Investigator.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. ICAC has made arrangements to ensure that the authorizing officer for the granting of Type 2 surveillance authorizations will always be a substantive Principal Investigator.
<p>3.</p>	<p>Addition of communication facilities with the likelihood of obtaining LPP information to a prescribed authorization (paragraph 8.12)</p>	
	<p>The Commissioner recommended the course of action that should be taken by the law enforcement agencies (LEAs) regarding the addition of communication facilities with the likelihood of obtaining legal professional privilege (LPP) information to prescribed authorizations with the “reasonably expected to use” clause.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. LEAs will duly follow the Commissioner’s recommended course of action in adding communication facilities with the likelihood of obtaining LPP information to prescribed authorizations with the “reasonably expected to use” clause.
<p>4.</p>	<p>Report of previous applications in REP-11 report and affirmation in support of an application (paragraph 8.13)</p>	
	<p>The Commissioner recommends that when an LEA submitted an REP-11 report to inform the panel judge of</p>	<ul style="list-style-type: none"> ● Recommendation accepted. LEAs will provide information on previous applications, both in respect

	<p style="text-align: center;">Comments and recommendations made by the Commissioner</p>	<p style="text-align: center;">The Administration's response</p>
	<p>the full name of the subject who was only known by his nickname in the original application for the prescribed authorization, the LEA should provide information on any previous applications, both in respect of the subject's full name and nickname, in the REP-11 report. The LEA should also provide such information in the affirmation in support of an application.</p>	<p>of the subject's full name and nickname, in the REP-11 report and the affirmation in support of an application as recommended by the Commissioner.</p>
<p>5.</p>	<p>Revocation of an executive authorization upon a report on the discontinuance of Type 2 surveillance (REV-1) (paragraphs 8.14-8.15)</p>	
	<p>The Commissioner noticed that the REV-1 form did not require the reporting officer to fill in the details as to who made the decision of discontinuance of the Type 2 surveillance and when such decision was made. It was different from the corresponding standard form for the revocation of an authorization upon a report on the discontinuance of interception and Type 1 surveillance, which require the reporting officer to fill in such details.</p>	<ul style="list-style-type: none"> ● Recommendation accepted. The REV-1 form has been amended to require the reporting officer to fill in the details as to who made the decision of discontinuance and when such decision was made.
<p>6.</p>	<p>Recommendations in connection with covert surveillance (paragraph 8.16)</p>	

	<p style="text-align: center;">Comments and recommendations made by the Commissioner</p>	<p style="text-align: center;">The Administration's response</p>
	<p>The Commissioner made a number of recommendations in connection with covert surveillance through his inspection visits to the LEAs and the checking of their inventory lists and device registers, for example –</p> <p>(a) when a kind of surveillance devices was no longer involved in the surveillance operation authorized by an authorization, the kind of devices should be taken out from the renewal application. On the other hand, if a new or additional kind of devices was required, a fresh application instead of a renewal application should be made.</p> <p>(b) it was inappropriate for the applicant to make any amendment on the statement in writing after the executive authorization had been granted. The applicant should report the mistake or omission to the authorizing officer via a report similar to the REP-11 report setting out the relevant details and explanations.</p> <p>(c) to enable the authorizing officer to see the whole picture of the operation in determining whether the executive authorization should be granted, the</p>	<p>(a) Recommendation accepted. Paragraph 130 of the revised Code of Practice issued on 22 November 2010 has been amended to stipulate the requirement.</p> <p>(b) Recommendation accepted. The applicant for an executive authorization will report any mistake or omission via a report setting out the relevant details and explanations.</p> <p>(c) Recommendation accepted. The applicants will present the entirety of his proposed surveillance operation (including the use of any non-ICSO</p>

	<p align="center">Comments and recommendations made by the Commissioner</p>	<p align="center">The Administration's response</p>
	<p>applicant should adopt a global approach in making the application, instead of merely referring to devices that were to be used under the executive authorization but not to devices that did not fall within the ambit of the Interception of Communications and Surveillance Ordinance (ICSO).</p>	<p>devices) in his application.</p>
<p>7.</p>	<p>Recommendations made upon review of LPP cases (paragraph 8.17)</p>	
	<p>The Commissioner made a number of recommendations upon review of the LPP cases in Chapter 5 of the Report, for example -</p> <p>(a) a new Audit Trail Report (ATR) system should be developed to record which parts of a call the listener had listened to.</p> <p>(b) the formats and printouts of the ATR and relevant records should be improved as specified by the Commissioner so as to better present such records and their completeness.</p>	<p>(a) Recommendation accepted. LEAs will follow the Commissioner's recommendation in developing a new ATR system.</p> <p>(b) Recommendation accepted. LEAs have improved the formats and printouts of the ATR as recommended by the Commissioner.</p>

	<p style="text-align: center;">Comments and recommendations made by the Commissioner</p>	<p style="text-align: center;">The Administration's response</p>
	<p>(c) if an authorization is revoked in an LPP case, and if the LEA intends to listen or re-listen to any intercept products obtained prior to the revocation of the authorization if it occurred, the LEA should ensure full disclosure of its intention in the REP-11 report submitted and expressly seek the panel judge's approval for doing so. The same notification of intention should also apply in a section 57 (discontinuance) report or a section 58 (arrest) report when likely LPP information has been obtained or encountered.</p>	<p>(c) Recommendation accepted. LEAs will specify in the REP-11 report if they intend to listen or re-listen to any intercept products obtained prior to the revocation of the authorization. The same notification of intention will also be specified in a section 57 (discontinuance) report or a section 58 (arrest) report when likely LPP information has been obtained or encountered.</p>
<p>8.</p>	<p>Recommendations made upon review of cases of non-compliance, irregularities and incidents (paragraph 8.18)</p>	
	<p>The Commissioner made a number of recommendations in the course of his review of the non-compliance, irregularities and incidents mentioned in Chapter 7 of the Report, for example –</p> <p>(a) after checking the ATR, the reporting officer should make a full and frank disclosure in the REP-11 report on LPP matters of the number of times a call containing LPP information or</p>	<p>(a) Recommendation accepted. LEAs will follow the Commissioner's recommendations in submitting REP-11 report relating to LPP.</p>

