

Electronic Evidence Fiche: MALAYSIA

1) DEFINITIONS

Malaysia
What are the definitions in your laws/regulations, if any, of:
Electronic evidence
<p>There is no specific definition for “electronic evidence” under Malaysian laws. However, the Evidence Act 1950 [Act 56] of Malaysia does provide certain definitions covering the definition of electronic evidence. Reference is made to section 3 of Act 56 as follows:</p> <ul style="list-style-type: none"> • “evidence” includes <ul style="list-style-type: none"> (a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence; (b) all documents produced for the inspection of the court: such documents are called documentary evidence. <ul style="list-style-type: none"> • “document” means “any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound-track or other device whatsoever, by means of <ul style="list-style-type: none"> (a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever; (b) any visual recording (whether of still or moving images); (c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever; (d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c), or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter”.
Computer system
<p>There is no specific definition for the exact term of “computer system” under Malaysian laws. Section 2 of the Computer Crimes Act 1997 [Act 563] and section 3 of the Evidence Act 1950 [Act 56] of Malaysia provide the definition for the term “computer”, meaning</p>

“an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, storage and display functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility”.

Computer data

Section 2 of the Computer Crimes Act 1997 [Act 563] of Malaysia provides the definition for the term “data” as the “representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer”.

Categories of computer data (e.g. basic subscriber information, traffic data and content data)

No such definitions under the laws of Malaysia.

Electronic surveillance or real-time collection of computer/communication data

There is no specific definition under the laws of Malaysia.
Section 6 of the the Communications and Multimedia Act 1998 [Act 588] states that “authorized interception” means interception by the licensee of any network facilities, network service or applications service permitted under section 265 (Network interception capability: (1) The Minister may determine that a licensee or class of licensees shall implement the capability to allow authorised interception of communications. (2) A determination, under subsection (1), may specify the technical requirements for authorised interception capability.)

Service provider (e.g. ISP, hosting)

There are specific definitions provided under the Communications and Multimedia Act 1998 [Act 588]. Reference is made to section 6 of Act 588 as follows:

- “applications service provider” means a person who provides an applications service;”
- “network service provider” means a person who provides network services”

Under section 2 of The Criminal Procedure Code [Act 593] “communication service provider” means a person who provides services for the transmission or reception of communications”.

2) DATA RETENTION REGIME

Malaysia

Do you have any domestic laws that stipulate a mandatory retention period of electronic data? If so, for what types of data and for how long?

Malaysia does not have any domestic law stipulating a mandatory retention period of electronic data. It depends on the policy of the service providers whether they retain electronic data and how long they retain it.

3) ADMISSIBILITY OF ELECTRONIC EVIDENCE IN A CRIMINAL TRIAL

Malaysia

What is the requirement under your domestic law for electronic evidence to be admissible in a criminal trial?

According to Section 62 of the Evidence Act 1950 [Act 56] of Malaysia (Explanation 3) “a document produced by a computer is primary evidence.”

Sections 90A, 90B and 90C of the Evidence Act 1950 [Act 56] provide the requirements for documents produced by a computer (which includes electronic evidence obtained) to be admissible in a criminal trial.

Paragraphs (1)-(3) from section 90A of Act 56 state as follows:

“(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

(3) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.”

The Evidence Act 1950 [Act 56] also provides a specific chapter for the admissibility of evidence obtained under mutual assistance in criminal matters requests (Chapter VA). The relevant sections are:

“90E. (1) Subject to subsections (2) to (9), any testimony, statement or deposition, together with any document or thing exhibited or annexed to such statement or deposition, that is received by the Attorney General pursuant to a request made under the Mutual Assistance in Criminal Matters Act 2002 in respect of the criminal matter, shall on its production be admitted in those criminal proceedings as evidence without further proof of any fact stated in the testimony, statement or deposition and in the document, if any, exhibited or annexed to such statement or deposition.”

“90F. A certificate by the Attorney General or by a person authorized by the Attorney General to make such a certificate certifying that any testimony, statement or deposition to which such certificate is attached, together with any document or thing exhibited or annexed thereto, if any, has been received by the Attorney General pursuant to a request made under the Mutual Assistance in Criminal Matters Act 2002 in respect of any criminal matter referred to in the certificate, shall on its production without further proof be admitted in the proceeding as conclusive evidence of the facts contained in the certificate.”

