

Electronic Evidence Fiche: BHUTAN

1) DEFINITIONS

Bhutan
What are the definitions in your laws/regulations, if any, of:
Electronic evidence
<p>There is no specific definition of “electronic evidence”. However, the 2018 Information Communication and Media Act (2018 ICM) defines the term “information”: It includes a collection of facts, data, news, or messages (whether in their original form or otherwise) which is contained in a document, signature, seal, text, images, sound, or speech (section 464 (59)). “electronic” means relating to technology having electrical, magnetic, optical, electromagnetic, biometric and photonic or similar capabilities, whether digital, analogue or otherwise (section 464 (38)). “Computer evidence” means any information of probative value that is either stored or transmitted in electronic form which include among others, computer evidence, cell phones, audio, and video devices.</p> <p>Additionally, according to section 3, Chapter 2 of the 2005 Evidence Act, “evidence” means all types of proof or probative matter presented and permitted by the Court at a legal proceeding by the act of the parties or required by the Court on its own through the medium of witnesses, documents inclusive of electronic records and physical evidence in relation to matters under inquiry; according to Section 4 that categorized the different types of evidence, letter (b) includes in documentary also electronic records.</p>
Computer system
<p>Under section 464(17) of the 2018 ICM a specific definition of the term “computer system” is not given, however the term “computer” is defined as any electronic, magnetic, optical or other data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network. Furthermore, according to section 464(19) “computer network” means a telecommunications network that allows computers to exchange data; the same definition is also in section 515 (19) of the Bhutan Information Communications and Media Bill, 2016.</p>
Computer data

Although the term “computer data” is not explicitly defined, it is relevant in this context to refer to the definition attributed—by section 464 (30)—to the term “data”, which, for the purposes of the 2018 ICM, means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and which is intended to be processed, is being processed, has been processed, or is capable of being processed in a computer system or computer network, and may be in any form including computer printouts, magnetic or optical storage media, punched cards, or punched tapes or stored internally in the memory of a computer, computer system or computer network; while the term “data message”, means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy (464 (31)). The same definition can be found in section 515 (28) of the Bhutan Information Communications and Media Bill, 2016.

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

Paragraph (94) of section 464 of the 2018 ICM provides the definition of “Subscriber” of a service as a person who subscribes to a specific ICT and media service primarily for his/her own use; while paragraph (98) of “traffic data” means any data identifying or purporting to identify any person, computer, or computer network or location to or from which the communication is or may be transmitted and includes communications origin, destination, route, time, data, size, duration or type of underlying service or any other information. According to section 515 (21) of the Bhutan Information Communications and Media Bill, 2016, “content” means any information, sound, text, data, picture (still or moving), other audio-visual representation, signal or intelligence of any nature or in any combination thereof which is capable of being created, processed, stored, retrieved or communicated electronically or in other form.

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

The term “electronic surveillance” does not appear explicitly. However, under section 515 (57) of the Bhutan Information Communications and Media Bill, 2016, “Intercept” means to stop, deflect, interrupt any message, data or information with a view to acquiring the contents thereof, whether by aural or other means or through the use of such devices as may be considered necessary.

Related to the investigation of an offence committed under the 2011 Anti-Corruption Act the Commission shall intercept any message transmitted or received by any telecommunication; or intercept, listen to and record any conversation by any telecommunication, and listen to the recording of intercepted. A Court order is needed in the given case, unless there is an imminent danger of evidence being destroyed in

the opinion of the Commission provided that the judicial authorization shall be obtained within twenty-four hours of the commencement of interception.

Service provider (e.g. ISP, hosting)

Under paragraph (60) of the Bhutan Information Communications and Media Bill, 2016, “Internet Service Provider (ISP)” means a natural or legal person or association of persons who provides individuals and businesses access to the Internet and who may make also available other Internet-based services; (52) “ICT facility or service provider” means a person who owns, operates, manages or provides any ICT facility.

