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# Common Law Doctrine of Public Interest Immunity Applies in Singapore

*Mah Kiat Seng v AG and  
others* [2021] SGHC 202

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# LEGAL UPDATE

# In this Update

In *Mah Kiat Seng v AG and others* [2021] SGHC 202, the High Court held that the common law doctrine of public interest immunity applies in Singapore.

The High Court noted that in most cases, the active exploration of potential safeguards (such as redaction) will enable public interest in the administration of justice to be upheld without risking that public interest in general would otherwise be harmed.



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## INTRODUCTION

In *Mah Kiat Seng v AG and others* [2021] SGHC 202, the High Court held that the common law doctrine of public interest immunity applies in Singapore.

The High Court noted that application of this doctrine requires a careful and nuanced balancing of competing public interests. With sufficient safeguards, such as redaction, the public interest in administration of justice can be adequately balanced with the public interest in preserving confidentiality of information.

## BACKGROUND

This case arose from the apprehension of the Plaintiff under the Mental Health (Care and Treatment) Act (“**MHCTA**”).

A complaint had been made, after which the 2<sup>nd</sup> Defendant (a police officer) was dispatched to the incident location and spoke to the Plaintiff. The 2<sup>nd</sup> Defendant formed the view that the Plaintiff was mentally disordered and posed a danger. The 2<sup>nd</sup> Defendant and two other police officers therefore arrested the Plaintiff, and the Plaintiff was taken to the Police Division Regional Lock-Up (“**RLU**”).

The Plaintiff commenced proceedings and alleged that:

- (a) he was wrongfully arrested and falsely imprisoned;
- (b) he was subject to assault and suffered trauma (both physical and mental); and
- (c) his personal property (*ie* his bag and mobile phone) were negligently damaged.

In these proceedings, the 1<sup>st</sup> Defendant was the Attorney-General (“**AG**”), representing the Singapore Police Force. The 3<sup>rd</sup> Defendant was a police officer at the RLU.

The Plaintiff sought discovery of various recordings made by CCTV cameras and body-worn cameras (“**BWC**”). He argued that while the Government was entitled to invoke the doctrine of public interest immunity, the public interest in the administration of justice in this case outweighed any public interest in non-disclosure.

At first instance before the Assistant Registrar (“**AR**”), the AG made arguments under Section 126 of the Evidence Act (“**EA**”) which provides that no public officer shall be compelled to disclose communications made to him in official confidence.

To accommodate the interests of justice, the AG agreed to permit inspection by allowing viewing of the footage at Police Cantonment Complex, without the taking of copies. In relation to the BWC recordings, the AG agreed to allow inspection of pixelated copies of the BWC recordings to protect the identity of the complainant.

The AR agreed with the AG that both the CCTV and BWC recordings were absolutely protected from disclosure by virtue of s126 of the EA.

The AR ordered the defendants to file and serve a list of documents listing:

- (a) all CCTV footage of the Plaintiff's imprisonment at RLU; and
- (b) BWC recordings showing the 2<sup>nd</sup> Defendant interviewing the Plaintiff.

The Plaintiff was allowed to inspect the footage but was not allowed to take copies, and the Defendants were allowed to pixelate the BWC recordings to conceal the identity of the complainant.

The Plaintiff appealed the AR's decision.

## **HIGH COURT'S DECISION**

The High Court did not agree that EA s126 was applicable and invited further submissions about the scope of this provision. The AG thereafter filed further submissions and accepted that the CCTV and BWC footage were not "*communications*" under EA s126 but that the government was entitled to invoke public interest immunity to fill in gaps in the statutory framework.

The High Court held that the common law doctrine of public interest immunity continued to exist and ordered that the Plaintiff be allowed to inspect the CCTV footage by appointment at the Cantonment Police Complex and that inspection was to take place under the court's continuing control.

The High Court also ordered that the Plaintiff be given reasonable time to view the footage and that he is not to be restricted to a single occasion for viewing of the footage.

### **Whether common law public interest immunity is part of Singapore law**

The High Court referred to various decisions of the English Courts on public interest immunity, including the decisions of the House of Lords in *Rogers v Home Secretary* [1973] 1 AC 388 (at 407) and the UK Supreme Court in *Al Rawi v Security Service and others (JUSTICE and others intervening)* [2021] 1 AC 531 (at [145]).

The High Court observed that common law public interest immunity has been described as a “rule that certain evidence is inadmissible on the ground that its adduction would be contrary to the public interest”. This is a rule, which in the appropriate circumstances, prohibits the giving, or permits the withholding, of evidence that would harm the public interest.

After considering the requirements of EA s 2(2), the High Court held that common law public interest immunity applies in Singapore. The High Court opined that:

- (a) the EA is not an exhaustive code of the evidence law. The rules of evidence concerning public interest immunity in ss 125 to 127 of the EA are not exhaustive.
- (b) ss 125 to 127 of the EA are to be supplemented by the common law rules and principles which are not inconsistent with those provisions; and
- (c) common law public interest immunity is not inconsistent with any of the provisions of the EA.