4) RECEIVING REQUESTS FOR ELECTRONIC EVIDENCE FROM OTHER STATES

4.1. Direct requests from foreign authorities to service providers

4.1.1. Requests for preservation

Malaysia
What legal framework(s) is/are applicable, if any?
Malaysia does not have any legal framework for requests for preservation.
Are the service providers in your country prohibited from or have limited capacity for executing such requests from foreign authorities?
The service providers are not prohibited, subject to the requirements and procedures of Malaysian domestic laws and also the service providers’ internal processes.
If they are prohibited or if there are limitations, are there any alternative options to preserve the data from your country, e.g. through police-to-police cooperation, specialized networks (e.g. G7/8 24/7 Network) or mutual legal assistance (MLA)?
The alternative options considered and utilised in order to ensure preservation of data are police-to-police cooperation (also through the Interpol channel) and/or mutual legal assistance (MLA) requests.

Is a judicial order required from the requesting state?
A judicial order from the requesting state is not necessarily required. If submitted, it may be considered subject to the requirements and procedures of Malaysian domestic laws.
Are there any time limits for data preservation? Any possibility of extension?
Time limits fully depend on the service provider. There are no time limitations stated under Malaysian laws. However, for banking documents, the data is generally preserved for a period of 7 years and a possibility of extension can be made via MLA requests before the expiration of the period therein.
Would service providers in your country notify the data subjects of the request?
Service providers will not notify the data subjects if the request is made under compulsion of law that is via mutual legal assistance requests or Malaysian court orders. When legal compulsion is utilised, the foreign authorities can request specifically in the mutual legal assistance request for the service provider not to notify the data subjects; this is allowed as it is done through legal process. If no legal compulsion is made, the requirement to notify the data subjects is based on the requirements of Malaysian domestic law namely the Personal Data Protection Act 2010 [Act 709]. Reference is made to section 30 of Act 709 as follows: “(1) An individual is entitled to be informed by a data user whether personal data of which that individual is the data subject is being processed by or on behalf of the data user.” Only the data subject can request for data access to his/her personal data. The data user (service provider) is also duty bound to inform the data subject if the said personal data is being processed by the data user.

4.1.2. Requests for voluntary disclosure

Malaysia
What legal framework(s) is/are applicable, if any?
Malaysia does not have any legal framework for requests for voluntary disclosure.
Are the service providers in your country prohibited from or have limited capacity for executing such requests from foreign authorities?
The service providers are not prohibited, subject to the requirements and procedures of Malaysian domestic laws and their own internal processes.

If they are prohibited or if there are limitations, are there any alternative options to obtain the data from your country, e.g. through police-to-police cooperation, specialized networks (e.g. G7/8 24/7 Network) or mutual legal assistance (MLA)?

The alternative options considered and utilised in order to ensure preservation of data are police-to-police cooperation (also through the Interpol channel) and/or mutual legal assistance requests.

Is a judicial order required from the requesting state? Are there any time limits?

A judicial order from the requesting state is not necessarily required but may be considered subject to the requirements and procedures of Malaysian domestic laws. Time limits fully depend on the service provider. There are no time limitations stated under Malaysian laws.

However, for banking documents, the data is generally preserved for a period of 7 years and a possibility of extension can be made via MLA requests before the expiration of the period therein.

Would service providers in your country notify the data subjects of the request?

Service providers will not notify the data subjects if the request is made under compulsion of law that is via mutual legal assistance requests or Malaysian court orders. When legal compulsion is utilised, the foreign authorities can request specifically in the mutual legal assistance request for the service provider not to notify the data subjects; this is allowed as it is done through legal process.

If no legal compulsion is made, the requirement to notify the data subjects is based on the requirements of Malaysian domestic law namely the Personal Data Protection Act 2010 [Act 709]. Only the data subject can request for data access to his/her personal data. The data user (service provider) is also duty bound to inform the data subject if the said personal data is being processed by the data user.

How can the process be simplified or quickened in emergency situations?

For urgent situations, it is highly recommended to consider the informal channel of police-to-police cooperation (especially the Interpol channel). This dismisses the need for mutual legal assistance requests at that stage (which can only be done through the diplomatic channel as it is a requirement under Malaysian domestic laws).

Another option is to utilise the powers of the Royal Malaysia Police (being the main law enforcement authority) to gain access to computerized data via a search. Reference is made to section 116B of the Criminal Procedure Code [Act 593] which provides for "Access to computerized data" as follows:

“(1) A police officer not below the rank of Inspector conducting a search under this Code shall be given access to computerized data whether stored in a computer or otherwise.

(2) Any information obtained under subsection (1) shall be admissible in evidence notwithstanding any other provisions in any written law to the contrary.

(3) For the purpose of this section, “access” includes being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of the computerized data.”