2) DATA RETENTION REGIME

Bhutan

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?

Although there are no explicit domestic laws imposing a mandatory retention period for electronic data, according to section 187 and 189 of the 2018 ICM, the Authority may at any time make and use recordings of any programme broadcast by any licensee for the purpose of maintaining supervision over such programmes. In line with section 188, the Authority may also require licensees to retain, for a period of at least six months, a recording of every programme broadcast by them, and to produce such recordings when demanded for the purposes of examination.

“Retention of data message” can be done where any law of Bhutan requires that certain documents, records or information have to be retained, only satisfying the conditions expressed under section 322 of the Bhutan Information Communications and Media Bill, 2016. The same conditions are indicated in under section 282 of the 218 ICM.

3) ADMISSIBILITY OF ELECTRONIC EVIDENCE IN A CRIMINAL TRIAL

Bhutan

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

The 2005 Evidence Act established general rules for admissibility of documentary evidence.

In light of the provisions included under section 3 and 4 (according to which “evidence” means all types of proof or probative matter presented and permitted by the Court at a legal proceeding by the act of the parties or required by the Court on its own through the medium of witnesses, documents inclusive of electronic records and physical evidence in relation to matters under inquiry; and that categorized the different types of evidence, letter (b) includes in documentary also electronic records) , Section 11 of the same Act sets a general rule which limits the admissibility of evidence when evidence that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the Court, upon request of a party or on its own, shall have the discretion to restrict the evidence to its proper scope and instruct the parties accordingly. More specifically, under section 43, it is established that an electronic document, including an electronic signature, is admissible to the same extent as a non-electronic document unless a genuine question is raised as to the security or integrity of the electronic document system by or in which the electronic document or electronic signature was recorded or stored.

Section 279 of the 2018 ICM Act grants legal recognition to data messages, specifying that information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of an electronic document or data message. Moreover section 299 provides for the admissibility of data messages. Particularly, in any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence: (1) On the sole ground that it is an electronic document or data message; or (2) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the sole grounds that it is not in its original form. Finally, section 300 assesses the evidential weight of a data message, claiming that it shall be based on the reliability of the manner in which the data message was generated, stored or communicated, the reliability of the manner in which the integrity of the information was maintained, the manner in which its originator was identified, and any other relevant factor.

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



What legal framework(s) is/are applicable, if any?
There is no legal framework applicable. There are limited mechanisms and procedures.
Are the service providers in your country prohibited from or have limited capacity for executing such requests from foreign authorities?
There is no legal framework applicable. There are limited mechanisms and procedures. All requests should go through the Ministry of Foreign Affairs unless there are Memorandums of Understanding (MoU) with respective Ministries or agencies. The requests may be executed through MoUs of respective agencies if any.
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)?
Requests can be made through Interpol (24/7 Network), or police-to-police channels, unless there is a MoU that indicates a specific agency. Bhutan is a member of the South Asian Association for Regional Cooperation and the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), which provide platforms for the exchange of law enforcement information. The Royal Monetary Authority (RMA) has signed memorandums of understanding with the financial intelligence units of Bangladesh, Cambodia, Republic of Korea and Sri Lanka. The Convention would be considered as a basis for mutual law enforcement cooperation on a case-by-case basis. The establishment of joint investigative teams is possible under section 157 of Anti-Corruption Act of Bhutan 2011 (ACAB). The Anti-Corruption Commission (ACC) can employ special investigative techniques under sections 86 and 87 of ACAB. It also developed an internal procedure on the use of special investigative techniques. The Commission may, in exercising its powers or functions relating to the investigation of an offence under this Act, use any of the following investigation techniques, among others: surveillance and observation; undercover operations; video recording; listening and bugging devices; controlled deliveries; or any other special investigation techniques. Furthermore, for what concerns offences under the 2011 ACC Act, additional power to preserve or secure evidence are enshrined in Chapter 6 of the provision. These sections remain relevant due to Chapter 9 that extend the power and scope to the international cooperation in criminal matters, related to the same offences.
Is a judicial order required from the requesting state?

