
Interception of Communications and Surveillance (Amendment) Bill 2015

Contents

Clause	Page
1. Short title.....	C521
2. Interception of Communications and Surveillance Ordinance amended.....	C523
3. Section 2 amended (interpretation).....	C523
4. Section 3 amended (conditions for issue, renewal or continuance of prescribed authorization)	C525
5. Section 23 amended (application for confirmation of emergency authorization).....	C525
6. Section 24 amended (determination of application for confirmation of emergency authorization)	C527
7. Section 26 amended (application for confirmation of prescribed authorization or renewal issued or granted upon oral application)	C527
8. Section 27 amended (determination of application for confirmation of prescribed authorization or renewal issued or granted upon oral application).....	C527
9. Section 38A added.....	C529
38A. Revocation of device retrieval warrant.....	C529

Clause	Page
10. Section 44 amended (examination by Commissioner)	C531
11. Section 46 amended (further provisions relating to examinations).....	C531
12. Section 48 amended (notifications to relevant persons).....	C533
13. Section 53 amended (further powers of Commissioner).....	C535
14. Section 53A added.....	C535
53A. Delegation of power to examine protected products	C535
15. Section 54 amended (general obligations of departments to report on non-compliance)	C537
16. Section 57 amended (discontinuance of interception or covert surveillance)	C537
17. Section 58 amended (reports to relevant authorities following arrests).....	C543
18. Section 58A added.....	C545
58A. Revocation of prescribed authorization in case of inaccurate information or change in circumstances	C545
19. Section 59 amended (safeguards for protected products).....	C553
20. Section 65A added.....	C555
65A. Protected products obtained after revocation of prescribed authorization.....	C555

A BILL

To

Amend the Interception of Communications and Surveillance Ordinance to provide for the revocation of device retrieval warrants, partial revocation of prescribed authorizations and additional grounds for revoking prescribed authorizations; to allow conditions in prescribed authorizations to be varied; to clarify the meanings of certain expressions; to treat certain protected products obtained after the prescribed authorizations concerned are revoked to be properly obtained; to require a department head to report a failure to comply with a relevant requirement that is not due to the department's fault; to enable the Commissioner to require the provision of protected products and to delegate the power to examine them; to make minor textual amendments; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Interception of Communications and Surveillance (Amendment) Ordinance 2015.

2. Interception of Communications and Surveillance Ordinance amended

The Interception of Communications and Surveillance Ordinance (Cap. 589) is amended as set out in sections 3 to 20.

3. Section 2 amended (interpretation)

(1) Section 2(1), definition of *device retrieval warrant*—

Repeal

everything after “section 34”

Substitute

“and, where the context requires, includes—

- (a) a device retrieval warrant to be issued under that section; and
- (b) a device retrieval warrant that has been partially revoked under section 38A;”.

(2) Section 2(1), definition of *emergency authorization*—

Repeal

everything after “Part 3”

Substitute

“and, where the context requires, includes—

- (a) an emergency authorization to be issued under that Division; and
- (b) an emergency authorization that has been partially revoked under Part 5;”.

(3) Section 2(1), definition of *executive authorization*—

Repeal

everything after “Part 3”

Substitute

“and, where the context requires, includes—

- (a) an executive authorization to be issued or renewed under that Division; and
- (b) an executive authorization that has been partially revoked under Part 5;”.

(4) Section 2(1), definition of *judge’s authorization*—

Repeal

everything after “Part 3”

Substitute

“and, where the context requires, includes—

- (a) a judge’s authorization to be issued or renewed under that Division; and
- (b) a judge’s authorization that has been partially revoked under Part 5;”.

4. Section 3 amended (conditions for issue, renewal or continuance of prescribed authorization)

Section 3(1)—

Repeal

“, or the continuance,”

Substitute

“of a prescribed authorization, or the continuance of a prescribed authorization or a part”.

5. Section 23 amended (application for confirmation of emergency authorization)

Section 23(1), Chinese text—

Repeal

“生效”

Substitute

“發出”。

6. Section 24 amended (determination of application for confirmation of emergency authorization)

(1) Section 24(3)(a)(ii), after “the variations”—

Add

“, and any new conditions.”.

(2) After section 24(3)—

Add

“(3A) The new conditions specified by the panel judge under subsection (3)(a)(ii) may apply to the emergency authorization itself or to any further authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance).”.

7. Section 26 amended (application for confirmation of prescribed authorization or renewal issued or granted upon oral application)

Section 26(1), Chinese text—

Repeal

“或續期生效”

Substitute

“發出或該續期批予”。

8. Section 27 amended (determination of application for confirmation of prescribed authorization or renewal issued or granted upon oral application)

(1) Section 27(3)(a)(ii), after “the variations”—

Add

“, and any new conditions.”.

