Global Attorney-Client Privilege Guide - Singapore

July 4, 2022

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# 01 - Discovery

## What disclosure/discovery is required in litigation?

The new Rules of Court 2021 (ROC 2021) came into effect on 1 April 2022. All civil proceedings, including appeals, commenced on or after 1 April 2022 will be governed by the ROC 2021. However, civil proceedings commenced before 1 April 2022 remain governed by the predecessor version of the Rules of Court, i.e., the Rules of Court 2014 (ROC 2014). Accordingly, this section will cover:

Discovery for proceedings commenced on or after 1 April 2022 to which the ROC 2021 apply

Discovery for proceedings commenced before 1 April 2022 to which the ROC 2014 apply

**Production of documents under the Rules of Court 2021**

The ROC 2021 introduces a number of key changes to terminology. In the context of discovery/disclosure, the ROC 2021 refers to the "production of documents."

The rules on production of documents under the ROC 2021 seek to narrow the scope of production of documents and reduce the time and costs expended in the production of documents process. The court may, at a case conference, order that the parties in an action must, within 14 days after the case conference, exchange a list of and a copy of all documents in their possession or control which fall into the following categories:

All documents that the party will be relying on

All known adverse documents, which include documents that a party ought reasonably to know are adverse to its case

In other words, the obligation to produce documents is not limited to the production of adverse documents that a party is actually aware of and includes the production of adverse documents that the party could have knowledge about through reasonable checks and searches.

"Control" has a wide meaning and the obligation to produce documents would include, for example, documents in the party's custody or power which were terms previously used under the ROC 2014.

Further, a requesting party may apply to court for the production of a specific document or class of documents in a party's possession or control. However, the court will not order the production of:

Documents that merely lead a party on a train of inquiry to other documents, except in a special case

A party's private or internal correspondence unless such correspondence are known adverse documents or in a special case

Subject to any written law, documents subject to any privilege or where production would be contrary to the public interest

**Discovery under the Rules of Court 2014**

Pursuant to the ROC 2014, the court may at any time order a party or parties to give discovery by drawing up and serving on any other party a list of the documents relating to any matter in question between them in the action that are or have been in that party's possession, custody or power. The documents that must be disclosed include documents falling within the following categories:

Documents on which that party relies or will rely

Documents which could either

Adversely affect the party's own case

Adversely affect another party's case

Support another party's case

A party that has served a list of documents on any other party must allow the other party to inspect the documents referred to in the list and to make copies of them.

Further and/or specific discovery may also be sought by application to court. In particular, an application for the discovery of specific documents or a specific class of documents may include, in addition to the documents in the categories above, any document that may lead the party seeking discovery of it to a train of inquiry resulting in that party obtaining information that may either:

Adversely affect its own case

Adversely affect another party's case

Support another party's case

# 02 - Type of privilege

## Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

The concept of legal professional privilege in Singapore can be broadly divided into legal advice privilege and litigation privilege.

Legal advice privilege covers all confidential communications between a party and their advocate and solicitor. Legal advice privilege prevents an advocate or solicitor employed by a party from:

Disclosing any communication made to them in the course and for the purpose of their employment by or on behalf of their client

Stating the contents or condition of any document with which they have been acquainted in the course and for the purpose of their employment

Disclosing any advice given by them to their client in the course and for the purpose of their employment

This privilege applies whether or not litigation is contemplated in respect of communications by the client and by third-party agents of the client who communicate merely as conduits. Where the third party does not communicate as a mere agent or conduit of the client, there are dicta from the Singapore Court of Appeal that such communications may nonetheless be privileged if the communication is made for the dominant purpose of seeking legal advice.

Litigation privilege covers all communications between a party and its lawyer, as well as communications with other third parties that were made for the predominant purpose of litigation. Litigation privilege protects from disclosure all information and materials created and collected for the sole or dominant purpose of litigation, including communications between the client and the client's legal professional adviser or between third parties and the client's legal professional adviser, whether or not they were made as an agent of the client and whether confidential or otherwise. In order for litigation privilege to apply, there must be a reasonable prospect of litigation.