As per legal procedure, it seems to be required but in the absence of a MLA request, it is not clear.
Are there any time limits for data preservation? Any possibility of extension?
<p>Yes, there is provision for data preservation for six months by Service Providers, however, those data and documents which are to be produced as evidence are being preserved by respective agencies in separate storage until the cases are finally closed by default.</p> <p>There is an issue of storage capacity limitation whereby it may not be possible to store data for longer durations unless it is extracted and stored in separate drives, depending on the priority.</p> <p>Extension may depend on the storage capacity of the system.</p>
Would service providers in your country notify the data subjects of the request?
Generally, no. However yes, if it is subject to a request made through a court warrant.

4.1.2. Requests for voluntary disclosure

Bhutan
What legal framework(s) is/are applicable, if any?
<p>There is no legal framework applicable. It might be happening in some cases through personal contacts.</p> <p>However, the Bhutan authorities could assist foreign authorities by requesting a service provider for voluntary disclosure. If the service providers based in Bhutan are not voluntary sharing, a request for data sharing can be made through a court warrant.</p>
Are the service providers in your country prohibited from or have limited capacity for executing such requests from foreign authorities?
They have a limited capacity to store data for long periods of time and a lack of procedures. All requests should go through the Ministry of Foreign Affairs in Bhutan.
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)?

Requests can be sent to the Ministry of Foreign Affairs and/or through police-to-police cooperation via Interpol Net (unless there is a MoU among agencies).
Is a judicial order required from the requesting state? Are there any time limits?
Since there is no MLA, request might be required through diplomatic channel. Maybe 6 months as per the provision. In the context of corruption, the 2011 ACC is applied also internationally due to Chapter 9 according to this act to execute the request. According to Section 146 and 146 due to which the Commission may, upon application and upon production to the High Court of a request accompanied by an order issued by a Court of the foreign State directed to any person within the jurisdiction of the domestic Court to deliver himself or herself or any document or material in his or her possession or under his or her control to the jurisdiction of the Court of the requesting State for the purpose of giving evidence in specified proceedings in that Court, obtain an order directed to that person in the same terms as in the order accompanying the request.
Would service providers in your country notify the data subjects of the request?
Maybe if there is a MoU with other internal or oversea agencies.
How can the process be simplified or quickened in emergency situations?
High level inter-governmental instruments through diplomatic channel (Ministry of Foreign Affairs).

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

Bhutan
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)?
There is no MLA Act or provision in place. It depends on the directives of the Government to share information with an agency of a foreign Government. It is safer through a domestic court order with a warrant.
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)?

So far, the legislation does not provide for real-time collection of data upon receipt of an MLA request. Once the MLA Bill enters into force, the provisions on real-time collection will be part of the legal framework regarding foreign requests.

At the present time the regulation for real-time collection through electronic surveillance is related to CCTV—stipulating recorded date and time frame with its data recording capacity. The police controls CCTV surveillance and some private CCTV data sharing may be done without requesting a court warrant. However, any request to share data from other service providers, particularly telecommunications and financial services providers, requires a court order. Any other real time seizures of any computer services, communication devices like mobile phone, tablets, and other electronic storage data seized by the police to retrieve any relevant evidence in connection to cases can be made if they are found under possession of suspects/victims from active crime scenes. Otherwise, it requires a court order.

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

a) Receive a request for MLA in criminal matters?

There is no MLA Act or provision in place. However, MLA requests can be sent to the Ministry of Foreign Affairs and/or through police-to-police cooperation via Interpol Net.

b) Execute/recognize the measure (if other than the receiving authority)?

There is no MLA Act and provision in place. However, the Anti-Corruption Commission (ACC) is the central authority for mutual legal assistance in corruption matters.