(2) After section 27(3)—

Add

“(3A) The new conditions specified by the relevant authority under subsection (3)(a)(ii) may apply—

- (a) to the prescribed authorization or renewed prescribed authorization itself; or
- (b) to any further authorization or requirement under the prescribed authorization or renewed prescribed authorization (whether granted or imposed under the terms of the prescribed authorization or renewed prescribed authorization or any provision of this Ordinance).”.

9. Section 38A added

Part 3, Division 6, after section 38—

Add

“38A. Revocation of device retrieval warrant

- (1) If, while a device retrieval warrant is in force but not yet completely executed, the officer of the department concerned who is for the time being in charge of the execution of the warrant—
 - (a) becomes aware that section 33(1)(a) or (b) does not apply to the devices or any of the devices specified in the warrant; or
 - (b) is of the opinion that the warrant or a part of the warrant cannot for whatever reason be executed,

the officer must, as soon as reasonably practicable after becoming aware of the matter or forming the opinion, cause a report on the matter or opinion to be provided to a panel judge.

- (2) If a panel judge receives a report under subsection (1), the panel judge may revoke the device retrieval warrant concerned or the relevant part of the device retrieval warrant concerned.
- (3) If the device retrieval warrant or a part of the device retrieval warrant is revoked under subsection (2), the warrant or that part of the warrant, despite section 35(b), ceases to have effect from the time of the revocation.
- (4) If the device retrieval warrant is not revoked or only part of the device retrieval warrant is revoked, the panel judge may do one or both of the following—
 - (a) vary any terms or conditions in the warrant;
 - (b) specify any new conditions in the warrant that apply to the warrant itself or to any further authorization under it (whether granted under its terms or any provision of this Ordinance).”.

10. Section 44 amended (examination by Commissioner)

Section 44(2)(a), after “one of interception or covert surveillance”—

Add

“, the month and year from which the interception or covert surveillance began”.

11. Section 46 amended (further provisions relating to examinations)

Section 46(3), after “other matter”—

Add

“(including any protected product, whether or not it contains any information that is or may be subject to legal professional privilege)”.

12. Section 48 amended (notifications to relevant persons)

- (1) Section 48(1)(a), after “one of interception or covert surveillance”—

Add

“, the month and year from which the interception or covert surveillance began”.

- (2) Section 48—

Repeal subsection (7)**Substitute**

“(7) In this section—

relevant person (有關人士) means—

- (a) if the interception or covert surveillance concerned is one that is continued after the prescribed authorization concerned or the relevant part of the prescribed authorization concerned has ceased to have effect, the subject of the interception or covert surveillance;
- (b) if the interception or covert surveillance concerned is carried out by an officer of the department concerned purportedly pursuant to a prescribed authorization but the subject of the interception or covert surveillance is not the intended subject under the prescribed authorization, the subject of the interception or covert surveillance; or

- (c) if the interception or covert surveillance concerned is carried out without the authority of a prescribed authorization, otherwise than in a situation specified in paragraph (a) or (b), the subject of the interception or covert surveillance.”.

13. Section 53 amended (further powers of Commissioner)

- (1) Section 53(1)(a), after “other matter”—

Add

“(including any protected product, whether or not it contains any information that is or may be subject to legal professional privilege)”.

- (2) Section 53(4), after “other matter”—

Add

“(including any protected product, whether or not it contains any information that is or may be subject to legal professional privilege)”.

14. Section 53A added

After section 53—

Add

“53A. Delegation of power to examine protected products

- (1) The Commissioner may delegate, in writing, the Commissioner’s power specified in subsection (2) to an officer working in the Commissioner’s office who is responsible to the Commissioner.

- (2) The power is the power to examine protected products provided to the Commissioner in compliance with a requirement imposed under section 53(1)(a).
- (3) The Commissioner may specify in any instrument of delegation any terms or conditions subject to which the delegation is to have effect.
- (4) A delegation under this section does not preclude the Commissioner from exercising at any time the power so delegated.”.

15. Section 54 amended (general obligations of departments to report on non-compliance)

- (1) Section 54—

Renumber the section as section 54(1).

- (2) After section 54(1)—

Add

- “(2) Without affecting other provisions of this Part, if the head of any department considers that—
 - (a) there may have been a failure to comply with a relevant requirement in a case handled by the department; but
 - (b) the failure is not due to the fault of the department or any of its officers,the head must also submit to the Commissioner a report with details of the failure.”.

