

# ADMISSIBILITY OF DOCUMENTS CLASSIFIED UNDER THE OFFICIAL SECRETS ACT 1972

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**I**n Malaysia, the use and dissemination of secret official information relating to the affairs of the state, national security, or diplomatic relations is governed by the Official Secrets Act 1972 (“OSA”). Generally, under the OSA, any document, information, or material deemed by the government to be an official secret is protected from public disclosure.

However, there are instances when parties may have to rely on a document which is classified as an official secret under the OSA in court proceedings.

In this article, we will discuss the court’s approach in dealing with admissibility of classified documents as evidence in legal proceedings.

## What is an Official Secret?

An official secret<sup>1</sup> is defined as:

- (a) Any document specified in the Schedule of the OSA, namely:

*“Cabinet documents, records of decisions and deliberations including those of Cabinet committees;*

*State Executive Council documents, records of decisions and deliberations*

*including those of State Executive Council committees;*

*Documents concerning national security, defence and international relations.”*

- (b) Any information classified as “Top Secret”, “Secret”, “Confidential”, or “Restricted” by a Minister, the Menteri Besar, or the Chief Minister of a State, or by any public officer appointed under Section 2B of the OSA.

## Offences under the OSA

Section 8(1) of the OSA<sup>2</sup> provides that it is an offence for any person who has in their possession or control any official secret to:

- (a) Communicate, directly or indirectly, any such information to any foreign country without authority;
- (b) Uses any such official secret for the benefit of any foreign country without authority, or in any other manner prejudicial to the safety or interests of Malaysia;
- (c) Unlawfully retain possession or control of any such information; or

[1] Section 2(1) of the OSA

[2] Section 8(1) of the OSA

- (d) Fail to take reasonable care of, or conduct themselves in a way that endangers the safety or secrecy of, any such official secret.

A person who commits an offence under the OSA may be liable to imprisonment and/or a fine, depending on the nature and circumstances of the offence.

### **Court's Power to Determine the Admissibility of a Document Classified under the OSA**

There is no absolute bar to the production of a document classified under the OSA as evidence in court. The court has the power to determine the admissibility of such document. In *BA Rao & Ors v Sapuran Kaur & Anor*<sup>3</sup>, the Federal Court held that it is the court, not the executive, that ultimately determines whether there is a real basis to claim that the affairs of the state are involved before preventing its disclosure.

A similar approach was taken by the High Court in *Takong Tabari (Suing in her personal capacity and as the Administratrix of the Estate of Jeffery Satuk Gabar-Deceased) v Government of Sarawak & 3 Ors*<sup>4</sup>:

*"... it must be recognised that the **issue of admissibility of any piece of evidence in a Court of law in this country comes mainly within the purview of the Evidence Act 1950**. I find nothing expressed or implied that the Act ("OSA") should be taken as a statute governing admissibility of evidence.*

***In my view the Act ("OSA") deals mainly with the prevention of unauthorised disclosure of official secrets and thus created offences for any such infringement. I do not think it is intended to be used to avoid any liability or to defeat any claim regardless of the culpability of the party relying on it. It is obvious that the primary goal of the Act is to protect classified documents or information which by such disclosure would be detrimental to the national security or public interest."***

*[Emphasis added]*

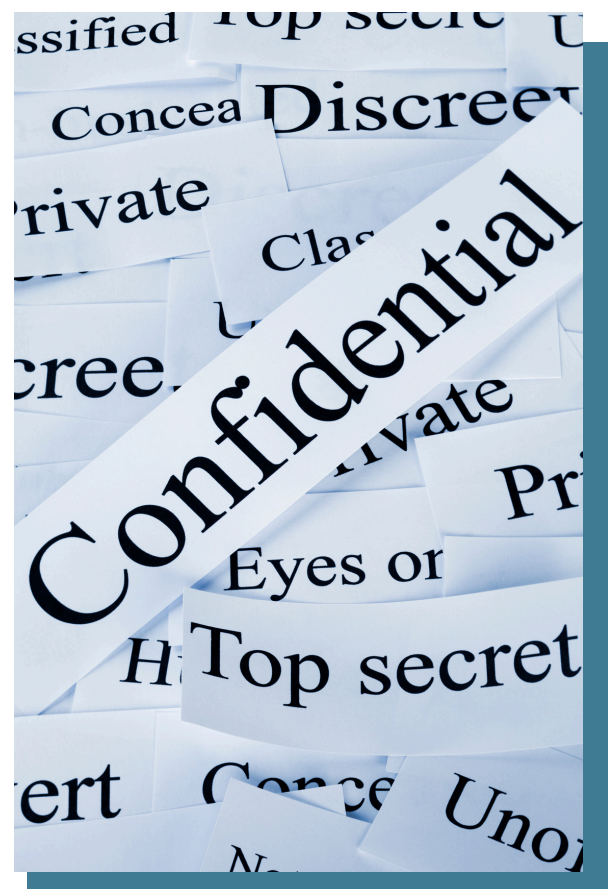
In short, even if a document has been classified as an official secret, it does not mean that the

document will be automatically or completely excluded from being produced as evidence in court. This approach was also adopted by the High Court in *Rotta Research Laboratorium SPA & Anor v Ho Tack Sian & Ors*<sup>5</sup>.

