

Interception of Communications and Surveillance (Amendment) Ordinance 2016

Contents

Section	Page
1.	Short title..... A2217
2.	Interception of Communications and Surveillance Ordinance amended..... A2219
3.	Section 2 amended (interpretation)..... A2219
4.	Section 3 amended (conditions for issue, renewal or continuance of prescribed authorization) A2221
5.	Section 23 amended (application for confirmation of emergency authorization)..... A2221
6.	Section 24 amended (determination of application for confirmation of emergency authorization) A2223
7.	Section 26 amended (application for confirmation of prescribed authorization or renewal issued or granted upon oral application) A2223
8.	Section 27 amended (determination of application for confirmation of prescribed authorization or renewal issued or granted upon oral application)..... A2223
9.	Section 38A added..... A2225
38A.	Report to panel judge: device retrieval warrant cannot be executed A2225

Section	Page
10. Section 44 amended (examination by Commissioner)	A2227
11. Section 46 amended (further provisions relating to examinations).....	A2227
12. Section 48 amended (notifications to relevant persons)	A2229
13. Section 53 amended (further powers of Commissioner).....	A2231
14. Section 53A added.....	A2231
53A. Delegation of power to examine protected products	A2231
15. Section 54 amended (general obligations of departments to report on non-compliance)	A2233
16. Section 57 amended (discontinuance of interception or covert surveillance)	A2233
17. Section 58 amended (reports to relevant authorities following arrests).....	A2239
18. Section 58A added.....	A2241
58A. Report to relevant authority: inaccurate information or change in circumstances.....	A2241
19. Section 59 amended (safeguards for protected products).....	A2249
20. Section 65A added.....	A2253
65A. Protected products obtained after revocation of prescribed authorization.....	A2253

HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 21 OF 2016



C. Y. LEUNG
Chief Executive
23 June 2016

An Ordinance 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.

[24 June 2016]

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Interception of Communications and Surveillance (Amendment) Ordinance 2016.

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. Report to panel judge: device retrieval warrant cannot be executed

(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 date on 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 date on 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

“Report to relevant authority: 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. Report to relevant authority: 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;

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- (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;

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- (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)

(1) Section 59(1)—

Repeal paragraph (c)

Substitute

- “(c) that, except as otherwise provided in subsection (1A), 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.”.
- (2) After section 59(1)—

Add

- “(1A) Subsection (1B) applies if the protected product consists of information described in section 23(3)(a), 24(3)(b)(i) or (ii), 26(3)(b)(i) or 27(3)(b)(i) or (ii).
- (1B) Despite section 23(3)(a) or 26(3)(b)(i) or any requirement in an order made under section 24(3)(b) or 27(3)(b), the head of the department concerned—
 - (a) must immediately notify the Commissioner of the case;
 - (b) must make arrangements to ensure that the information is retained; and
 - (c) must—
 - (i) if the Commissioner notifies the head of the department that the Commissioner will not require the provision of the information under section 53(1)(a), cause the immediate destruction of the information; or

- (ii) if the Commissioner requires the provision of the information under section 53(1)(a)—
 - (A) provide the information as required; and
 - (B) cause the immediate destruction of the information when it is no longer required by the Commissioner.”.

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.”.