



Government Information (Public Access) Act 2009
Notice of Decision

Applicant: [REDACTED]
Decision maker: Adeline
Date of decision: 1 October 2024
Reference: GIPA24 [REDACTED]
Keywords: Government information – access to information –
conclusive presumption of overriding public interest against
disclosure – legal professional privilege

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Summary

1. [REDACTED] (the Applicant) applied for access to information from the NSW Department of Communities and Justice (the Department) under the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act).
2. I have decided:
 - to provide access to some of the information falling within the scope of the access application; and
 - that some of the information sought is information for which there is a conclusive presumption of overriding public interest against disclosure under the GIPA Act, and that information will not be released.
3. Information on how to seek a review of my decision is set out in paragraphs 34 – 39.

Summary of access application

4. On 11 September 2024 the Applicant applied under the GIPA Act to the Department for access to the following information:

Requested information from 11/09/2024 to 12/09/2024.

I'm seeking any (and all) internal policies, protocols, procedures, guidelines, training manuals or other similar documents used by/for Local Court Registrars when determining media applications for access to material held by the court.

DCJ states media (non-party) access to material held by the court is governed by s314 of the Criminal Procedures Act. I'm after any/all internal documents (including emails) that explain to Local Court Registrars what material is or isn't covered by this section of the Act.

5. On 12 September 2024 the Department acknowledged the access application as valid.
6. On 16 September 2024 the Applicant amended the scope of the application pursuant to section 49(1) of the GIPA Act as follows:

I'm seeking any (and all) internal policies, protocols, procedures, guidelines, training manuals or other similar documents used by/for Local Court Registrars when determining media applications for access to material held by the court.

Decision

7. I am authorised by the principal officer, for the purposes of section 9(3) of the GIPA Act, to decide the access application.
8. I have decided:
 - Under section 58(1)(a) of the GIPA Act, to provide access to some of the information; and
 - pursuant to section 58(1)(d) of the GIPA Act, to refuse access to some of the requested information because it is information for which there is

a conclusive presumption of overriding public interest against disclosure pursuant to clause 5 of Schedule 1 of the GIPA Act.

9. These decisions are reviewable under section 80(d) of the GIPA Act.

10. In this Notice of Decision, I will explain my reasons.

Searches for information

11. Under the GIPA Act, we must conduct reasonable searches for the government information sought in the application.

12. Searches were undertaken of the Department's records management systems and intranet by business unit **Court Services** to find any information that falls within the scope of the application. The following information was located and copies provided to me for consideration:

- Procedure Guide - Access to court records; and
- Procedure Guide – Key Information – Registrar discretion for media access.

13. The A/Executive Director, Court Services certified that reasonable searches have been undertaken and I accept this certification. I am satisfied that reasonable searches have been undertaken.

Reasons for decision – Public Interest Test

14. An Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act.

15. I applied the public interest test by:

- a. identifying any public interest considerations in favour of disclosure;
- b. identifying any relevant public interest considerations against disclosure;
- c. attributing weight to each consideration for and against disclosure; and
- d. deciding where the balance between them lies.

Public interest considerations in favour of disclosure

16. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Department may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).

17. In my view the following public interest considerations in favour of disclosure apply when considering the information in issue:

- a. The statutory presumption in favour of the disclosure of government information;
- b. The general right of the public to have access to government information held by agencies; and
- c. Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their practices for dealing with members of the public.

Public interest considerations against disclosure

18. When applying the public interest test, the only public interest considerations against disclosure that I can take into account are those set out in the table to section 14 of the GIPA Act. I have not identified any public interest considerations against disclosure as being relevant to the application.

Balancing the public interest considerations

19. Having weighed up the considerations in favour of release, and in the absence of any public interest considerations against disclosure, I have decided to grant access to the information requested.

