

立法會
Legislative Council

LC Paper No. LS4/05-06

Legal Service Division

Paper for the Subcommittee on Review of Existing Statutory Provisions on Search and Seizure of Journalistic Material of the Panel on Security

The various degrees of the word “prejudice” in existing legislation

At the last meeting of the Subcommittee, members considered the situations in which law enforcement agencies may apply for a warrant to search for journalistic material under section 85 of the Interpretation and General Clauses Ordinance (Cap. 1). The Subcommittee asked for information on the forms of drafting adopted for reflecting various degrees of likelihood that appear in existing legislation.

2. Members may recall that under section 85(3) and (5), one of the conditions for the issue of a warrant authorizing search of journalistic materials is that service of a notice of an application for a production order under section 84(2) may seriously prejudice the investigation. The expression “may seriously prejudice” sets in legislative term degrees of a likelihood of the occurrence of prejudice which is of a serious nature. There are other forms of drafting in existing legislation which are to reflect degrees of likelihood. Some examples on the likelihood of prejudice to an investigation are extracted below:-

“would prejudice”

Chapter:	486	Title:	PERSONAL DATA (PRIVACY) ORDINANCE
Section:	30	Heading:	Matching procedure not to be carried out except with consent of data subject, etc.

(5) Subject to subsection (6), a data user shall not take adverse action against an individual in consequence (whether in whole or in part) of the carrying out of a matching procedure -

- (a) unless the data user has served a notice in writing on the individual -
 - (i) specifying the adverse action it proposes to take and the reasons therefor; and
 - (ii) stating that the individual has 7 days after the receipt of the notice within which to show cause why that action should not be taken; and
- (b) until the expiration of those 7 days.

(6) Subsection (5) shall not operate to prevent a data user from taking adverse action against an individual if compliance with the requirements of that subsection **would prejudice any investigation** into the commission of an offence or the possible commission of an offence.

“might prejudice”

Chapter:	397	Title:	THE OMBUDSMAN ORDINANCE
Section:	14	Heading:	Protection of witnesses, etc.

(3) Where the giving of any information or the answering of any question or the production of any document or thing-

- (a) is the subject of a certificate by the Chief Executive that it might prejudice security, defence or international relations (including relations with any international organization) in respect of Hong Kong; or
- (b) is the subject of a certificate by the Chief Secretary for Administration that it **might-**
 - (i) **prejudice the investigation** or detection of crime; or
 - (ii) involve the disclosure, without the consent of the Chief Executive, of the deliberations of the Executive Council, the Ombudsman shall not require the information or answer to be given or, as the case may be, the document or thing to be produced.

“likely to prejudice”

Chapter:	455	Title:	ORGANIZED AND SERIOUS CRIMES ORDINANCE
Section:	25A	Heading:	Disclosure of knowledge or suspicion that property represents proceeds, etc. of indictable offence

(5) A person commits an offence if, knowing or suspecting that a disclosure has been made under subsection (1) or (4), he discloses to any other person any matter which is **likely to prejudice any investigation** which might be conducted following that first-mentioned disclosure.

“reasonably likely to prejudice”

Chapter:	524	Title:	LONG-TERM PRISON SENTENCES REVIEW ORDINANCE
Section:	13	Heading:	Pre-requisites for review of certain sentences

(3) Despite subsection (2), the Board may decline to provide the prisoner with a copy of material the disclosure of which **would be reasonably likely-**

- (a) to jeopardise the health or safety of any person; or
- (b) to jeopardise the security of any detention facility; or
- (c) **to prejudice** the conduct of any lawful **investigation** into any offence.

3. Apart from the degree of likelihood that prejudice may be caused, section 85(5) also imports a degree of seriousness of the prejudice. In this context, apart from “seriously prejudice” as in sections 84 and 85 of Cap. 1, the only other drafting which we could find in the Laws of Hong Kong is “substantially prejudice”. The example is given below:

“substantially prejudice”

Chapter:	486	Title:	PERSONAL DATA (PRIVACY) ORDINANCE
Section:	42	Heading:	Power of entry on premises for the purposes of an inspection or investigation

(6) A magistrate may, if satisfied by information upon oath by the Commissioner or any prescribed officer that there are reasonable grounds for believing that the purposes of any **investigation may be substantially prejudiced** if the Commissioner were required to comply with subsection (3) before exercising his power under subsection (2) in respect of any premises, issue a warrant-

- (a) in the form specified in Part 1 of Schedule 6; and
- (b) in respect of those premises.

(7) A magistrate may, if satisfied by information upon oath by the Commissioner or any prescribed officer that there are reasonable grounds for believing that the purposes of an **investigation may be substantially prejudiced** if the Commissioner is prevented by the operation of subsection (4) from exercising his power under subsection (2) in respect of any domestic premises, issue a warrant-

- (a) in the form specified in Part 2 of Schedule 6; and
- (b) authorizing the Commissioner to exercise that power in respect of those premises.

4. In the context of the provisions quoted above, the terms “would prejudice”, “might prejudice” or “likely to prejudice” are used to reflect the degree of likelihood that prejudice may result from the non-issuance of order or warrant as contemplated by the legislation in question. Prejudice is an abstract concept which could only be applied by the court when there are material facts placed before it. The use of such form of drafting suggests that the Legislature intended to leave it to the courts to determine whether on the facts of a particular case the likelihood of prejudice is such that it justifies the court to allow an application for search warrant.

5. The two expressions, “seriously prejudice” and “substantially prejudice” are subject to the modifier “may”, and the word “prejudice” in the two expressions is subject to the modifiers “seriously” and “substantially” respectively. It is evident from the presence of the modifiers that the condition for making an order or issuing a warrant is not met unless the prejudice that is likely to occur is of such a nature that the court determines to be “serious” or “substantial”. Again, this form of drafting suggests that the Legislature is leaving it to the court to determine whether there is likelihood of prejudice and, if so, whether the prejudice may be considered as serious or substantial according to the facts of a particular case before it.

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23 September 2005