



THE PARLIAMENT OF
TRINIDAD AND TOBAGO

BILL ESSENTIALS

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Minister: Attorney General and
Minister of Legal Affairs

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Links: The links to the Bill, and its progress can be found on the Bill's home page through the Parliament's website, www.ttparliament.org

BILL ESSENTIALS






BILL ESSENTIALS NO.27, 2019–2020

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The Interception of Communications (Amendment) Bill, 2020

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BACKGROUND

1. The **Interception of Communications (Amendment) Bill, 2020**¹ (“the Bill”) was introduced in the Senate by the Attorney General and Minister of Legal Affairs on February 4, 2020. The Bill will amend the Interception of Communications Act Chap. 15:08² (“the Act”). The main objectives of the Bill are to:
 -  allow for the interception and recording of communications from prisons and vehicles used to transport prisoners;
 -  authorise officers to apply for a warrant to obtain stored communication and stored data from a telecommunications service provider;
 -  permit officers to disclose the stored communication and the stored data;
 -  establish the procedure for the disclosure of sensitive information; and
 -  allow for intercepted information to be admissible as evidence in any proceedings.
2. The Bill is inconsistent with **Sections 4** and **5** of the **Constitution of the Republic of Trinidad and Tobago** and would therefore be required to be passed by a special majority of three-fifths of the Members of each House.

KEY FEATURES OF THE BILL

Application

3. **Clause 4** of the Bill stipulates that the Act shall apply to:
 - a. Criminal proceedings;
 - b. Proceedings under the **Proceeds of Crime Act**;³
 - c. Proceedings under the **Extradition (Commonwealth and Foreign Territories) Act**;⁴
 - d. Proceedings under the **Anti-Terrorism Act**;⁵ and

¹ <http://www.ttparliament.org/publications.php?mid=28&id=880>

² http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs.../11.27.pdf

³ http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs.../11.27.pdf






⁴ https://rgd.legalaffairs.gov.tt/laws2/Alphabetical_List/lawspdfs/12.04.pdf

⁵ http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs.../12.07.pdf

- e. Proceedings under the **Civil Asset Recovery and Management and Unexplained Wealth Act**.⁶
4. However, the Act does not apply to trials already in progress on the coming into force of the Act. A trial is deemed to be in progress once evidence is being led.

Interpretation

5. **Clause 5** inserts definitions of certain terms introduced by the Bill, *inter alia*:-

-  “*device*” means any electronic programmable apparatus used to perform pre-determined arithmetic, logical, routing or storage operations;
-  “*stored communication*” means any communication or data which has been transmitted by a telecommunications network and is stored on any facility capable of storing such communication or data;
-  “*stored data*” means any data of whatever description stored on a device;
-  “*prison*” includes all the prisons in Trinidad and Tobago⁷, as well as holding cells at police stations, convict depots, rehabilitation centres and any other place which the Minister may appoint as a prison; and
-  “*rehabilitation centre*” means a residence for the rehabilitation of youthful offenders, in which youthful offenders are lodged, clothed, and fed as well as taught.⁸

Interception of Communication

6. **Clause 6** repeals and replaces subsection (1) of Section 6 of the Act on the prohibition of interception. The new **subsection (1)** creates an indictable offence to punish persons who intentionally intercept a communication in the course of its transmission, in addition to the existing summary offence. The penalty for the summary offence remains unchanged however, on conviction on indictment the person is liable to a ***fine of one million dollars (TTD \$1,000,000.00)*** and ***fifteen (15) years imprisonment***.
7. The Act presently bars the admissibility of communication intercepted under a warrant by an authorised officer as evidence in criminal proceedings. **Clause 6 (b) (ii)** amends Section 6

⁶ <http://www.ttparliament.org/legislations/a2019-08.pdf>

⁷ The Port of Spain Prison; the Golden Grove Prison; the Maximum Security Prison, Golden Grove; the Remand Prison, Golden Grove; the Women’s Prison, Golden Grove; the Eastern Correctional Rehabilitation Centre; the Carrera Convict Prison; the Tobago Convict Prison; the Immigration Detention Centre and any Rehabilitation Centre.