Form of Access

20. Access to the information is provided in the form of electronic copies of the relevant documents in PDF format.

Conclusive presumption of an overriding public interest against disclosure

21. Section 14(1) of the GIPA Act states:

It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

22. If information falls within the scope of one of the clauses in schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.
23. Clause 5 (Legal professional privilege) of Schedule 1 to the GIPA Act is relevant to this application because a document within the scope of the access application contains information which is of the kind covered by Schedule 1 to the GIPA Act. The information is contained in the 'Introduction' section of a Procedure Guide titled '*Key Information – Registrar discretion for media access*'.
24. Clause 5 of Schedule 1 of the GIPA Act states:

Legal Professional Privilege

- (1) *It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.*
- (2) *If an access application is made to an agency in whose favour legal professional privilege exists in all or some of the government information to which access is sought, the agency is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on the basis of this clause.*
- (3) *A decision that an agency makes under subclause (2) is not a reviewable decision under Part 5.*

25. Client legal privilege, often referred to as 'legal professional privilege' protects confidential legal advice and communications between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client or for use in current or anticipated litigation.
26. The existence and maintenance of privilege must always be considered in light of all the facts and circumstances that apply to the information.
27. In order for an agency to rely on clause 5 of schedule 1 to the GIPA Act, the information must be of a kind that would not be required to be disclosed in legal proceedings in NSW because it is information that attracts client legal privilege and the agency has not waived, either expressly or impliedly, that privilege.
28. In order for client legal privilege to attach to the information, each element of client legal privilege must be satisfied. The essential elements of client legal privilege derive from section 118 and 119 of the *Evidence Act 1995 (NSW)* these are set out below:
 - the existence of a client and lawyer relationship;
 - the confidential nature of the communication or document, and
 - the communication or document was brought into existence for the dominant purpose of either:
 - enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or
 - for use in existing or anticipated litigation.
29. The information constitutes Advice from the NSW Crown Solicitor's Office (lawyer) to the Department (client) and attracts a claim of legal professional privilege as it:
 - is confidential in nature as it contains confidential legal advice from the NSW Crown Solicitor's Office to the Department; and
 - was brought into existence for the dominant purpose of the NSW Crown Solicitor's Office providing legal services to the Department.
30. Under clause 5(2) of schedule 1 to the GIPA Act, an agency must consider whether it is appropriate to waive privilege before it decides to refuse access under clause 5(1).
31. With respect to the Advice prepared by the NSW Crown Solicitor's Office to the Department, the Department is whose favour the privilege exists. That is, the legal professional privilege or client privilege belongs to the Department, specifically the Court Services business unit of the Department, and can only be waived by the client (the Department).
32. I have been advised by Court Services that they do not wish to waive privilege over the information.
33. In summary, information falling within Schedule 1 of the GIPA Act is not subject to the public interest test as there is a conclusive presumption of an overriding public interest against their disclosure. Accordingly, access is refused and this information will not be released.

Review rights

34. If the Applicant disagrees with the decision in this notice that is reviewable, the Applicant may seek a review under Part 5 of the GIPA Act. Before the Applicant does so, I encourage the Applicant to contact me to discuss any concerns. My contact details are set out below.

35. The Applicant has three review options:
- internal review by another officer of this agency, who is no less senior than me
 - external review by the Information Commissioner, or
 - external review by the NSW Civil and Administrative Tribunal (NCAT).
36. The Applicant has 20 working days from the date of this Notice to apply for an internal review.
37. If the Applicant would prefer to have the decision reviewed externally, they have 40 working days from the date of this Notice to apply for a review by the Information Commissioner or the NCAT.
38. To assist the Applicant, I have enclosed a fact sheet published by the Information and Privacy Commission (IPC), entitled *Your review rights under the GIPA Act*. The Applicant will also find some useful information and frequently asked questions on the IPC's website: www.ipc.nsw.gov.au
39. The Applicant can also contact the IPC on freecall1800 IPC NSW (1800 472 679).

Further information

40. If the Applicant has any questions about this Notice of Decision, please email infoandprivacy@dcj.nsw.gov.au or telephone (02) 9716 2662.

Adeline

OGIP Advisor

**Open Government, Information and Privacy
Department of Communities and Justice**



Court Services

Court Services Procedure Guide

Access to court records



The content of this document is for the information of Court Services staff only and may not be distributed to any other person or organisation without prior approval of the Executive Director, Court Services.

Version: 8.2

Last Saved Date: 13 February 2024



A printed copy of this guide may not remain current and relevant as updates occur on a regular basis. Please check for any new versions prior to relying on the printed version.

Court Services Procedure Guide

Access to court records

Document information

Overview

This procedure guide provides information and guidance on dealing with requests for access to court information and records.

This document:

- describes the legislation and rules;
- explains the processes;
- provides guidance on best practice; and
- provides tools and links to other useful resources.

Target audience

This document is written for all Court Services employees.