4.2. Requests received by your central authority for Mutual Legal Assistance (MLA)

Malaysia

How do you execute MLA requests for electronic evidence stored by domestic service providers (e.g. through a domestic court order or a search warrant)?

A search warrant is utilised in most cases as it is fast and only requires the application for a search warrant at the subordinate court level. This is usually requested by a foreign state if the mutual legal assistance request is done at the investigation stage or pre-trial stage of the court proceedings.

However, if the electronic evidence is required for purposes of court proceedings, namely a criminal trial in the foreign state, then a production order is usually requested by the foreign state. A production order is initially an *ex parte* application before the court which is then served to the opposing party and becomes an *inter parte* application, which can be challenged.

If the application for electronic evidence involves banking documents, Malaysian domestic laws require that a production order application is made at the High Court level (not a subordinate court as in a search warrant application).

Can you provide assistance in real-time collection of non-content and/or content data (e.g. through electronic surveillance) upon the receipt of a MLA request? If yes, are there any limitations or conditions (e.g. limited to certain crime types or penalties thresholds)?

For requests relating to the process of electronic surveillance, Malaysian domestic laws allow the relevant enforcement authority (the Royal Malaysia Police) to intercept communications under section 116C of the Criminal Procedure Code [Act 593] which states as follows:

“Interception of communication and admissibility of intercepted communications

116c. (1) Notwithstanding any written law to the contrary, the Public Prosecutor, if he considers that it is likely to contain any information relating to the commission of an offence, may authorize a police officer

(a) to intercept, detain and open any postal article in the course of transmission by post;

- (b) to intercept any message transmitted or received by any communication; or
 (c) to intercept, listen to or record any conversation by communication.
 (2) The Public Prosecutor, if he considers that any communication is likely to contain any information relating to the commission of an offence, may
 (a) require a communications service provider to intercept and retain a specified communication or communications of a specified description received or transmitted, or about to be received or transmitted by that communications service provider; or
 (b) authorize a police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communication or communications of a specified description and to remove and retain such device.”

There are no limitations or conditions to certain types of offences or penalties as the police are required by law to investigate any criminal offence under all relevant Malaysian laws. However, there are laws providing powers of interception and electronic surveillance to specific authorities:

- Security Offences (Special Measures) Act 2012 [Act 747] - Section 6: Royal Malaysia Police for security offences and organized crimes
- Communications and Multimedia Act 1998 [Act 588] - Sections 252 & 254: Royal Malaysia Police or any other authorised officer (public officer appointed by the Commission) for all offences under the Act
- Copyright Act 1897 [Act 332] - Section 50B: Person appointed or deemed appointed by the Assistant Controller for all offences under the Act
- Malaysian Anti-Corruption Commission Act 2009 [Act 694] - Section 43: Officer of the Commission with authorisation of the Public Prosecutor for all offences under the Act

What are the central and competent authorities in your country to:

- a) Receive a request for MLA in criminal matters?**
b) Execute/recognize the measure (if other than the receiving authority)?

- a) The Attorney General of Malaysia is the Central Authority for Malaysia to receive mutual legal assistance requests under section 19 of the Mutual Assistance in Criminal Matters Act 2002 [Act 621] (“MACMA”).
- b) The Transnational Crimes Unit (“TCU”) at the Prosecution Division of the Attorney General’s Chambers of Malaysia (“AGC”) handles and processes all incoming and outgoing mutual legal assistance requests.
 The TCU executes all mutual legal assistance requests that are required to be done before the Malaysian courts, namely applications for search warrants, production orders, taking of evidence through sworn examination before a judge, restraint and/or forfeiture orders, and any other matters involving the court and legal process.
 The local enforcement authorities execute all mutual legal assistance requests upon the instructions and legal advice of TCU and also upon the issuance of

legal process by the Malaysian courts (after applications are completed by TCU) for all criminal offences under their respective purviews.

What are the accepted languages for MLA requests?

While the national language of Malaysia is Bahasa Malaysia, preferably all mutual legal assistance requests should be made in English.

The Malaysian courts have instructed that all matters before the court relating to mutual legal assistance matters are to be prepared, filed, argued and examined in English, including the taking of evidence from a witness. [Chief Registrar of the Federal Court Circular No. 1/2003 dated 30 April 2003]

Can the request be submitted electronically to the central authority?

In cases of urgency, a copy of the mutual legal assistance request can be sent electronically to the Transnational Crimes Unit (“TCU”) at the Prosecution Division of the Attorney General’s Chambers of Malaysia (“AGC”) at the email address icu@agc.gov.my.