⁸ Section 2 of the Children’s Community Residences, Foster Care and Nurseries Act Chap. 46:04 http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/46.04.pdf

(2) (b) of the Act to allow for intercepted communication to be admitted into evidence in any proceedings, subject to certain circumstances.⁹

8. **Clause 6 (b) (v)** inserts a new **paragraph (h)**, after the existing paragraph (g), which exempts from the general prohibition of interception, interception conducted by an authorised officer of any communication transmitted to or from a device in a prison or a vehicle transporting prisoners.
9. **Clause 6 (d)** introduces a **new subsection (6)** which clarifies subsection (5) on lawfully intercepted information being exempt from the **Freedom of Information Act Chapter 22:02**¹⁰. This new subsection elucidates that exempt information includes sensitive information and any other information not specified in the annual report of the Minister.

Interception of communications

10. **Clause 7** seeks to insert two new **sections 6A** and **6B** after the existing section 6 of the Act, to specifically address the interception of communications from a prison or a vehicle used to transport prisoners.
11. **Section 6A** prescribes that the Commissioner of Prisons shall inform all prisoners and prison staff that any communication transmitted to or from any device in a prison or a vehicle used to transport prisoners may be **intercepted**.
12. Importantly, **section 6A (2)** makes clear that legal professional privilege will not attach to intercepted communications which were not conducted on designated devices or in a designated place within the prison.¹¹
13. **Section 6B** empowers an authorised officer to record communications within a prison or a vehicle used to transport prisoners. It further prescribes that the Commissioner of Prisons shall inform all prisoners and prison staff that any communication may be **recorded**. Most importantly, it provides that communications recorded within a prison or a vehicle used to transport prisoners will not be subject to legal professional privilege unless the communications occur within a place within the prison designated by the Minister.

⁹ This is subject to sections 17 (2B) and 17 (2C) of the Bill which will be dealt with later.

¹⁰ http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs/22.02.pdf

¹¹ Legal Professional Privilege is the right which attaches to certain types of confidential communication. This prevents such communication between lawyers and their clients from being disclosed, even in court. Legal Professional Privilege comprises of legal advice privilege and litigation privilege.

Possession of Interception Devices

14. **Clause 8** includes the importation of interception devices which may be used for unauthorised interception of private communications, as an offence under section 7 of the Act.

Warrant for Interception

15. **Clause 9** seeks to amend Section 8 of the Act in relation to warrants for interception. **Clause 9(a)** repeals and replaces subsection (1) with a new **subsection (1)** which empowers the authorised person named in a warrant to not only intercept communications, but also to obtain and disclose stored communication or data in the manner prescribed in the warrant.
16. Further, **Clause 9(b)** introduces a new **subparagraph (iii)** to Section 8(2) (a), enabling a Judge to grant a warrant for interception for the purposes of the **Mutual Assistance in Criminal Matters Act Chap. 11:24**¹² or to give effect to the provisions of any international mutual assistance agreement.
17. Moreover, **Clause 9(c)** repeals and replaces Section 8 (6) of the Act. The new **subsection (6)** creates an indictable offence for disclosing the existence of or application for a warrant, in addition to the current summary offence. The penalty for the summary offence remains unchanged however, on conviction on indictment the person is liable to a ***fine of one million dollars (TTD \$1,000,000.00)*** and ***fifteen (15) years imprisonment.***

Scope of Warrant

18. **Clause 10** clarifies the procedure in Section 9(4) for implementing a warrant. The applicant desirous of assistance in implementing a warrant may request and bear the cost of such assistance to conduct the interception.

Application for a Warrant in urgent circumstances

19. **Clause 11** expounds on Section 11 (1)(b) of the Act, specifying that the Judge, once satisfied of the urgency, may issue a warrant authorising the interception of communications as well as the power to obtain and disclose stored communication or data in the manner provided in the warrant.

¹² http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs/11.24.pdf

Duties of persons providing assistance or telecommunications service

20. Section 13 of the Act provides that *persons or entities who provide a telecommunications service by means of a public or private telecommunications network and all other providers of telecommunications services shall take all steps that are necessary to ensure that prompt assistance can be provided where necessary to comply with interception warrants granted under this Act.*
21. **Clause 12** amends Section 13 of the Act to expand the scope of interceptions, by deleting the words “*interception warrants granted*” and replacing it with the words “*interceptions authorised*”. This amendment will ensure that prompt assistance is provide for all authorised interceptions under the Act or any other written law by an authorized officer and not only those interceptions authorised by warrants.
22. Finally, **Clause 12** also amends Section 13 by inserting a new **subsection (4)** which allows a person or entity which is required to provide technical assistance to bear the cost of providing that assistance.

