

MALAYSIA

Legal privilege global guide

About

Welcome to DLA Piper's Legal Professional Privilege Global Guide, the ultimate guide to legal professional privilege around the world.

Legal professional privilege protects the confidentiality of communications between lawyers and their clients and it has become an exception to the general principle of public policy for full disclosure. It is, in substance, a fundamental human right.

Although the concept of legal professional privilege is universal, its scope and limitation differ between jurisdictions. We are aware that many of our clients operate on a global platform, so it is of critical importance that they are aware of these differences in order to make informed decisions about the countries in which they are active and about how their business interests may be protected.

This global guide is a dynamic resource containing up-to-date details of the varying concepts and scope of legal professional privilege across dozens of jurisdictions globally. New jurisdictions are regularly being added to the guide, so if you cannot find the jurisdiction you are seeking, please let us know.

How to use this guide

Let us provide a few examples:

1. You are a Compliance Director for a listed company located in Country A and you have found that problematic conduct has occurred within your subsidiary in Country B.

Scenario A: You are about to send an e-mail to your in-house colleague in Country B with a legal assessment of the conduct in question. Before you push the button, you think about the scope of legal privilege. You will ask yourself: "Does Country B protect in-house lawyer communications? Or can my e-mail be seized by inspectors or discovered in court?" Our guide provides a first answer.

Scenario B: You plan to forward the legal advice received from DLA Piper to your colleague in Country B. Then you ask yourself the following question: "What is the scope of legal privilege in Country B?" Indeed, virtually all jurisdictions recognize the concept of privilege, but there is a big difference in terms of when privilege applies (e.g. only after the start of an investigation) and how broad is the scope. Again, our guide provides a first answer.

2. You are a freshly appointed Compliance Director for your internationally active company, and no clouds darken your horizon - yet. Before launching a new communications policy, you want to find out about the underlying privilege issues.

Our guide provides initial guidance for your strategic legal communications and planning, and will help shape your strategy for sourcing and storing legal advice.

But remember, our Legal Professional Privilege Global Guide **does not constitute legal advice**. While this guide will be essential reading for those who need to find out more about the scope of legal professional privilege around the world, it is imperative that you contact the contributors to the individual chapters for more comprehensive guidance and legal advice in your particular case.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

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Malaysia

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Concept of legal professional privilege

In Malaysia, there are generally two subsets of legal professional privilege. The first is legal advice privilege, which is enshrined in statute, specifically Section 126 of the Evidence Act 1950 (Evidence Act). The second subset is litigation privilege, which exists under common law.

Scope of legal professional privilege

What is protected by legal professional privilege?

Legal advice privilege

Legal advice privilege under Section 126 of the Evidence Act has a wider scope of application than the usual common law litigation privilege. Primarily, legal advice privilege covers all legal advice given by an advocate and solicitor (as described below) to their client. Legal advice privilege also covers *any* documents which have been provided to the advocate and solicitor, brought to the attention of the advocate and solicitor, or which the advocate and solicitor had become familiar with in the course of their professional employment.

Litigation privilege

Litigation privilege under common law covers all documents that were created at a time when litigation was either pending or in contemplation. To determine if litigation privilege applies, the Malaysian courts will apply a two-stage test: (i) to determine whether litigation was pending or apprehended when the document or information was obtained, and (ii) to determine whether litigation was the dominant purpose for the preparation of the document in question.

Legal professional privilege in the context of criminal investigations

Legal professional privilege applies equally in the context of criminal investigations in Malaysia. See for example the Malaysian Anti-Corruption Commission Act 2009 (Anti-Corruption Commission Act 2009) which provides, under Section 46(2), that no order of the court may compel an advocate and solicitor to disclose any privileged information or communication in respect of any property which is liable to seizure, for the purpose of any pending proceedings.

Legal professional privilege in the context of investigations by the antitrust/competition authority

Section 22 of the Competition Act 2010 (the Competition Act) expressly provides that no person is required to produce or disclose any communication with a legal advisor which would be protected under Section 126 of the Evidence Act, unless privilege is waived by the privilege holder.

Legal professional privilege in merger control procedure

As of the date of writing, there are no merger control provisions applicable under the Competition Act. However, even if the Competition Act is amended to include merger control provisions, Section 22 of the Competition Act would likely extend to apply to legal professional privilege in a merger control situation, unless the amended provisions state otherwise.

Currently in Malaysia, there is a sector-specific merger control regime for aviation services under the Malaysian Aviation Commission Act 2015 (the Aviation Commission Act). While there are merger control provisions under the Aviation Commission Act, there are no specific provisions on legal professional privilege. This would mean that the usual laws of privilege under the Evidence Act and common law (as outlined above) apply.