Although both legal advice privilege and litigation privilege are embodied in the Evidence Act, reference to English law principles is permitted unless those principles are inconsistent with the Evidence Act.

# 03 - Scope of privilege

## Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Privilege is a right of the client rather than an obligation or right of the lawyer. As a result, the privilege applies equally to copies held by the client and those held by the lawyer.

## Are in-house lawyers treated in the same way as external lawyers for determining privilege?

The Evidence Act was amended in February 2012 to extend legal advice privilege to communications with in-house lawyers in their legal capacity. Specifically, legal advice privilege now extends to communications and advice between an entity and its "legal counsel" made or given in the course of and for the purpose of their employment as legal counsel. Legal counsel is broadly defined as a person (by whatever name called) who is an employee of an entity employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes. It should be noted that only communications with in-house counsel made for the purpose of seeking their legal advice are privileged. This is an important distinction where the in-house counsel is entrusted with multiple roles in the entity in addition to being a legal adviser.

As regards confidential communications with in-house legal counsel before the amendments to the Evidence Act in February 2012, the Singapore Court of Appeal has held that such communications would be protected by the common law rule protecting such communications. Such privilege at common law would apply where the following three requirements are satisfied:

The advice must have been rendered by a legal professional

The legal professional must have been acting in their capacity as legal adviser when they provided the advice

The communications must have been made in confidence

In respect of litigation privilege, the relevant statutory provision and case law developments appear to extend litigation privilege to cover communications or advice rendered by an in-house lawyer to the company (i.e., the client). The requirements described above in relation to the applicability of litigation privilege (that there must be a reasonable prospect of litigation and the communications must be for the dominant purpose of litigation) would therefore apply likewise to an in-house lawyer.

## Does privilege extend to internal communications between in-house lawyers?

Confidential internal communications between two or more in-house lawyers are protected by legal advice privilege provided that the communication is made for the purpose of providing legal advice to that client or clients.

## Are foreign lawyers recognized for the purposes of privilege?

The Legal Profession Act extends the solicitor-client privilege contained in the Evidence Act to professional communications between a client and a law corporation or limited liability law partnership. The sections further provide that the privilege shall apply to all the partners, officers and employees of such law corporation or limited liability law partnership. Since foreign lawyers may register to practice Singapore law in a Singapore law practice, their communications will be accorded privilege as employees of the law corporation or limited liability law partnership (subject to any conditions that may be prescribed by the attorney-general under the registration of the foreign lawyer).

In respect of a joint-law venture between a foreign law practice and a Singapore law practice, or a formal law alliance between one or more foreign law practices and one or more Singapore law practices, solicitor-client privilege over communications between the joint law venture or formal law alliance and their clients exists by virtue of the Legal Profession Act. However, the Legal Profession Act is silent on whether employees of the joint-law venture or formal law alliance are accorded privilege in their communications.

In respect of a "foreign law practice", which is defined as a law practice — except a Singapore law practice — providing legal services in any foreign law in Singapore or elsewhere, there is no provision of law or regulation that expressly confers attorney-client privilege on such a firm.

## Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Strictly, legal advice privilege does not extend to nonlegal professionals who, from time to time, may advise on legal issues relating to their field.

However, the Singapore Court of Appeal had, upon consideration of an Australian authority, suggested that legal advice privilege can attach to communications from third parties depending on the nature of the function the third party performed and the purpose and content of the communications (i.e., instead of considering simply the third party's legal relationship with the party that engaged it). In particular, if that function was to enable the client to make the communication necessary to obtain legal advice it required, and the communication is so intertwined with the communication made by the client to its legal adviser, the communication with the third party (and work product) may be brought within legal advice privilege. In other words, legal advice privilege may potentially be applied to communications from third parties obtained with the dominant purpose of obtaining legal advice.