Order requiring disclosure of protected communication

23. **Clause 13** expands the scope of Section 15 of the Act by specifying that an Order requiring the disclosure of protected communication can be obtained from a Judge under this Act or any other written law, as opposed to not specifying the legal basis for which the warrant may be issued.

Effect of disclosure order






24. **Clause 14** amends Section 16 (1) of the Act and requires a person to whom a disclosure order is addressed to securely retain the key¹³ used to obtain access to protected communication and issue a certificate stating that he used a key in his possession to obtain said access.

Admissibility of Evidence

25. **Clause 15** extensively amends Section 17 of the Act on the admissibility of evidence. Section 17(1) is repealed and replaced with a new **subsection (1)** which expands the meaning of “*sensitive information*” to include applications for warrants for the interception of communication and for obtaining communication data or stored communication, as well as

¹³ According to section 5 of the Interception of Communications Act Chap. 15:08, the word “key” used in relation to any protected communication, means any key, code, password, algorithm or other data the use of which (with or without other keys)— (a) allows access to a protected communication; or (b) facilitates the putting of a protected communication into an intelligible form.

information relating to the method of interception and any information suggesting the identity of any party carrying out the interception.

26. Further, by deleting the word “*criminal*” in Section 17(2), **Clause 15 (b)** allows the contents of intercepted communication to be admitted as evidence in any proceedings.
27. **Clause 15 (c)** introduces three (3) new subsections to Section 17. **Subsection (2A)** allows for contents of an intercepted communication, obtained under Section 6 (2) (c), (d), (e), (f) or (g)¹⁴ of the Act, to be admissible as evidence in any proceedings. **Subsection (2B)** allows for contents of an intercepted communication, obtained under Section 6 (2) (b), (h) or 6B¹⁵ of the Act, to be admissible as evidence in any proceedings where the Judge is satisfied that it is in the interest of justice to do so.
28. **Subsection (2C)** provides that a Judge should consider all the circumstances concerning the obtaining of the communication and other relevant factors which would render what the Defendant said unreliable. The Judge must consider, in respect of the recorded communications that:
-  nothing was done to induce or trick the accused or defendant into saying something;
 -  the integrity of any recording is sound;
 -  the use of the recording device was proportionate to the gravity of the alleged or suspected offence;
 -  the use of the method was appropriately authorised by an officer independent of the investigation; and
 -  no recording of any conversation subject to legal professional privilege which occurred in a place specified by the Minister.
29. Lastly, **Clause 15** seeks to repeal subsections (4) and (5) and replace with a new **subsection (4)** which specifies the procedure for disclosure of, and admissibility of evidence in relation to, sensitive information in any proceedings. The new subsection prescribes that no evidence should be given and no question should be asked of any witness that suggests the disclosure of sensitive information unless the Court grants leave to do so. The Court must not grant leave unless satisfied by the party challenging the evidence that it would be relevant to the validity and lawfulness of the warrant or the accuracy and integrity of the

¹⁴ These sections of the Act deal with the exceptions to prohibition of interception of communication.

¹⁵ These sections deal with the interception of communications by an authorised officer and the recording of communication by an authorised officer.

intercepted communication or communication data. The Court must also be satisfied that a refusal may render an unsafe decision by the Court or jury.

Disclosure of sensitive information in closed proceedings and Special Advocates

30. **Clause 16** introduces a new **section 17A** to the Act which prescribes the procedure to be followed where the Court has to determine whether to disclose sensitive information. This section empowers the Court to issue a special measure direction that closed proceedings be utilised. During these closed proceedings no person other than the Judge, prosecutor, the Court Interpreter or any other person required to assist the Court in its proceedings and the Special Advocate shall be present in the courtroom. Any person involved in said proceedings must be approved by the Court.
31. A **Special Advocate** refers to an Attorney-at-Law appointed by the Court to represent the interests of the accused or defendant, as the case may be, and who acts in the interests of justice. A Special Advocate is an Attorney-at-Law whose function is to represent the interests of the accused by making submissions, adducing evidence, cross-examining witnesses and generally assisting the court.