Are communications with in-house counsel protected by legal professional privilege?

No. This position is untested in the Malaysian courts, and it remains to be seen whether the courts in Malaysia will specifically recognise communications with in-house counsel as being protected by legal professional privilege. Malaysia has no equivalent provision to Singapore, which has enacted Singapore's Evidence Act (Cap. 97) section 128A to extend privilege to communications with in-house legal counsel.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

This position is untested in the Malaysian courts. However, legal professional privilege is unlikely to apply to the correspondence of non-national qualified lawyers, pending further developments under Malaysian law.

This is because, under the Evidence Act, legal advice privilege extends to an "advocate". Under the Interpretation Act 1948 and 1967, an "advocate" is defined to mean a person entitled to practice in Malaysia. As non-national qualified lawyers are not entitled to practice in Malaysia under the Legal Profession Act 1976, legal advice privilege would not extend to non-national qualified lawyers.

How is legal professional privilege waived?

Generally, legal professional privilege is absolute and may only be waived by the privilege holder, save for situations where protection is eroded by legislation. For example, under Section 46 of the Anti-Corruption Commission Act 2009 and Section 47 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFA), an application may be made to a Judge of the High Court to order disclosure by an advocate and a solicitor in relation to an investigation to offences under the acts.

However, such disclosure is strictly related to information available in respect of any transaction or dealing relating to property liable to seizure. There are further provisions under both sections that limit the extent of disclosure to exclude any privileged information or communication which came to the knowledge of the advocate and solicitor for the purpose of the proceedings pending before the court.

Legal professional privilege in the context of merger control

There are currently no merger control provisions under the Competition Act 2010. However, in the event merger control provisions are introduced, and when there is no express exclusion of privilege under said merger control provisions, legal professional privilege would apply.

Recent cases and/or other legal developments

In October 2021, the Malaysian Court of Appeal affirmed the High Court's decision in an action brought by the Malaysian Bar Council against the Inland Revenue Board of Malaysia (IRB). The Malaysian Bar Council sought certain declarations to prevent the IRB from conducting raids on law firms in order to audit client accounts and access accounting books and records pertaining to client accounts.

The Court of Appeal held that the client accounts, and information related to the client accounts, are protected under Section 126 of the Evidence Act i.e. subject to legal professional privilege. The Court of Appeal further held that privilege is absolute and may only be waived by the privilege holder. The Malaysian Court of Appeal's decision is currently the subject of an appeal to Malaysia's Federal Court.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

There is no specific legal privilege applicable within the context of internal investigations, save for legal advice privilege under Section 126 of the Evidence Act and litigation privilege under common law.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

No. Privilege is absolute unless waived.

c) Are communications to / by companies and in-house counsel protected by privilege?

No. As described above, Malaysian law has yet to specifically recognise that communications to/by companies and in-house counsel are protected by privilege.

d) Are there any specific requirements of a privileged incident response engagement letter?

No.

b) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes, if these notes, transcripts, or expert reports were considered as part of the provision of legal advice, or if the documents were prepared with litigation in mind. In order to preserve privilege over such work product, there should be explicit directions from the advocate and solicitor to the third parties before the third parties commence work.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No.

c) How are seized documents put into evidence in a criminal / civil procedure?

If privileged documents are seized, subject to an objection being taken, those documents must be sealed and brought before the court to determine if those documents are protected by privilege.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

Legal privilege can be waived in Malaysia if the right to privilege is not asserted or enforced. To prevent this from occurring, the privilege holder ought to make an objection and make the relevant applications to the courts in order to protect the document. In addition, it is important to clearly label and mark the relevant documents as “legally privileged” to avoid any ambiguity.

b) In data breach litigation, does a company ever need to rely on the findings of internal investigations, and if so, does that mean privilege has been waived?

Yes. If the company relies on the findings of an internal investigation in court proceedings, then privilege in respect of the findings is waived.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last 5 years? If so, please provide details.

No.

b) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Generally, no. However, if the data meets the standards for legal privilege under Malaysian law, then it may be treated as privileged regardless of the approach taken outside the jurisdiction.

c) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

If an investigation is commenced outside Malaysia, and if the relevant authorities from that jurisdiction attempt to seize the privileged data, the laws of the jurisdiction in question are likely to apply as to whether the data is considered privileged or otherwise.

However, where there is ambiguity about whether the data would be considered privileged under Malaysian law, the privilege holder may consider making an application to the Malaysian court to make the relevant determination on this, including to obtain any relevant injunctions to prevent disclosure, as required.

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