Version history

No.	Date	Notes
1.0	16 May 2018	New procedures
2.0	24 October 2018	Update regarding types of identification and storage of application forms
3.0	22 January 2021	NDIS worker checks added to Part 3 – Access by other agencies and non-parties
4.0	2 November 2021	Updated following Crown Solicitors Office advice about laws relating to access to court records and relevant considerations for decisions about leave to access court records
5.0	July 2022	Update re requests for records from Crown Solicitors Office regarding Terrorism (High Risk Offenders) Act 2017
6.0	1 September 2022	Update re requests from DCJ regarding the review of amendments of the Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021
7.0	7 September 2022	Update to legislation relating to access to Family Law Documents
8.0	19 July 2023	Review undertaken and minor fixes resolved
8.1	20 November 2023	Update to requests by members of parliament
8.2	13 February 2024	Intranet hyperlinks amended to new intranet page

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PART 1 Introduction and general process

Introduction

Objective

This section provides introductory information on the management of applications for access to court records.

Key terms

The following terms are commonly used when discussing access to records:

Term	Definition
Access	Accessing a court record (such as court file or transcript) by obtaining viewing or reading the original document/s or obtaining a copy.
Court record	A court record is any document, item, recording, transcript or case management system entry that is associated with a court proceeding.
Non-party	A person or organisation that was not involved in the court proceedings that the access application relates to.
Non-publication order	An order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information) – s3, <i>Court Suppression and Non-publication Orders Act 2010</i> .
Party	A person or organisation that was involved in or had some connection to the court proceedings that the access application relates to.
Suppression order	An order that prohibits or restricts the disclosure of information (by publication or otherwise) – s3, <i>Court Suppression and Non-publication Orders Act 2010</i> .

Legislation

There is a large volume of legislation that applies to requests for access to court records. Relevant Acts, Regulations and Rules will be cited as appropriate throughout this guide.

What is a request for access to court records?

A request by a party or non-party to inspect or obtain copies of information contained on a court record or file.

This procedure guide provides an overview of the legislation and procedures applicable in various situations.

Every application for access must be considered on its merits.

Who requests access to court records?

Any person or organisation can apply to access a court record and different laws and procedures will apply to consideration of that request depending on the type of applicant and specific circumstances relating to the case and/or record. Types of applicants include:

- Parties, victims and witnesses
-

- Media representatives
- Non-parties, other government agencies, employers and general public
- Researchers

Who can decide an application for access?

It will depend on the legislation relating to the case or record, however generally an application for access is determined by a registrar or deputy registrar.

In some situations, a judicial officer can also determine an application for access.

Access to JusticeLink

Access to the JusticeLink database is governed by the Chief Justice of the Supreme Court, Chief Judge of the District Court and Chief Magistrate of the Local Court.

Access is restricted to those persons working within NSW government agencies that have a legitimate business need to access JusticeLink records.



Access by private individuals or organisations is not permitted.

Any person or organisation seeking access to the JusticeLink database is required to make a written application. Applications for access to JusticeLink are managed by the JusticeLink Support team and are referred to heads of jurisdiction for consideration.

Access to JusticeLink records

Generally information from JusticeLink is not permitted to be printed or provided to an applicant as it contains administrative information that does not form part of the court record and may not adequately represent what is contained on the court file.

Applications for a screen shot or other printed record of a JusticeLink case or proceeding must be considered as an application for access to a court record which is to be determined by a registrar.

DCJ Media Policy

The Department of Communities and Justice (DCJ) has a separate media policy that clarifies procedures on the handling media enquiries.

All media enquiries, other than requests for court records, such as a request for public comment on legal or government policies and other media requests, must be referred to the Departmental Spokesperson.



Access the Department of Communities and Justice Media Policy via the Intranet.

Copy access to court records

Where a court directs that parties be provided copy access to documents on the court file the following policy applies:

- Where the court grants parties in proceedings copy access to documents the documents will be copied by the court registry (a fee may be charged for this service)

- Parties can elect to collect the copied documents from the registry or have the documents posted
- Unless the document is small or is required immediately for the court proceedings, copying is to be done within 24 hours of the court order
- Unless the court specifically directs, no original document is to be uplifted from the court file by any person.

[Court Services Bulletin 2002/0169]

Parties in the Children's Court will receive a copy of any Children's Court Assessment Report without charge, on request.