16. Section 57 amended (discontinuance of interception or covert surveillance)

- (1) Section 57, heading—

Repeal

“Discontinuance”

Substitute

“Revocation of prescribed authorization following discontinuance”.

- (2) Section 57(1), after “prescribed authorization”—

Add

“or a part of a prescribed authorization”.

- (3) Section 57(1), after “surveillance concerned”—

Add

“or the relevant part of the interception or covert surveillance concerned”.

- (4) Section 57(2)(a), after “prescribed authorization”—

Add

“or a part of the prescribed authorization”.

- (5) Section 57(2)(a), after “covert surveillance”—

Add

“or the relevant part of the interception or covert surveillance”.

- (6) Section 57(2)(b), after “covert surveillance”—

Add

“or a part of the interception or covert surveillance”.

- (7) Section 57(4), after “authorization concerned”—

Add

“or the relevant part of the prescribed authorization concerned”.

- (8) Section 57(5)—

Repeal

“any”

Substitute

“the prescribed authorization or a part of the”.

- (9) Section 57(5), after “, the prescribed authorization”—

Add

“or that part of the prescribed authorization”.

- (10) After section 57(5)—

Add

“(5A) If only part of the prescribed authorization is revoked, the relevant authority may do one or both of the following—

- (a) vary any terms or conditions in the prescribed authorization;
- (b) specify any new conditions in the prescribed authorization that apply to the prescribed authorization itself or to any further authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance).”.

- (11) Section 57(7), after “a prescribed authorization”—

Add

“or a part of a prescribed authorization”.

- (12) Section 57(7), after “the prescribed authorization”—

Add

“or that part of the prescribed authorization”.

17. Section 58 amended (reports to relevant authorities following arrests)

(1) Section 58, heading—

Repeal

“Reports to relevant authorities following arrests”

Substitute

“Revocation of prescribed authorization following arrest of subject of interception or covert surveillance”.

(2) Section 58(2)—

Repeal

everything after “subsection (1),”

Substitute

“if the relevant authority considers that the conditions for the continuance of the prescribed authorization concerned or a part of the prescribed authorization concerned under section 3 are not met, the relevant authority must revoke the prescribed authorization or that part of the prescribed authorization.”.

(3) Section 58(3), after “Where the prescribed authorization”—

Add

“or a part of the prescribed authorization”.

(4) Section 58(3), after “, the prescribed authorization”—

Add

“or that part of the prescribed authorization”.

(5) After section 58(3)—

Add

- “(3A) If the prescribed authorization is not revoked or only part of the prescribed authorization is revoked, the relevant authority may do one or both of the following—
- (a) vary any terms or conditions in the prescribed authorization;
 - (b) specify any new conditions in the prescribed authorization that apply to the prescribed authorization itself or to any further authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance).”.

18. Section 58A added

After section 58—

Add

“58A. Revocation of prescribed authorization in case of inaccurate information or change in circumstances

- (1) This section applies if, while a prescribed authorization is in force, the officer of the department concerned who is for the time being in charge of the interception or covert surveillance concerned—
 - (a) becomes aware that there is a material inaccuracy in the information provided for the purposes of—
 - (i) the application for the issue of the prescribed authorization made under section 8, 14 or 20, including such an application made orally under section 25;

- (ii) the application for the renewal of the prescribed authorization made under section 11 or 17, including such an application made orally under section 25;
 - (iii) the application for confirmation of the prescribed authorization as provided for in section 23(1) or 26(1); or
 - (iv) the application for confirmation of the renewal of the prescribed authorization as provided for in section 26(1); or
 - (b) becomes aware that there has been a material change in the circumstances on the basis of which—
 - (i) the prescribed authorization was issued under section 9(1)(a), 15(1)(a), 21(1)(a) or 25(4)(a);
 - (ii) the prescribed authorization was renewed under section 12(1)(a), 18(1)(a) or 25(4)(a);
 - (iii) the prescribed authorization was confirmed under section 24(1)(a) or 27(1)(a) or ordered to have effect under section 24(3)(a)(ii) or 27(3)(a)(ii); or
 - (iv) the renewal of the prescribed authorization was confirmed under section 27(1)(a).
- (2) Subject to subsection (3), the officer must—
- (a) as soon as reasonably practicable after becoming aware of the matter described in subsection (1)(a)(i) or (b)(i), cause a report on the matter to be provided to the relevant authority by whom the prescribed authorization has been issued;

