

Discovery (Disclosure) of Documents In Litigation

Please read this document carefully so that you will know what your discovery obligations and rights are.

What is “discovery”? Why is “discovery” important?

Our lawyers have given you this document because you are a party to a civil lawsuit in a Singapore Court.

In your previous meetings with our lawyers, they may have briefly outlined the obligations you would have during the lawsuit to preserve and disclose relevant documents. Your opponent has similar obligations.

The obligation to disclose relevant documents to one’s opponent is known as “discovery” in Singapore, and “disclosure” in England. This document explains the discovery / disclosure process to you in greater detail.

Discovery is a very important part of any civil lawsuit in the Singapore Courts. As your lawyers, we owe a strict duty to the Court to ensure that discovery is carried out properly.

If a party to any lawsuit, or his lawyer, is found to have ignored his discovery obligations, the Court has the power to throw out that party’s claim (if he is the Plaintiff) or that party’s defence (if he is the Defendant), without a trial.

It would be wrong of a party to assume that this power will not be exercised. The Singapore High Court has demonstrated a willingness to exercise this power in appropriate cases – see e.g. *Alliance Management SA v Pendleton Lane P* [2008] 4 SLR(R) 1; [2008] SGHC 76 and *K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254; [2009] SGHC 143.

It is therefore very important that you, and we (as your lawyers) comply with these discovery obligations, so that we do not jeopardise your success in the lawsuit.

What are your discovery obligations? How is discovery carried out?

The discovery process requires each party to a lawsuit to disclose to all others, the existence of all and any documents which are relevant to the issues in the lawsuit, and which **are or have at any time been** in their “possession, custody, or power”. In the course of your handing documents over to us, we will explain what the phrase “possession, custody, or power” means.

The documents are disclosed to opposing parties by exchanging Lists of Documents. After this, parties must make available to each other, for inspection, all documents in the List for which privilege is not claimed. We explain “privilege” later in this document.

If copies of your documents are requested by the other party or parties, you have to supply them. As your lawyers, we will arrange for this. The party requesting the copies usually has to pay for the copies requested. Similarly, you may request copies of your opponent’s documents, but you will have to pay for these copies.

If your lawsuit involves a large number of documents, discovery is very likely to be a substantial exercise involving a significant amount of your / your company’s management time and expense. It is, nonetheless, essential that discovery be carried out carefully and conscientiously. Poor discovery can undermine the best of cases. Discovery often determines the success or failure of a case. For example : You would not want to find out, only at an advanced stage of the lawsuit or even at trial, that you had not given discovery of a very good piece of evidence even though it was sitting in your files all the while. If you try to produce this document too late, the Court may reject this document because it should have been disclosed earlier, in discovery. If that happens, your case is bound to suffer.

What sort of documents must be disclosed in discovery?

You must give discovery of **all documents that relate to matters in question in the lawsuit** (i.e. the issues raised in the pleadings of all parties to the lawsuit).

These will include documents which may assist one or other of the parties, however slightly, to advance its case or damage its opponent's case in relation to any issue, or which may lead to a chain of enquiry which may directly or indirectly have that result.

What about electronic documents and tape recordings?

You must disclose relevant documents, regardless of what form or media they are stored in. They may be hard copies or electronic data stored in a computer or server. They may be originals or copies. Documents which must be considered for disclosure include (without limitation) computer printouts, e-mail, internal memos, photographs, plans, drawings, video and sound recordings, microfilm records as well as computer databases.

The Singapore High Court and the Singapore Subordinate Courts have each issued a practice direction dealing with the discovery of electronic documents and electronically-stored documents. Our lawyers will explain this practice direction to you in greater detail if your case involves many electronic documents or electronically-stored documents.

Must I disclose documents that are bad for my case?

You must disclose relevant documents to your opponent even if they are harmful to your case or are confidential. This rule equally applies to your opponent. **If a party to a lawsuit is found to have intentionally hidden or destroyed documents, the Court may throw out that party's claim (if he is the Plaintiff) or that party's defence (if he is the Defendant), without a trial.**

Please ensure that all your affected employees and staff are made aware of your discovery obligations in the lawsuit and the need to preserve all relevant documents, whether or not those documents are privileged.

Must I search for documents? What if this is expensive or time-consuming? What if the documents have been destroyed?

You have a duty to search for all relevant documents. Care should be taken to ensure that all documents possibly relevant to the lawsuit are identified at the earliest opportunity. This is so that we can advise you on whether the document is indeed relevant to the lawsuit, or not.

No documents at all (in particular documents that you may regard as damaging to your case) should be destroyed, defaced, or altered in any way. You should consult us, as your lawyers, before you take any action that will destroy or damage any documents possibly relevant to the lawsuit, even if such actions are in the ordinary course of your business.

Can I deny my opponent access to certain "privileged" documents?

You may deny your opponent access to certain relevant documents on the grounds of "privilege".

In very simple terms, you may claim privilege over documents which contain communications with your lawyers and/or documents coming into existence for the purpose of your lawyers giving you legal advice or for the purpose of your receiving legal advice from your lawyers. You may also claim privilege over any documents made for the sole or dominant purpose of this lawsuit.

However, documents which are merely "confidential" in nature and which do not fall within the types of documents mentioned above, must still be disclosed to your opponent to the extent that they are relevant to the lawsuit and necessary for a fair trial e.g. medical records, customer records etc.

Discovery is not a "one-off" exercise – it is a continuing obligation.

The obligation to disclose relevant documents to your opponent continues after your List of Documents has been exchanged with your opponent. **Your discovery obligations last until the end of the lawsuit.**

What if I find more documents after my List of Documents is filed?

Sometimes relevant documents come into existence, or are found, only after the List of Documents has been exchanged with your opponent. These will have to be disclosed in one or more Supplementary List(s) of Documents which must be served on your opponent as soon as practicable.

It is important, therefore, to ensure that further relevant (and possibly harmful) documents are not created which will have to be disclosed to your opponent.

In the circumstances, if you wish to put anything in writing regarding the case (except in letters, faxes or emails to us or in documents prepared at our request) please consult us first. This includes internal correspondence within your company.

What must I hand over to you, as my lawyers? What will you do with my documents?

As your lawyers, we will prepare your List of Documents and any Supplementary Lists of Documents that may be required, as well as the supporting Affidavit(s) that have to be filed with each of these Lists. Affidavits are written statements made under oath or affirmation. We will tell you when these Affidavits need to be executed by you.

You may have already given us some documents. We will work with these for the time being, to prepare your List of Documents.

Going forward, please review your files and computer data again, carefully, to provide us with **all other** potentially relevant documents. We would be pleased to assist you in this process e.g. by meeting with you at your offices / your home so that we can have a better understanding of your filing system and document retention policy.

Any questions?

Please feel free to ask any of the lawyers handling your matter questions you may have about this advice or any other discovery-related topic not covered by this advice.

We would be pleased to assist you.
