

Interception of Communications and Surveillance Ordinance

A Guide on Application for Examination

The law

1. The Interception of Communications and Surveillance Ordinance, Cap 589 ('the Ordinance') was passed in August 2006, putting the activities of interception of communications ('interception') and covert surveillance by officers of four law enforcement agencies ('LEAs'), namely, Customs and Excise Department, Hong Kong Police Force and Independent Commission Against Corruption regarding interception, and the same departments plus Immigration Department regarding covert surveillance, under a statutory framework, and the Commissioner on Interception of Communications and Surveillance ('the Commissioner') was appointed as the oversight and review authority of such activities. An LEA and its officers can only lawfully carry out interception or covert surveillance on anybody where such activity is authorized by a prescribed authorization.

2. Under section 43 of the Ordinance, a person can apply in writing to the Commissioner for an examination if he/she suspects that he/she is the subject of any interception or covert surveillance activity carried out by any officer of an LEA. Pursuant to section 44, upon receiving an application, the Commissioner shall, save where the circumstances set out in section 45 apply (see below), 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.

3. After the examination, if the Commissioner finds the case in the applicant's favour, he will, subject to certain provisions of the Ordinance, notify the applicant concerned and invite him/her to confirm whether he/she wishes to seek an order for the payment of compensation by the Government, and if so, to make written submissions for that purpose. The submissions

will be taken into account by the Commissioner in considering the award of compensation to the applicant.

Grounds for not carrying out an examination

4. Under section 45(1) of the Ordinance, the Commissioner may refuse to carry out an examination if he considers that:

- (a) 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;
- (b) the application is made anonymously;
- (c) the applicant cannot be identified or traced after the use of reasonable efforts; or
- (d) the application is frivolous or vexatious or is not made in good faith.

5. Where before or in the course of an examination, the Commissioner is satisfied that any relevant criminal proceedings are pending or are likely to be instituted, section 45(2) mandates the Commissioner not to carry out the examination or proceed with the carrying out of the examination until the criminal proceedings have been finally determined or finally disposed of or until they are no longer likely to be instituted. Relevant criminal proceedings, as defined under section 45(3), are 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.

Other application requirements

6. It is only when the proper basis of an application is satisfied that the Commissioner is entitled to institute the process of his examination of the case. The proper basis is to satisfy both of the following requirements, namely,

- (a) there is suspicion of interception 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.

7. Regarding requirement (a), that a complainant was surreptitiously or openly observed or followed by officers of an LEA would normally not satisfy the proper basis for an application for examination, because the matter complained of is not an interception and it does not qualify as a covert surveillance under the Ordinance because there was no suspicion of any surveillance device being used^{Note}. For the Commissioner to initiate an examination, the devices suspected to be used by the officers of the LEAs must be of the type which would constitute a covert surveillance, namely, data surveillance device, listening device, optical surveillance device or tracking device.

8. As regards requirement (b), the suspected interception or covert surveillance must be carried out by an LEA officer, not for example the employer of the complainant.

9. In addition, as the Ordinance came into force on 9 August 2006, any interception or covert surveillance activity which has or is alleged to have occurred before the implementation of the Ordinance is not within the ambit of the Commissioner's functions.

Disclosure of reasons for determination not allowed

10. In performing his examination functions, amongst others, under the Ordinance, the Commissioner shall take heed not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security. For instance, the Commissioner is not allowed to disclose to an unsuccessful applicant the reason why he has reached the determination of finding not in favour of the applicant's case [section 46(4)(a)], meaning that the application is not successful, or even indicate whether any interception or covert surveillance alleged has taken place [section 46(4)(c)]. This statutory prohibition is designed to forbid the

^{Note} According to section 2 of the Ordinance, 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.

disclosure of any sensitive and secret information as mentioned above, thus preventing the provision of an advantage to 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.

How to apply for an examination under section 43

11. If you suspect that you are the subject of any interception or covert surveillance activity that has been carried out by officers of one or more of the LEAs under the Ordinance, you may apply to the Commissioner for an examination. Your application is to be made personally in writing. In so doing, you should give a full account of your case and send your application letter together with the duly completed Consent Form on the use of personal data to the Commissioner's office at Units 1501 - 1504, 15/F, Sunlight Tower, 248 Queen's Road East, Wanchai, Hong Kong.

Procedure involved in handling an application for examination

12. If the Commissioner considers that an examination in respect of an application should be conducted, the Commissioner's office will make enquiries with the particular LEA who, as the applicant alleges, has carried out either interception or covert surveillance against the applicant as to whether any such statutory activity has taken place and if so, the reason why. Enquiries will also be made with the Panel Judges' Office as to whether any authorization has 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 and other investigations will be pursued if that may help obtain evidence regarding the existence or otherwise of any such alleged statutory activity. The results obtained from various channels will be compared and counterchecked to ensure correctness. Other than the information given above, it is undesirable to disclose more details about the methods used for the examination of applications or about the examinations undertaken, because that would probably divulge information that may prejudice the prevention or detection of crime or the protection of public security.