As a matter of prudence, in any event, it would be advisable to have the legal adviser manage such communications with the third party as part of its legal advice.

# 04 - Sharing documents with third parties

## In what circumstances (if any) can a document be given to a third party without losing protection?

Privilege may be waived by an express waiver, or an implied waiver when privileged information is disclosed to third parties. The circumstances of the dissemination determine whether there is a waiver. In 2008, the Singapore High Court approved of the following proposition for determining when a document loses privilege:

Where a document is disclosed to one or more third parties with no express or implied requirement that the third party should treat the document as confidential, there will not be any legal bar on the third party disclosing the document. However, the privilege in a document is not waived where information is imparted in the course of a relationship or venture that a reasonable person would regard as involving a duty of confidentiality and where a reasonable person in the recipient's position would regard the information as confidential.

Further, the Singapore Court of Appeal has clarified that given the importance of legal professional privilege, waiver is not to be easily implied. A court tasked to determine whether there has been an implied waiver of privilege by reason of a reference made to privileged material should approach the matter by examining all the circumstances of the case. In this regard, the Court of Appeal identified the following non-exhaustive list of factors which were relevant, namely:

What has been disclosed (the materiality of the information in the context of the pending proceedings)

The circumstances under which the disclosure took place (in particular, the position in the authorities appears to be that disclosures of privileged material during trial almost invariably results in a waiver)

Whether the party had "relied" or "deployed" the advice to advance their case

Whether there is a risk that an incomplete and misleading impression had been given

Ultimately, the court should consider whether, in all the circumstances of the case, fairness and consistency required disclosure. This is an objective inquiry, as it is the objective role played by the legal advice which is relevant and not the subjective intention of the party who is asserting privilege.

Where disclosure of privileged documents was made inadvertently to opposing parties, and unless it is too late to restore the status quo, courts will generally not allow parties to take advantage of the mistakes of their opponent; the courts may order the parties receiving the privileged documents to return the documents, and those parties will be restrained from using the information contained in those documents.

Although the courts of Singapore have not considered the precise point of whether the doctrine of limited waiver applies in Singapore, it is possible to argue that the doctrine will apply based on the above dictum.

The courts of Singapore have recognized that common interest privilege (i.e., a privilege in aid of anticipated litigation in which several persons have a shared interest) applies in Singapore. This allows sharing of privileged materials with others who have a common interest in the subject matter to which the privileged materials relate without any loss of legal privilege.

Inadvertent disclosure of part of a memorandum may also result in a waiver of privilege in respect of the other parts of the memorandum where there can be no informed argument without the disclosure.

# 05 - Investigations

## Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

There is no difference in how privilege operates in civil or criminal proceedings, although there are nuances relating to who determines whether a document is privileged when privilege is claimed.

In civil proceedings, it is generally the case that the courts are the ultimate arbiter over whether a document is privileged when a party has refused production of a document by asserting privilege.

In criminal proceedings, however, there is recent dicta by the Singapore High Court that where documents have been lawfully seized by the police and a claim of privilege is asserted over the seized documents, the Attorney-General's Chambers rather than the court should conduct an initial review of seized materials for legal professional privilege. The Attorney-General's Chambers should conduct this initial review if the lawyer and/or their clients' claim to legal professional privilege was not accepted by the Attorney-General's Chambers at face value, or if there was a reasonable basis to think that legally privileged material would be encountered in a review of seized material, even if there was no specific claim of legal privilege. The High Court further observed that the review should be conducted by a team of Attorney-General's Chambers officers who are not, and will not be, involved in the underlying investigation. Once the Attorney-General's Chambers has conducted its initial review of any claims of privilege, this will ensure that only narrowly defined disputes as to privilege are brought to court for the court's determination.

In the same High Court decision, the court observed that the Evidence Act and the Criminal Procedure Code did not contain provisions prohibiting the seizure and review of legally privileged material, in contrast to the UK's position, where the police are prohibited by law from seizing material which they reasonably suspect to be legally privileged.