The High Court also disagreed with earlier obiter remarks in *BSD v Attorney-General* [2019] SGHC 118 (“**BSD**”) that common law public interest immunity does not apply in Singapore. This was for two reasons.

First, was that the Court of Appeal’s decision in *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 had not been cited to the Court in *BSD*. The Court of Appeal in *ARW* had accepted that the AG retained a common law right to object to disclosure of information on the grounds of public interest privilege, even though this was not a right found within the EA.

Second, was that the arguments made in *BSD* were overly narrow and focused only on the inconsistency between technical operation of public interest immunity and EA s125 (which relates to evidence of affairs of State).

The High Court considered that when analysing whether provisions of the EA are consistent with the common law, the analysis must be undertaken from a conceptual and purposive rather than a technical perspective. In other words, a common law rule of evidence is not inconsistent with the EA if it is conceptually in keeping with the rationale and spirit of provisions within the EA.

## KEYPOINT

*Documents which otherwise ought to be disclosed under the rules of civil or criminal procedure may only be withheld if the Court concludes that the public interest against disclosure outweighs the public interest in the administration of justice.*

### **How public interest immunity is to be applied**

The High Court considered that documents which ought to be disclosed under the rules of civil or criminal procedure may only be withheld if the court concludes that the public interest against disclosure outweighs the public interest in the administration of justice. This involves weighing the balance between the public interest in administration of justice and the public interest in withholding disclosure.

The High Court held that there is no principled reason nor special policy reasons to treat law enforcement body-worn or stationary camera law enforcement footage as a special class of information which should be withheld from disclosure. Therefore, whether particular law enforcement body-worn and stationary camera law enforcement footage should be disclosed in Court proceedings is to be determined on a case-by-case basis, upon consideration of all relevant factors, including the degree of relevance of information contained in such footage, the specific risks arising from disclosure, and the harm to the public interest should such risks eventuate.

The Court considered that s126 of the EA (which provides that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by disclosure) applied to the BWC footage of the 2<sup>nd</sup> Defendant's interactions with the Plaintiff. There was no basis to challenge the 2<sup>nd</sup> Defendant's determination that public interest would suffer by the disclosure of the BWC footage as the 2<sup>nd</sup> Defendant's determination was made in good faith for a proper purpose and was not *Wednesbury* unreasonable (or irrational).

## **COMMENTARY**

The High Court has made clear that public interest immunity applies in Singapore.

In deciding whether a claim for common law public interest immunity should be granted, the Court has the power to view the document, except where the document is an unpublished official record relating to affairs of state.

Further, the Court can consider what appropriate safeguards can be taken to mitigate any risks to the public interest. This includes redaction of the material, holding proceedings in camera, or only allowing for inspection of documents without copies.

This is an important decision in any proceedings where documents in the hands of public authorities are relevant, including criminal proceedings. Public authorities are likely to rely upon EA s126 to object to disclosure of documents on the basis that those documents were communications to a public officer in official confidence. However, not every document held by a public agency constitutes a communication to a public officer in official confidence.



Like in the present case, the CCTV and other recordings were not by themselves communications to a public officer in official confidence protected under EA s126, save where they recorded such a communication. This has practical consequences in cases where CCTV or other footage exists in the hands of the relevant public authority, and where such footage records material events.

The High Court's guidance makes clear that where there is a dispute over such documents, the Court has the power to view the document to decide whether a claim for common law public interest immunity should stand.

Although the decision in *Mah Kiat Seng v Attorney-General* was in the context of a civil claim, and the Court's finding on how documents ought to be disclosed under criminal procedure are therefore strictly obiter, it is arguable that the Court's decision should apply equally to both civil and criminal proceedings.

This is notwithstanding the absence of an equivalent discovery obligation on the Public Prosecutor in criminal proceedings. It remains arguable that the public interest in the administration of justice should apply *a fortiori* in the criminal law context.

This decision by the High Court is a timely and useful reminder that public interest is multi-faceted. Although the government is entitled to rely on the doctrine of public interest immunity, this requires a "*careful and nuanced balancing of competing public interests*". Where the public interest in secrecy or confidentiality of information conflicts with the public interest of disclosure in the interests of justice, a careful and fact sensitive approach with the aid of the necessary safeguards would best benefit the overall public interest.

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If you have any questions or  
comments on this article, please  
contact:



**Gary Low**

Director, Dispute Resolution  
Co-Head, Criminal Law Practice

T: +65 6531 2497

E: [gary.low@drewnapier.com](mailto:gary.low@drewnapier.com)



**Terence Tan**

Director, Dispute Resolution

T: + 65 6531 2378

E: [terence.tan@drewnapier.com](mailto:terence.tan@drewnapier.com)

**Drew & Napier LLC**

10 Collyer Quay  
#10-01 Ocean Financial Centre  
Singapore 049315

**[www.drewnapier.co](http://www.drewnapier.co)**

T : +65 6535 0733

T : +65 9726 0573 (After Hours)

F : +65 6535 4906