### **Factors Considered by the Court**

When an objection to the admissibility of a classified document is raised, the court would consider whether there is a real basis to contend that the document concerns the affairs of the state or national security. In determining the admissibility of such document, the court will have to strike a balance between the public and private interests. While the protection of national security and public interest is paramount, the principles of justice and transparency must also be upheld.

Therefore, the party objecting to the production of a classified document will need to demonstrate that the classified information or document falls within the ambit of the types of information or documents specified in the Schedule of the OSA, namely the affairs of the state, Cabinet documents or deliberation, or documents concerning national security, defence, and international relations.



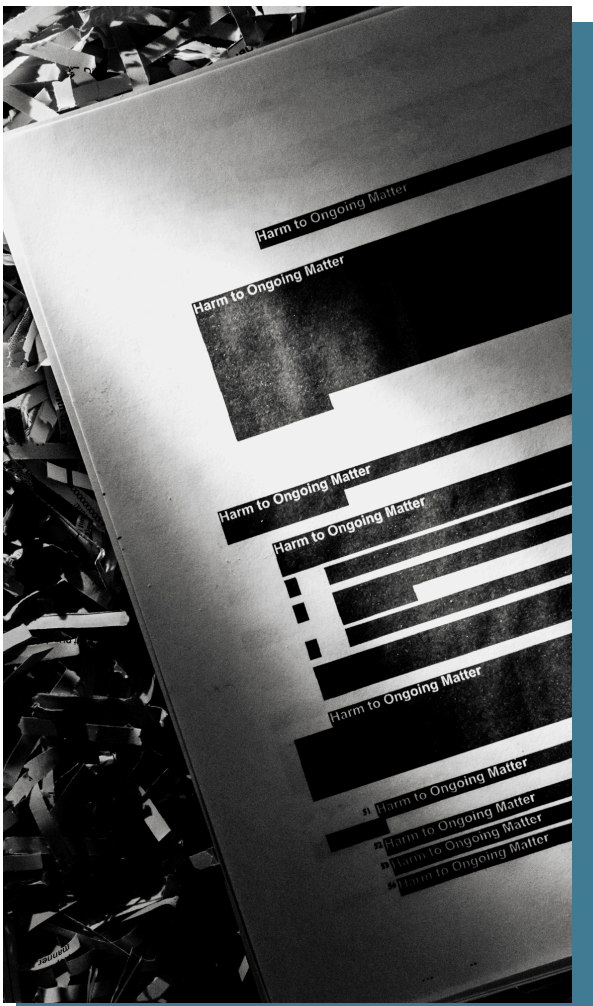
[3] [1978] 2 MLJ 146

[4] [1995] 1 CLJ 403

[5] [2015] 4 MLJ 223

The court would typically consider the reasons for classifying the information or document as an official secret. For instance, in the case of *Norhayati Mohd Ariffin v Mohd Russaini Idrus*<sup>6</sup>, the High Court found that in classifying the special task force report as an official secret, the officer did not provide any basis for arriving at his decision. The High Court held that any explanation subsequently given by the officer in affidavit to oppose the production of the report in court was “merely elucidatory”.

Recently, in *Federal Land Development Authority & Anor v Tan Sri Haji Mohd Isa Bin Dato’ Haji Abd Samad & 20 Ors*<sup>7</sup>, the High Court ordered the production and use in court of a report prepared at the instruction of the Prime Minister’s Department in relation to a land development project, which had been classified as an official secret under the OSA. In ordering the production of the report, the court held that the classification of the report under the OSA does not ipso facto preclude its production in court, and that the report should be produced as it was relevant and necessary to assist the court in determining the issues at trial.



## Ancillary Orders

In allowing a classified document to be produced and admitted as evidence, the court may issue protective or ancillary orders to restrict access to it, limiting its availability only to authorised parties and ensuring that it is not disclosed to the public. In appropriate cases, there may be a need to protect the confidentiality of these documents. Examples of the ancillary orders include:

- (a) An order that the classified document be sealed and kept in the chambers of the judge, with only the judge having access to and being allowed to view the document;
- (b) An order limiting disclosure of the classified document only to the parties involved in the proceedings;
- (c) An order allowing the classified document to be used only for the purposes of the proceedings;
- (d) An order for the redaction of sensitive information in the classified document before the production of the document in court.

## Conclusion

In conclusion, earlier decisions of the court show that there is no absolute bar to the production of a classified document as evidence in court. Whether such document can be produced will have to be considered on a case-to-case basis.

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[6] [2023] 9 CLJ 304

[7] Grounds of Judgment dated 22.8.2024 in KLHC Suit No.: WA-22NCvC-843-11/2019