Admissibility of communications data

32. **Clause 18** amends Section 19 by allowing stored communication or stored data, obtained in accordance with Section 18, to be admissible as evidence in accordance with the law relating to the admissibility of evidence.
33. Additionally, **Clause 18** repeals and replaces subsections (2) and (3) with a new **subsection (2)** which outlines the procedure for admitting into evidence any communications data, stored communication or stored data before the Court. No evidence is to be adduced which suggests or tends to suggest the disclosure of sensitive information without leave of the Court. Further, such leave is not to be granted unless the evidence is relevant or refusal to grant leave may render an unsafe decision.

Destruction of Records

34. **Clause 19** modifies Section 20 which deals with destruction of records. The **Clause** inserts new **subsections (8)** and **(9)** after the existing subsection (7).

35. **Subsection (8)** provides the circumstances under which a record of information would be considered to be related to the objective of the interception. These circumstances include where the record of information provides information which helps in identifying the sender or recipient of the communication; assists in explaining the communication; and provides a link between the sender and the recipient.
36. **Subsection (9)** provides that for information which may reveal the commission of other offences by other people should not be disclosed to the accused but should be retained and be the subject of a public interest immunity¹⁶ application to the Court by the prosecution.

Offences

37. **Clause 21** of the Bill seeks to amend Section 23 (3) of the Act by deleting the word “criminal” so that the exemption from the offence would apply to any proceedings, not only criminal proceedings.

Tipping Off

38. **Clause 22** of the Bill inserts a **new section 23A** which creates the offence of tipping off. This section seeks to make it an offence to disclose information or any other matter which is likely to prejudice any investigation which may be connected or related to an interception. The section also makes it an offence to aid or abet tipping off.
39. A person who commits the offence of tipping off or aiding a tip-off is liable on summary conviction to a ***fine of five million dollars (TTD \$5,000,000.00)*** and to ***imprisonment for five (5) years*** and on conviction on indictment to a ***fine of twenty-five million dollars (TTD \$25,000,000.00)*** and to ***imprisonment for fifteen (15) years***.
40. The new section also establishes a defence if the person can prove that he did not know or suspect that the disclosure was likely to be prejudicial.

Power to Make Rules

41. **Clause 23** amends Section 25 of the Act by inserting a new **subsection (3)** which provides that regulations under this Act may prescribe for the contravention of said regulations and

¹⁶ A party may object to disclosure and/or inspection on the grounds that production of the document(s) would be injurious to the public interest. This objection is known as an objection on the grounds of public interest immunity. <https://www.lexisnexis.co.uk/legal/guidance/public-interest-immunity>

prescribe penalties for any offence up to **two hundred and fifty thousand dollars (TTD \$250,000.00)** and **two (2) years in prison**.

42. **Clause 24** inserts a new **Section 25A** into the Act which provides that the Rules Committee of the Supreme Court established by the Supreme Court of the Judicature Act may make Rules to govern the proceedings under this Act. The Rules are subject to **negative resolution** of Parliament.

COMPARATIVE LEGISLATION

Interception and recording of communications originating from prisons and prisoner transport vehicles

United Kingdom	Trinidad and Tobago
<i>Investigatory Powers Act, 2016 (Chapter 25)</i>	<i>The Interception of Communications (Amendment) Bill, 2020</i>
A warrant under Section 9 would be issued for obtaining communications or other information by monitoring, observing or listening to a person's communications or other activities; recording anything which is monitored, observed or listened to. Such warrant can be a targeted equipment interference warrant or a targeted examination warrant.	Interception and recording of communications from a prison and a prisoner transport vehicle to be done by an authorised officer.

Obtaining stored data communication from telecommunications service provider and disclosing such communications to such persons and in such manner as specified in warrant

United Kingdom	Trinidad and Tobago
<i>Investigatory Powers Act, 2016 (Chapter 25)</i>	<i>The Interception of Communications (Amendment) Bill, 2020</i>
Under Section 61, if a designated senior officer of a relevant public authority considers it necessary to obtain communications data for the purposes of a specific investigation or a specific operation, the designated senior officer may authorise any officer of the authority to engage in any conduct for the purpose of obtaining the data from any person, which relates to: a telecommunication system, or data derived from a telecommunication system. Such authorisation may authorise the obtaining or disclosure of data by a	An authorised officer may apply, <i>ex parte</i> , to a Judge for a warrant authorising the person named in the warrant to obtain stored communication from a telecommunications service provider and to disclose the stored communication to such persons and in such manner as may be specified in the warrant.