	<p style="text-align: center;">Comments and recommendations made by the Commissioner</p>	<p style="text-align: center;">The Administration's response</p>
	<p>possible LPP information had been listened or re-listened to, the respective time and date (showing duration) of each such listening or re-listening, and the identity of each of the listeners.</p> <p>(b) applicants should submit the draft application documentation to the supervisor for endorsement through e-mail so that there could be a record of such action. The endorsing officer should also give his endorsement through e-mail indicating that he has perused the draft application documentation.</p> <p>(c) the issuing officers of the device registry should ensure that the request form has been correctly and properly filled in before they issue the surveillance devices. The request form should also contain the signature of the requesting officer.</p> <p>(d) an applicant should confirm in the supporting affidavit whether, in the previous two years, there have been previous applications in respect of the subject and whether there have been previous</p>	<p>(b) Recommendation accepted. LEAs will ensure that their applicants will submit the draft application documentation to the supervisor for endorsement, either through e-mail or through written submission on file.</p> <p>(c) Recommendation accepted. The issuing officers of the device registry will follow the Commissioner's recommendations in issuing surveillance devices.</p> <p>(d) Recommendation accepted. LEAs will ensure that their applicants comply with the requirement of disclosing in the supporting affidavits if there is any previous application on the subject and on the</p>

	<p style="text-align: center;">Comments and recommendations made by the Commissioner</p>	<p style="text-align: center;">The Administration's response</p>
	<p>applications in respect of the telecommunications service sought to be intercepted.</p>	<p>telecommunications service.</p>
<p>C. Other Recommendations (see Chapter 9)</p>		
<p>9.</p>	<p>Circumstances where notifying the relevant person under section 48 is undesirable (paragraphs 9.2-9.8)</p>	
	<p>Under section 48(1) of the ICSO, the Commissioner shall give notice to any person who is the subject of an unauthorized covert operation and inform that person of his right to apply for an examination in respect of the unauthorized operation. However, section 45(2) provides that the Commissioner shall not carry out the examination where he is satisfied that any relevant criminal proceedings are pending or likely to be instituted, until they have been finally determined or disposed of or they are no longer likely to be instituted.</p> <p>There is no provision in the ICSO to allow the Commissioner the discretion to refrain from giving the notice to the relevant person under section 48(1) when the circumstances specified in section 45(2) (i.e. criminal proceedings are pending or likely to be instituted) arise.</p>	<ul style="list-style-type: none"> ● Recommendation being considered by the Administration. The Administration will look into the issue in the comprehensive review on the ICSO.

	<p style="text-align: center;">Comments and recommendations made by the Commissioner</p>	<p style="text-align: center;">The Administration's response</p>
	<p>The Commissioner considers that the working of these provisions in practice would cause embarrassment. The Commissioner recommends that the Administration should consider appropriate amendments to the ICSO to address this issue.</p>	
10.	<p>Application for examination in respect of a deceased person (paragraphs 9.9-9.15)</p>	
	<p>The Commissioner proposes that the ICSO should expressly address the issue of how to proceed with an application for examination in respect of the applicant who dies before or in the course of an examination. The ICSO should also address how such matters should be dealt with in respect of a relevant person who dies before or after the Commissioner's giving of a notice under section 48(1).</p>	<ul style="list-style-type: none"> ● Recommendation being considered by the Administration. The Administration will look into the issue in the comprehensive review on the ICSO.
11.	<p>Substantive rank of the authorizing officer (paragraphs 9.16-9.19)</p>	
	<p>The Commissioner recommends that in all circumstances, only officers whose substantive rank is not below a rank equivalent to that of Senior Superintendent of Police</p>	<ul style="list-style-type: none"> ● Recommendation accepted. Paragraph 33 of the revised Code of Practice issued on 22 November 2010 has been amended to stipulate the requirement.

	<p style="text-align: center;">Comments and recommendations made by the Commissioner</p>	<p style="text-align: center;">The Administration's response</p>
	<p>should be appointed as the authorizing officer for Type 2 surveillance authorization and that this requirement should be clearly spelt out in the ICSO.</p>	<p>The Administration will look into the Commissioner's legislative amendment proposal in the comprehensive review on the ICSO.</p>
<p>12.</p>	<p>Unauthorized interception due to revocation of authorization (paragraphs 9.20-9.22)</p>	
	<p>The Commissioner considers that any interception conducted during the interim period between the revocation of a prescribed authorization and the actual disconnection of the facilities is unauthorized on the ground that it is carried out without the authority of a prescribed authorization. The Commissioner proposes that the ICSO should be amended to provide the panel judge or the authorizing officer with the power to stay a revocation or defer a revocation until a time later than when he makes such a determination. Alternatively, the LEA who faces revocation of a prescribed authorization should be allowed to cause the disconnection of the facilities concerned to be effected within a reasonable time after the revocation so that any interception taking place in the interim period would not be considered as unauthorized.</p>	<ul style="list-style-type: none"> ● Recommendation being considered by the Administration. The Administration will look into the issue in the comprehensive review on the Ordinance.