It is presently unclear whether there are any differences in how legal professional privilege operates in regulatory situations. The Evidence Act is silent on this issue.

## Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

The issue of whether notes of interviews with employees and other documents produced during investigations are covered by privilege remains unclear in Singapore. However, the Singapore Court of Appeal has endorsed an Australian decision recognizing that certain communications from third parties were protected by legal advice privilege, depending on the function of the third party rather than the nature of the relationship between the third party and the party that engaged it.

However, it should be noted that the Singapore courts have not conclusively decided on this issue. The contrary English position, where the English courts have suggested that an employee is only considered the "client" for the purposes of legal advice privilege where they can be considered the "directing mind and will of the corporation", may still prove to be persuasive.

# 06 - Regulatory investigations

## Can governmental regulators require a privileged document to be provided to them?

Aside from the observations of the Singapore High Court regarding documents lawfully seized by the police, the issue of whether governmental regulators can require a privileged document to be provided to them is unclear in Singapore. The Evidence Act is silent on the applicability of legal professional privilege outside the context of judicial proceedings, especially in the context of search and seizure by police and other regulatory authorities in the course of their investigations.

In July 2017, the Ministry of Law issued a public consultation on several proposed amendments to the Evidence Act and the Criminal Procedure Code, including amendments to clarify whether legal professional privilege can be asserted in the context of search and seizure by police and other regulatory authorities in the course of their investigations, and in cases where orders for production are issued under any written law. However, these amendments were not implemented in the final bill passed in March 2018. The Ministry of Law had announced that this issue would be dealt with by a Code of Practice agreed upon among the Attorney-General's Chambers, law enforcement agencies, and the Criminal Bar to deal with legal professional privilege issues in criminal investigations. However, pending that, it appears that this may have been superseded in the light of the recent observations of the Singapore High Court as to how potentially privileged materials seized by the police should be dealt with. It remains to be seen whether the Ministry of Law would consider it necessary to issue a further Code of Practice which may further clarify the Court's observations.

The specific legislation relevant to the investigations may, however, expressly deal with privilege. There are examples of legislation in Singapore which, while conferring coercive information-gathering powers on the relevant regulatory authorities, expressly provide that persons under statutory obligations to observe secrecy (such as advocates and solicitors) are not obliged to disclose such communications.

For instance, under the Singapore Competition Act, legal privilege is recognized, and the investigative powers of the regulatory body are curtailed such that communications between a professional legal adviser and their client and communications made in connection with or in contemplation of legal proceedings or for the purpose of such proceedings are regarded as privileged documents, cannot be seized and need not be produced. Communications with in-house lawyers, in addition to lawyers in private practice, including foreign lawyers, can benefit from the privilege. However, the Competition Commission is still given the power to require the details of the relevant persons to whom or by whom the communications were made to be given to the Commission to ascertain if the communications are indeed privileged.

Similarly, under the Singapore Companies Act, where the Minister directs that a company be investigated, an advocate and solicitor cannot be compelled to disclose any privileged communication.

# 07 - Recent issues

## What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The issue of how potentially privileged materials seized by the police should be dealt with was recently given some consideration by the Singapore High Court. Having reviewed the positions in foreign jurisdictions, the court ultimately observed that the Attorney-General's Chambers, rather than the court, should conduct an initial review of seized materials for legal professional privilege. Upon the conclusion of the initial review, narrowly defined disputes as to privilege may then be referred to the court for a determination.

Although the Singapore High Court's observations on this issue were strictly *obiter* and therefore not binding, the Court made these observations after extensive submissions by the parties (including Attorney-General's Chambers) on the appropriate procedure for such review. Therefore, the Singapore High Court's suggested approach is likely to be highly persuasive for future cases where potentially privileged materials have been seized by investigative authorities.

# 08 - Authors

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