<p>person who is not an authorised officer, or any other conduct by such person, which enables or facilitates the obtaining of the communications data concerned, and may require a telecommunications operator who controls or provides a telecommunication system to obtain or disclose data relating to the use of a telecommunications service provided by another telecommunications operator in relation to that system.</p>	
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Communication transmitted to/from any device in prisons or prisoner transport vehicle not subject to legal professional privilege upon interception unless done on designated device or at a designated place

<p>United Kingdom</p>	<p>Trinidad and Tobago</p>
<p><i>Investigatory Powers Act, 2016 (Chapter 25)</i></p>	<p><i>The Interception of Communications (Amendment) Bill, 2020</i></p>
<p>An application is made under Section 27, by or on behalf of an intercepting authority for a warrant must contain a statement that the purpose, or one of the purposes, of the warrant is to authorise or require the interception, or (in the case of a targeted examination warrant) the selection for examination, of items subject to legal privilege. In deciding whether to issue the warrant, the person to whom the application is made must have regard to the public interest in the confidentiality of items subject to legal privilege.</p> <p>The person to whom the application is made may issue the warrant only if the person considers— that there are exceptional and compelling circumstances that make it necessary to authorise or require the interception, or (in the case of a targeted examination</p>	<p>Communications are not subject to legal professional privilege, unless the communications take place- on a designated device; or in such places within a prison as may be specified by the Minister, by Order.</p>

<p>warrant) the selection for examination, of items subject to legal privilege, and that the arrangements made include specific arrangements for the handling, retention, use and destruction of such items.</p>	
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Sensitive data/communication which is stored can be admissible as evidence with leave of the court

<p>United Kingdom</p>	<p>Trinidad and Tobago</p>
<p><i>Investigatory Powers Act, 2016 (Chapter 25)</i></p>	<p><i>The Interception of Communications (Amendment) Bill, 2020</i></p>
<p>In the case of a communication stored in or by a telecommunication system, the interception must be carried out in accordance with a court order made for that purpose.</p>	<p>In any proceedings, no evidence shall be adduced and no question shall be asked of any witness that suggests or tends to suggest the disclosure of sensitive information, except with the express leave of the Court hearing the proceedings</p>

Offence to disclose information which is likely to prejudice any investigation connected/related to the interception of such communications (Tipping Off)

<p>United Kingdom</p>	<p>Trinidad and Tobago</p>
<p><i>Investigatory Powers Act, 2016 (Chapter 25)</i></p>	<p><i>The Interception of Communications (Amendment) Bill, 2020</i></p>
<p>Under Section 82, it is an offence for a telecommunications operator, or any person employed or engaged for the purposes of the business of a telecommunications operator, to disclose, without reasonable excuse, to any person the existence of— any requirement imposed on the operator by virtue of this Part to disclose communications data relating to that person, or any request made in pursuance of an authorisation for the operator to disclose such data.</p>	<p>A person commits an offence if he discloses to any other person information or any other matter which is likely to prejudice any investigation which may be connected or related to the interception.</p>

REFERENCES

KEY LEGISLATION



The Interception of Communications (Amendment) Bill, 2020

<http://www.ttparliament.org/publications.php?mid=28&id=880>

OTHER LEGISLATION



Proceeds of Crime Act Chap.11:27

http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs.../11.27.pdf



Extradition (Commonwealth and Foreign Territories) Act Chap.12:04

https://rgd.legalaffairs.gov.tt/laws2/Alphabetical_List/lawspdfs/12.04.pdf



Anti-Terrorism Act Chap.12:07

http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs.../12.07.pdf



Civil Asset Recovery and Management and Unexplained Wealth Act.

<http://www.ttparliament.org/legislations/a2019-08.pdf>



Freedom of Information Act Chap.22:02

http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs/22.02.pdf



Mutual Assistance in Criminal Matters Act Chap.11:24

https://rgd.legalaffairs.gov.tt/laws2/Alphabetical_List/lawspdfs/11.24.pdf

OTHER JURISDICTIONS

UNITED KINGDOM



Investigatory Powers Act, 2016

http://www.legislation.gov.uk/ukpga/2016/25/pdfs/ukpga_20160025_en.pdf

http://www.legislation.gov.uk/ukpga/2000/23/pdfs/ukpga_20000023_en.pdf



Legal Unit
Parliament Secretariat
Parliamentary Complex, Cabildo Building,
No. 23-27 St. Vincent Street, Port-of-Spain

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Research assistance provided by Shenece A.R Noel and Casey D'Aguiar of the Hugh Wooding Law School.

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