The Royal Bhutan Police, Office of the Deputy Chief of Police, Crime & Operations Branch is the Central Authority for extradition (art. 6 of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988); Mutual Legal Assistance (under art. 7.8); and the transfer of sentenced persons (under art. 17 of the United Nations Convention against Transnational Organizes Crime).

According to the ACA 2011, Chapter 9, Section 146, regarding international cooperation, in case of request made by a foreign State where a foreign State makes a request for assistance in the investigation or prosecution of a corruption offence, the Commission shall, after consultation with the Minister responsible for Foreign Affairs and, if required, the Attorney General: (a) Execute the request; or (b) Inform the foreign State of any reason for either not executing the request forthwith or delaying the execution of the request. Due to Section 157, the Commission may establish a joint investigative body in relation to matters that are the subject of investigations in one or more States pursuant to: (a) Bilateral or multilateral agreements or arrangements; or (b) In the absence of such agreements or arrangements, on a case-by-case basis.

Although currently there are no uniform standard norms and comprehensive laws on MLA in Bhutan, the Royal Government of Bhutan approved the Department of Law and Order (DLO) to act as competent authority for MLA on 9 January 2018 (not empowered yet). It is still necessary to have an MLA Act defining and empowering the DLO as the competent authority with clear responsibilities and accountabilities to achieve the intended objective.

Bhutan Computer Incidence Response Team 382 of the ICM Act. The Government shall by directive establish an agency to be called the Bhutan Computer Incidence Response Team which shall serve as the national agency to coordinate cyber security activities and be a central point of contact on all cyber security matters pertinent to national security in the country. The Bhutan Computer Incidence Response Team shall establish policies and procedures required to implement its functions under this Act.

What are the accepted languages for MLA requests?

English

Can the request be submitted electronically to the central authority?

No, it does not seem to be allowed to send requests directly (whether electronically or otherwise) to the Central Authority.

Can the request be submitted directly to the central authority?

No, the accepted channels are:

- Diplomatic channels
- Interpol

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?

There is no MLA Act and provision in place.

In the context of a request for investigating the offences described under the 2011 ACC Act it is necessary that the request is not contrary to the Constitution or prejudice the national interest; if under the law of the requesting state it is likely that the evidence will be used for a scope contrary to the Bhutan Constitution and values.

5) REQUESTING ELECTRONIC EVIDENCE ACROSS BORDERS

5.1. Direct requests to foreign service providers

5.1.1. Requests for preservation

Bhutan
What legal framework(s) is/are applicable, if any?
There is no legal framework available at the moment.
Which authority(ies) in your country is/are allowed to request data preservation to foreign service providers?
All requests should go through the Ministry of Foreign Affairs unless there are MoU with respective ministries or agencies.
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?
Requests can be sent to the Ministry of Foreign Affairs and/or through police-to-police cooperation via Interpol Net (unless there is MoU among agencies)
Can a court order or a search warrant be issued for data preservation by foreign service providers? If not, what are the reasons?
A local court order or search warrant would not be enforceable on foreign service providers due to the lack of jurisdiction over them.

5.1.2. Requests for voluntary disclosure

Bhutan
What legal framework(s) is/are applicable, if any?
There is no legal framework for voluntary disclosure requests.
Which authority(ies) in your country is/are allowed to request data disclosure to foreign service providers?

It may occur some cases through personal contacts.
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?
Requests may be made through the Ministry of Foreign Affairs, the Interpol 24/7 network, internal networks and through MoUs with respective agencies if they exist.
Can a court order or a search warrant be issued for data disclosure by foreign service providers? If not, what are the reasons?
It is not explicitly provided by the law.

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

Bhutan
What is your central authority to send requests for MLA in criminal matters?
There is no MLA Act and provision in place.
Are informal contacts with the central authority of the requested states allowed and used?
It may occur in some cases through personal contacts.