

# Information on Legal Frameworks in Guatemala Pertaining to Freedom of Expression and Privacy

## 1. PROVISION OF REAL-TIME LAWFUL INTERCEPTION ASSISTANCE

### 1.1 Guatemalan Constitution

Article 24 of the Guatemalan Constitution provides for a general right to privacy of communications, including those made by telephone and 'other means of modern technology', which cannot be violated without judicial authorisation in accordance with the relevant laws.

### 1.2 Law Against Organised Crime (Decree No. 21-2006)("LAOC")

Article 48 LAOC states that, where necessary to prevent or investigate a specified range of offences (such as drug and people trafficking, money laundering, fraud, murder, embezzlement, smuggling and terrorism when committed as part of a group of three or more people or conspiracy to commit any of these offences), communications may be intercepted with the court's permission.

Under article 49, the Prosecutor's Office ("**PO**") is the only body competent to request such a court order from the Judges of First Instance in Criminal Matters but any government agency can request that the PO make such an application. It can be interpreted that among others the police, intelligence agencies, tax authorities can seek assistance from PO to request a court order to intercept communications.

According to article 50 LOAC, in its application the PO must include:

- (a) a description of the events under investigation and the suspected offences involved;
- (b) details of the communications services which are to be intercepted (such as specific telephone numbers);
- (c) a description of the measures already taken to investigate the offence;
- (d) a justification of the interception with reference to its necessity and appropriateness; and
- (e) if possible, the names of the individuals affected by the proposed interception.

Under article 53(d) and 58 of LOAC if granted by the judge, the order must contain details of the scope of the authorised interception and the court's reasoning for authorising it. It must also state the term of the authorisation which can be up to 30 days (extendable through additional applications fulfilling the same criteria) and the date and time for a review hearing, as discussed further below.

Once granted, the court order is notified to the relevant communication service provider ("**CSP**") and a team from the Wiretapping and Other Media Section of the Police will carry out the interception. Article 56 obliges CSPs to have the necessary capability to implement interception orders and provides for a general duty of cooperation of CSPs with such activities.

### 1.3 **Regulation for the Implementation of Special Research Methods (158-2009)**

The 2009 Regulations provide further administrative detail for the interception process. They establish the Section for Wiretapping and Other Media which is the division of the police responsible for carrying out interceptions. Article 40 also states that applications for interception orders must take the format of an oral hearing alongside a written request to the court, adhering to the requirements set out in the LAOC.

Among others, the Regulations also contain obligations on CSPs to:

- (a) provide immediate implementation assistance on notice of an interception order; (article 41 2<sup>nd</sup> paragraph)
- (b) be able to receive and comply with legal and technical orders relating to interception and delivery of communications data; (article 41 1<sup>st</sup> paragraph)
- (c) ensure that interceptions do not disrupt their subscribers' communications; (article 42(a) and
- (d) implement all necessary security measures to ensure that their employees and government officials do not reveal information on interceptions. (article 42(d))

## 2. **DISCLOSURE OF COMMUNICATIONS DATA**

### 2.1 **Regulation for the Implementation of Special Research Methods (158-2009)**

Article 42 of the 2009 regulations obliges CSPs to retain their subscribers' identity and communications data for a minimum period of one year. The same provision also requires that they provide necessary assistance to the PO when it requests such communications data, including any necessary clarifications.

As communications data would come within the remit of the 2009 regulations (Article 12), before the PO can make such a request of a CSP it must make an application for a court order from the Judges of First Instance in Criminal Matters in the same manner and under the same provisions as detailed above for interceptions. If the request is only for communications data rather than full interception of communications, however, the requirement of showing necessity and appropriateness will be easier for the PO to fulfil.

## 3. **NATIONAL SECURITY AND EMERGENCY POWERS**

### 3.1 **Guatemalan Constitution**

As referred to above, article 24 of the Guatemalan Constitution provides for a general right to privacy of communications. While article 138 provides for the possibility of certain constitutional rights to be limited in cases of invasion, serious disturbance of the peace, activities against the security of the state or public calamity, this only applies to a select group of rights which does not extend to the article 24 right to privacy. Therefore there are no situations in which extenuating circumstances can allow government interception of communications without going through the judicial authorisation process detailed above.

Article 40 of the Constitution allows for government expropriation of private property for reasons of duly proven collective utility, social benefit, or public interest. Such

expropriation is subject to prior compensation to the property owner amounting to the actual value of the property in usable legal currency. Such compensation must be paid to the owner before the expropriation, apart from in cases of war, public calamity or grave disturbance of the peace, in which case it must be paid immediately after the emergency situation has ceased and, in any event, within 10 years.

It is unclear whether this power extends beyond the expropriation of land (to shares in a company or a company's network, for example) and it has never been used to take control of a company or a telecommunications network. Such a decision to expropriate a company's property, could be challenged in the Constitutional Court.

### **3.2 Public Order Act 1965 ("POA")**

Under article 120 and 138 of the Guatemalan Constitution, and Article 8 numeral 1) of the POA states that in emergency situations the Executive<sup>1</sup> can declare a 'state of prevention' by decree which allows the state to militarize public services and intervene in services provided by private companies. Such intervention can last for up to 15 days or indefinitely with congressional approval if there is a state of war.

## **4. CENSORSHIP-RELATED POWERS**

There is no current law in force in Guatemala which allows government agencies to shut down CSPs' networks or services or to require that CSPs block IP addresses, including for websites which publish illegal content.

## **5. OVERSIGHT OF THE USE OF THESE POWERS**

### **5.1 Law Against Organised Crime (Decree No. 21-2006)**

Once the court has authorised interception, article 59 LAOC states that the PO must report back to the court every fortnight on the development of the interception activity in order to verify that the measures are being carried out in accordance with the court's authorisation and that they are meeting their intended purpose.

Under article 57 LAOC, the judge who makes the order must also personally attend the site of the interception at least once during the authorised interception period to verify that the interception is being carried out in accordance with the order (Art 57 LAOC).

### **5.2 Guatemalan Constitution**

If the President issues a decree to authorise the militarisation of a service, this will automatically summon Congress which must ratify, amend, or reject the decree within three days. (Article 138 2<sup>nd</sup> paragraph)

The Human Rights Ombudsman and the Constitutional Court also have oversight of this process and any citizens or companies who are affected can bring an action in the Constitutional Court seeking to revoke the decree on the grounds that it is unconstitutional. (Article 275)

---

<sup>1</sup> Under Title IV Chapter III of the Constitution, the Executive is made up of the President, Vice President and Ministers of State. The President is the head of the Executive Organ and 'exercises the functions of the Executive Organ through the mandate of the people.' (Article 182)

## **6. PUBLICATION OF LAWS AND AGGREGATE DATA RELATING TO LAWFUL INTERCEPT AND COMMUNICATIONS DATA REQUESTS**

### **6.1 Publication of laws**

There are no restrictions on the publication of laws in Guatemala. Article 5 of the Constitution establishes that everyone has the right to do anything which the law does not prohibit and each law must be published in the National Newspaper in order to be legal and binding to all citizens.

### **6.2 Publication of aggregate data**

There are no laws which prevent CSPs from publishing aggregate data relating to any of the above powers, including the volume of interceptions or metadata requests over a specified period.