TCU will take action on the request as an advance copy received informally. Actions that can be taken are only informal actions of assistance by the enforcement agencies, which does not include any court proceedings or enforcement of any actions that are allowed under Malaysian domestic laws.

Section 19 (2) of the Mutual Assistance in Criminal Matters Act 2002 [Act 621] (“MACMA”) requires that all mutual legal assistance requests be transmitted formally to Malaysia through the diplomatic channel. A compulsive measure can only be taken by TCU and the respective enforcement agencies after receipt of the mutual legal assistance request formally.,

Can the request be submitted directly to the central authority?

Only an advance copy of the mutual legal assistance request (considered as informally sent) can be submitted directly to the Central Authority.

The requirements of Malaysian domestic laws under section 19 of the Mutual Assistance in Criminal Matters Act 2002 [Act 621] (“MACMA”) require the mutual legal assistance request to be sent through the diplomatic channel (the only way to be considered as formally sent).

What are the specific requirements (e.g. dual criminality, minimum penalty thresholds, etc.) that the requesting states have to meet under your domestic laws for MLA requests seeking for the provision of electronic evidence?

The specific requirements that have to be met for mutual legal assistance requests are generally as follows:

- (1) Dual criminality;
- (2) Minimum penalty threshold of 1 year of imprisonment;
- (3) Undertaking of specialty;
- (4) Undertaking of reciprocity; and

(5) Undertaking of confidentiality.

Depending on each mutual legal assistance request, further requirements may have to be fulfilled in order to be executed (e.g. an undertaking to return items of evidence provided to the foreign state back to Malaysia after the completion of the criminal matter in the foreign state).

5) REQUESTING ELECTRONIC EVIDENCE ACROSS BORDERS

5.1. Direct requests to foreign service providers

5.1.1. Requests for preservation

Malaysia
What legal framework(s) is/are applicable, if any?
Malaysia does not have any legal framework for requests for preservation.
Which authority(ies) in your country is/are allowed to request data preservation to foreign service providers?
All Malaysian local enforcement authorities (“LEAs”) are allowed to make requests for preservation.
If the requested foreign service providers are prohibited or limited to preserve the data, are there any alternative options to preserve the data, e.g. through police-to-police cooperation, specialized networks (e.g. G7/8 24/7 Network) or MLA?
It is recommended to consider police-to-police cooperation (specifically through the Interpol channel) and/or mutual legal assistance requests as means to ensure the preservation of data.
Can a court order or a search warrant be issued for data preservation by foreign service providers? If not, what are the reasons?
A court order or a search warrant can be transmitted by the Malaysian Central Authority upon reception of an MLA request sent to Malaysia by the foreign state. Hence, a foreign service provider can make an application to its own government to send a MLA request to Malaysia and if the requirements of the Malaysian domestic law (MACMA) are fulfilled, the court order or search warrant can be issued.

5.1.2. Requests for voluntary disclosure

Malaysia
What legal framework(s) is/are applicable, if any?
Malaysia does not have any legal framework for requests for voluntary disclosure.
Which authority(ies) in your country is/are allowed to request data disclosure to foreign service providers?
All Malaysian local enforcement authorities (“LEAs”) are allowed to make requests for voluntary disclosure.
If the requested foreign service providers are prohibited or limited to voluntarily disclose the data, are there any alternative options to obtain the data, e.g. through police-to-police cooperation, specialized networks (e.g. G7/8 24/7 Network) or MLA?
If there are prohibitions or limitations, then it would be recommended to consider police-to-police cooperation (specifically through the INTERPOL channel) and/or MLA requests.
Can a court order or a search warrant be issued for data disclosure by foreign service providers? If not, what are the reasons?
As elaborated above, a foreign service provider can consider to request their own government to send a MLA request to Malaysia and if the requirements of the Malaysian domestic law (MACMA) are fulfilled, a court order or search warrant can be issued by Malaysia. Generally, a court order or search warrant will not be issued if the foreign service provider is requesting for a court order or search warrant directly to Malaysia without the formal transmission of an MLA request.

5.2. Requests sent by your central authority for **Mutual Legal Assistance (MLA)**

Malaysia
What is your central authority to send requests for MLA in criminal matters?
The Attorney General of Malaysia is the Central Authority for Malaysia to send mutual legal assistance requests under section 7 of the Mutual Assistance in Criminal Matters Act 2002 [Act 621] (“MACMA”).

Are informal contacts with the central authority of the requested states allowed and used?

Informal contacts are highly encouraged between Central Authorities. This could include contacts via electronic means such as e-mails as well as telephone conversations, physical meetings and video conferences, including through the South East Asia Justice Network (SEAJust).