- (b) as soon as reasonably practicable after becoming aware of the matter described in subsection (1)(a)(ii) or (b)(ii), cause a report on the matter to be provided to the relevant authority by whom the prescribed authorization has been renewed;
 - (c) as soon as reasonably practicable after becoming aware of the matter described in subsection (1)(a)(iii) or (b)(iii), cause a report on the matter to be provided to the relevant authority by whom the prescribed authorization has been confirmed or ordered to have effect; or
 - (d) as soon as reasonably practicable after becoming aware of the matter described in subsection (1)(a)(iv) or (b)(iv), cause a report on the matter to be provided to the relevant authority by whom the renewal of the prescribed authorization has been confirmed.
- (3) The officer is not required to cause a report on a material change in circumstances to be provided to the relevant authority under subsection (2) if—
- (a) the change arises from a discontinuance of the interception or covert surveillance concerned or a part of the interception or covert surveillance concerned under section 57(1) or (2) and a report has been provided to the relevant authority under section 57(3); or
 - (b) the change arises from the arrest of the subject of the interception or covert surveillance concerned as referred to in section 58(1) and a report has been provided to the relevant authority under that section.

- (4) Where the relevant authority receives a report under subsection (2), if the relevant authority considers that the conditions for the continuance of the prescribed authorization concerned or a part of the prescribed authorization concerned under section 3 are not met, the relevant authority must revoke the prescribed authorization or that part of the prescribed authorization.
- (5) If the prescribed authorization or a part of the prescribed authorization is revoked under subsection (4), the prescribed authorization or that part of the prescribed authorization, despite the relevant duration provision, ceases to have effect from the time of the revocation.
- (6) If the prescribed authorization is not revoked or only part of the prescribed authorization is revoked, the relevant authority may do one or both of the following—
 - (a) vary any terms or conditions in the prescribed authorization;
 - (b) specify any new conditions in the prescribed authorization that apply to the prescribed authorization itself or to any further authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance).
- (7) If, at the time of the provision of a report to the relevant authority under subsection (2), the relevant authority is no longer holding his or her office or performing the relevant functions of that office—

- (a) without affecting section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), the reference to relevant authority in that subsection includes the person for the time being appointed as a panel judge or authorizing officer (as appropriate) and lawfully performing the relevant functions of the office of that relevant authority; and
 - (b) the provisions of this section are to apply accordingly.
- (8) In this section—
- relevant duration provision* (有關時限條文) means section 10(b), 13(b), 16(b), 19(b) or 22(1)(b) (as may be applicable).”.

19. Section 59 amended (safeguards for protected products)

Section 59(1)—

Repeal paragraph (c)

Substitute

- “(c) that the protected product—
- (i) is destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization, unless it is to be or has been provided to the Commissioner in compliance with a requirement imposed under section 53(1)(a) before it is so destroyed; or
 - (ii) if it has been provided to the Commissioner in compliance with a requirement imposed under section 53(1)(a), is, after it is no longer required by the Commissioner, destroyed as soon as its retention is not necessary—

- (A) for the relevant purpose of the prescribed authorization; and
- (B) if further requirements are imposed by the Commissioner under section 53(1)(a), for the purpose of enabling compliance with the requirements.”.

20. Section 65A added

After section 65—

Add

“65A. Protected products obtained after revocation of prescribed authorization

- (1) If a prescribed authorization or a part of a prescribed authorization is revoked under section 24(3)(a)(i), 27(3)(a)(i), 58(2) or 58A(4), the head of the department concerned must make arrangements to ensure that the interception or covert surveillance concerned or the relevant part of the interception or covert surveillance concerned is discontinued as soon as reasonably practicable.
 - (2) Any protected product that is obtained after the prescribed authorization concerned or the relevant part of the prescribed authorization concerned is revoked and before the interception or covert surveillance concerned or the relevant part of the interception or covert surveillance concerned is discontinued in accordance with the arrangements made by the head of the department concerned under subsection (1) is, for the purposes of this Ordinance, to be regarded as having been obtained pursuant to a prescribed authorization.”.
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Explanatory Memorandum

The former Commissioner on Interception of Communications and Surveillance has made a number of recommendations to enhance the effectiveness of the regulatory regime under the Interception of Communications and Surveillance Ordinance (Cap. 589) (*Ordinance*), including the recommendation that the Commissioner on Interception of Communications and Surveillance (*Commissioner*) be given express power to require public officers to provide to the Commissioner protected products, that is, interception products and surveillance products. The object of this Bill is to amend the Ordinance to implement the former Commissioner's recommendations that have been endorsed by the incumbent Commissioner and agreed by the Administration.