[Court Services Bulletin 2005/0003]



This does not extend to access and copying of:

- Documents produced on subpoena to a court registry.
- Audio visual exhibits (see p 56, below).

Spent convictions

A conviction becomes a "spent conviction" where a person completes the required crime-free period from the date of their conviction (s 8, *Criminal Records Act 1991* (CRA)). Generally, the crime-free period is:

- 10 years, for convictions of courts other than the Children's Court (s 9 CRA),
- 3 years, in relation to an order of the Children's Court (s10 CRA).

However:

- Convictions for certain offences cannot become spent (s 7 CRA),
- A finding that an offence is proved without proceeding to conviction is immediately spent (s 8 CRA).

Under s 13 CRA, it is generally an offence to disclose information about spent convictions to any other person. However this offence does not apply to a disclosure by:

- A law enforcement agency to a court in compliance with an order of the court,
- Court staff of information contained in a court record.

Media access applications: s 13 does not override the media's entitlement in s 314 of the *Criminal Procedure Act 1986* to inspect court documents, in circumstances where a document contains information about a spent conviction.

However, in situations where a registrar has a discretion to determine an access application under rules of court, consideration should be given to:

- Whether the court record contains information about spent convictions,
- If so, the public policy considerations underlying s 13, including the stated object of the CRA to limit the effect of a conviction for a relatively minor offence if the person completes a period of crime-free behaviour, and

- Any good reason otherwise for access to be granted.



Section 13, *Criminal Records Act 1991*

Part 3 provides more information about media access to court records.

Extinguished convictions (for historical homosexual offences)

Part 4A of the *Criminal Records Act 1991* provides for the extinguishment of convictions for historical homosexual offences.

The offence of disclosing information about extinguished convictions (s 19G) does not apply to a disclosure by court staff of information contained in a court record.

Disclosure to media: Due to the historical nature of extinguished convictions, it is unlikely that a registrar will encounter a media application under s 314 CPA for access to a court record that contains information about extinguished convictions. An application under s 314 must be made within 2 working days of the conclusion of proceedings.

However, an access application under rules of court can be made at any time. If determining such an application, there may be strong discretionary reasons to decline access to a court document containing information about an extinguished conviction.

Disclosure to others: s 19G specifically provides that it is not an offence to:

- Disclose information about the conviction to the person who was convicted.
- Provide court records to DCJ Legal (formerly, the Office of the General Counsel) for the purpose of providing information to the Secretary of the Department of Communities and Justice who can consider an application to extinguish an historical homosexual offence.



Section 19G, *Criminal Records Act 1991*

Department of Communities and Justice Media Unit

Objective	<p>This section provides further information on the role and assistance to be provided to staff of the DCJ Media Unit.</p>
Priority assistance to be provided	<p>Information is often sought from registries from court related matters that require a briefing to or response from the Attorney General, Department or heads of jurisdiction including the Chief Magistrate.</p> <p>Same day urgent assistance is expected of court registries when information is sought by the DCJ Media Unit.</p>
Provision of information to DCJ Media Unit	<p>Registrars and court registry staff are to provide priority assistance to DCJ's media officers to ensure that the department is responsive to public concerns on law and order matters.</p> <p>DCJ's media officers brief the Attorney General and/or heads of jurisdictions on issues raised in media publications or by community organisations and the Attorney General or a senior judicial officer may be called upon to provide an immediate response to these issues. As such, it is essential that Media Unit staff and other departmental officers are assisted by court registries to access relevant court documents.</p> <p>Registrars are to facilitate access to relevant court results or court records and assist with providing access to transcripts by preparing urgent transcript applications where required.</p> <p>Registrars are not to make comment on the appropriateness of decisions of the court or seek to interpret the reasoning behind court judgments. Under no circumstances should registrars inform the judicial officer concerned that inquiries are being made regarding a particular case, as this might be seen to be attempting to influence the outcome of proceedings.</p> <p>It is not necessary to require departmental officers to submit a written request for information and registrars can act on a verbal request, however email confirmation of the information sought may be requested.</p>
Access to transcripts by DCJ Media Unit	<p>DCJ's Media Unit has a protocol with Reporting Service Branch for the expedited provision of transcripts to assist briefings. Where possible transcripts will be prepared on a same day basis.</p> <p>Registrars are responsible for providing support to Reporting Services Branch, including preparing urgent transcript applications and the provision of relevant recording information.</p>
Limited referrals to DCJ Media Unit	<p>Registrars can contact the media officers about media issues; however, courts are not to refer general media enquiries that would ordinarily be dealt with by the court registry (such as requests for court results).</p>

Court Information Act – has not been commenced

Objective

This section provides important information about the *Court Information Act 2010*.

