

Protection of Privileged Communication: What Corporations Need to Know

Recent headlines on the raid conducted by the Malaysian Anti-Corruption Commission have triggered concerns from corporations in Malaysia regarding the confidentiality of their internal information, especially in relation to privileged communication with external counsels.

Essentially, a raid is conducted by a regulatory authority with the main objective of obtaining all relevant information and documents which will assist in its investigation towards the entity being raided, or against any third party connected and/or having any relationship with that entity. Therefore, it is pertinent for corporations to understand the scope and limitations of such a raid, and safeguard their rights and interests when complying with any instructions or orders produced by the regulatory authority.

Governing Law

First, we shall examine the legal position in Malaysia that governs the protection of privileged communication between a lawyer and their client. The protection of privileged communication, which is derived from common law, was embedded into the Malaysian legal system by virtue of Section 126 and Section 129 of the Evidence Act 1950:

Section 126 – Legal Advice Privilege

(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:..."

Section 126 accords protection to any legal advice obtained by a client from a lawyer, regardless of whether such advice/communication was made during the professional engagement or after the relationship has ceased. There is no requirement for an actual/potential legal proceeding to exist for the legal advice privilege to apply.

Section 129 – Litigation Privilege

No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

The protection provided under Section 129 is much broader in the sense that it covers any confidential communication between a client and his legal professional adviser for the main purpose of preparing for existing or anticipated litigation.

Based on the Interpretation Acts 1948 and 1967, and decided cases, the term 'advocate' in Section 126 is limited to a person entitled to practise as an advocate and solicitor in Malaysia. The absence of case law on the interpretation of the term "legal professional adviser" in Section 129 makes it

unclear whether such privilege would include foreign lawyers, in-house counsel and/or other legal professionals.

Scope of Protection

As a general rule, the scope of protection on privileged communication would cover any type of communication between a lawyer and his client. The privilege widely covers any legal advice, information, documentation, correspondence, emails, videos, recordings, and any other types of communication, including communications made via mobile phones and text messages.

The protection would also include any communication or information obtained internally (e.g., interview statement, internal investigation report, and internal memo) on a matter of existing or potential litigation, which is subsequently submitted to the external counsel for legal advice.

The privileged communication or information may not always reside with the lawyers as it may also be in the possession of the client. Hence, the client must also be very cautious and careful in sharing any privileged communication.

It is, therefore, important for the client to know how to react and respond when a raid is conducted on its premises. This is where some organisations have taken the initiative or have been duly advised by their lawyer to establish and implement a standard operating procedure (SOP) and/or policy which provides guidance to internal members of the company on how to conduct themselves during a raid by a regulatory authority.

A client may decide to share any privileged communication or document with a third party without waiving the privilege attached to it. However, the receiving party must be made aware of the nature of such information, the client should demand that such information be kept confidential, and any attempt to obtain such information by anyone should be made known to the client accordingly.

Why Invoke Privilege Protection?

During an investigation or a raid conducted by any regulatory authority, it is pertinent for clients to invoke the protection of privileged communication to ensure that access to such communications is denied or resisted, and only obtained through proper procedures.

The protection of privileged communication is essential in safeguarding the client's interest by rendering such communication/evidence inadmissible in court which may otherwise incriminate or prejudice the client in criminal or civil proceedings.

The disclosure of such privileged communication is exempted and must always be protected and resisted by the lawyer, client and/or any person with whom such privileged communication is shared. Nevertheless, in the event such privileged communication was wrongfully obtained or released, it must be challenged and shall not be admitted as evidence in court.

It is crucial that the invocation of privileged communication is made expressly and directly to the relevant authorities as any indirect or implied invocation may not be sufficient to highlight such privilege.

Exemptions to Privilege

The case of Dato' Anthony See Teow Guan v See Teow Chuan & Anor [2009] 3 MLJ 14 clearly declared that the legal professional privilege under Section 126 of the Evidence Act 1950 is absolute and it remains so until waived by the privilege holder, i.e., the client. Such a waiver shall be made explicitly and specifically by the client or made with the express consent of the client.

Nevertheless, a specific provision of the law may also legitimately require disclosure of a certain privileged communication and/or document. For example, Section 20 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AML Act") overrules the legal professional privilege between lawyer and client for the purposes of the reporting obligation as an advocate and solicitor under the AML Act.

The AML Act also provides under Section 47 that the High Court may order an advocate and solicitor to disclose information available to him in respect of any transaction or dealing relating to any property which is liable to seizure under the AML Act. However, subsection 47(2) also contains a provision which still upholds a significant part of privilege communication whereby nothing in subsection 47(1) shall require an advocate and solicitor to comply with any order to the extent that such compliance would disclose any privileged information or communication which came to his knowledge for the purpose of any pending proceedings.

The Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") also contains a similar provision whereby Section 46 allows the High Court to make an order for the disclosure by an advocate and solicitor in respect of any transaction or dealing relating to any property which is liable to seizure under the MACC Act. However, subsection 46(2) also limits the disclosure of any privileged information or communication where such disclosure is in relation to any pending proceedings.

Conclusion

It is imperative that any sort of communication between a lawyer and client be kept confidential and always secured, even if such a request for disclosure is made by a regulatory authority. The sanctity of privileged communication must be safeguarded and has indeed been protected by the Malaysian judiciary system.

From the client's perspective, efficient methods of safeguarding and preserving such privileged communication must be established and implemented by employees of all levels and business associates.

Should you have any questions or concerns, contact us:



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