2. Clause 1 sets out the short title.
3. Clause 3 amends the definitions of *device retrieval warrant*, *emergency authorization*, *executive authorization* and *judge's authorization* in section 2(1) of the Ordinance. After the amendment, a device retrieval warrant, emergency authorization, executive authorization or judge's authorization that has been partially revoked will still be regarded as a device retrieval warrant, emergency authorization, executive authorization or judge's authorization (as the case may be) under the Ordinance.
4. Clause 4 amends section 3(1) of the Ordinance so that the conditions for the continuance of a prescribed authorization set out in that section also apply to any part of a prescribed authorization.

5. Clauses 5 and 7 amend sections 23(1) and 26(1) of the Ordinance respectively to make minor amendments to the Chinese texts of those sections.
6. Clause 6 amends section 24 of the Ordinance to empower the panel judge to specify new conditions when refusing to confirm an emergency authorization.
7. Clause 8 amends section 27 of the Ordinance to empower the relevant authority to specify new conditions when refusing to confirm a prescribed authorization or renewal that is issued or granted upon oral application.
8. Clause 9 adds a new section 38A to the Ordinance to provide for the revocation of a device retrieval warrant if section 33(1)(a) or (b) of the Ordinance does not apply to the devices specified in the warrant or the warrant cannot for whatever reason be executed. The panel judge is empowered to revoke the warrant in whole or in part, to vary existing terms and conditions in the warrant and to specify new conditions.
9. Clause 10 amends section 44(2)(a) of the Ordinance to require the Commissioner to notify a person who makes an application for an examination under section 43 of the Ordinance the month and year from which the unauthorized interception or covert surveillance began.
10. Section 46 of the Ordinance provides that a person who makes an application for an examination under section 43 of the Ordinance is not entitled to have access to any information made available to the Commissioner in connection with the examination. Clause 11 amends section 46(3) of the Ordinance to clarify that protected products are also inaccessible to such an applicant.

11. Clause 12 amends section 48 of the Ordinance to clarify the meaning of *relevant person* and requires the Commissioner to notify the relevant person the month and year from which the unauthorized interception or covert surveillance began.
12. Clause 13 amends section 53 of the Ordinance to provide that the Commissioner may, for the purpose of performing the Commissioner's functions, require any public officer or any other person to provide protected products to the Commissioner.
13. Clause 14 adds a new section 53A to the Ordinance to empower the Commissioner to delegate the Commissioner's power to examine protected products to officers working in the Commissioner's office who are responsible to the Commissioner.
14. Section 54 of the Ordinance requires the heads of the Customs and Excise Department, the Hong Kong Police Force, the Immigration Department and the Independent Commission Against Corruption to report to the Commissioner a failure by the department or any of its officers to comply with any relevant requirement. Clause 15 amends that section so that a report is also required to be made even though the failure is not due to the fault of the department or its officers.
15. Clause 16 amends section 57 of the Ordinance to enable an officer of a department to discontinue a part of an interception or covert surveillance. It also requires the relevant authority to partially revoke the prescribed authorization after receiving a report on the matter, and empowers the relevant authority to vary existing terms and conditions in the prescribed authorization and to specify new conditions.

16. Clause 17 amends section 58 of the Ordinance to require the relevant authority to revoke a part of a prescribed authorization after the subject of the interception or covert surveillance has been arrested if the relevant authority considers that the conditions for the continuance of that part of the prescribed authorization under section 3 of the Ordinance are not met. It also empowers the relevant authority to vary existing terms and conditions in the prescribed authorization and to specify new conditions.
17. Clause 18 adds a new section 58A to the Ordinance to provide for the revocation of a prescribed authorization in the case of any material inaccuracy in the information contained in a relevant application or any material change in circumstances. The relevant authority is required to revoke the prescribed authorization or a part of the prescribed authorization if the relevant authority considers that the conditions for the continuance of the prescribed authorization or that part of the prescribed authorization under section 3 of the Ordinance are not met. The relevant authority is also empowered to vary existing terms and conditions in the prescribed authorization and to specify new conditions.
18. Clause 19 amends section 59(1)(c) of the Ordinance to provide for the destruction of protected products that have been provided to the Commissioner in compliance with a requirement imposed by the Commissioner under section 53(1)(a) of the Ordinance.
19. Clause 20 adds a new section 65A to the Ordinance to provide that any protected product that is obtained after the prescribed authorization concerned is revoked and before the interception or covert surveillance concerned is discontinued in accordance with the arrangements made by the department head concerned

under the new section is to be regarded as having been obtained pursuant to a prescribed authorization.