The Act is not in force

Applicants may sometimes refer to a right of access to court records pursuant to the *Court Information Act 2010*, however that Act, although passed and available on the legislation website, is **NOT IN FORCE** and **CANNOT** be used as the basis for decisions on access to court records.

Decisions on access to a court record must be made using other current legislation and rules of court.

The status information at the start of the Act (on NSW Legislation website) indicates that none of its provisions have commenced:

Court Information Act 2010 No 24

Current version for 8 December 2016 to date (accessed 18 February 2018 at 17:16)

[Status information](#)



New South Wales

Status information

Currency of version
Current version for 8 December 2016 to date (accessed 18 February 2018 at 17:16).
Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force
None of the provisions displayed in this version of the legislation have commenced. See [Historical notes](#)

Access to court results

Objective

To provide information on access to court results (which is different to providing access to a court record).

Court result vs. court record

Providing the result of a court appearance is not the same as providing access to a court record, however some of the same considerations are to be applied.

A court record is a physical item, such as a document or exhibit that a person can apply to view or receive a copy of, whereas a court result is a verbal or written account of the court outcome, either in general terms (e.g. case finalised and person sentenced to imprisonment) or specific detail (e.g. amount of fine imposed or specific bail conditions).

Written application not required

Details of the result of a court appearance can generally be provided without written application.

The applicant should be able to provide sufficient detail of the case they seek information about and indicate the information they seek (e.g. details of the sentence imposed or specific bail conditions made).



If the person is seeking to view any document or item on a court file they must make a written application for access to a court record.

Identity of applicant

A person seeking a court result should identify themselves and any connection to the case to assist with determining whether access to the court result (either generally or with specific details) should be provided.

As many requests for court results are by telephone or email it is not feasible to verify the identity of the applicant, the information provided by the applicant is to be taken in good faith as correct.



If a registry officer is concerned about the authenticity of a person seeking a result or their reason for seeking the information, staff can limit the information to a general result only, without specific detail, or they can request that a written application be made for consideration by a registrar.

General right to court results

Any person that could have attended a court in person and heard the result in open court can seek information about the result via other means, such as by telephone or email.



The principle of open justice supports open access to court results; however, consideration must also be given to any restrictions on access to the information.

Restrictions on giving court results

Before providing a court result a registry officer must determine whether there are any restrictions on providing the information.

Restrictions include:

- The proceedings were determined in a closed court
- There is a non-publication or suppression order that applies to the information sought
- The jurisdiction of the court precludes the provision of information (such as the Drug Court which has a general non-publication order that applies to all Drug Court proceedings)



Where a restriction applies advice is to be sought from a registrar as to what, if any, information can be provided.

Providing details of results

Registry staff are permitted to approve the provision of court results (not access to court records), however registrars should oversee the provision of information and ensure that staff are fully aware of relevant legislation and guidelines restricting access.



Make an ROP entry on JusticeLink with details of the name of any person seeking a court result and the information provided. This assists other business areas to manage repeat applications.

Charter of Victims Rights

The Victims Charter provides the types of court information that a victim is entitled to receive. This includes information about bail conditions imposed for the protection of the victim or their family and information about the prosecution of a defendant, such as future listing information.

The Women's Domestic Violence Advocacy Services may be assisting a victim of crime and may be allowed to access court information about proceedings on behalf of the victim.



The Charter of Victims Rights is provided in section 6, *Victims Rights and Support Act 2013*.

Victims of crime

There is an administrative policy in the District and Local Courts which allows victims to access judgments and written evidence in the proceedings in which they are concerned as victims, without payment of a fee. A victim of crime includes a person who is the protected person in a final AVO.

[Court Services Bulletin 2005/0079]

Access to Family Law records

A search of family law records may be made pursuant to Rule 15.13, Federal Circuit and Family Court of Australia (Family Law) Rules 2021. A non-party may be provided access if they are a person with a proper interest in the case.

Application to access court records - process

Objective

To provide guidance on the application process for requests to access court records.

Applications to be made in writing

All applications seeking access to court records are to be made in writing.

A written record is to be retained by the court registry that provides details of the applicant and reasons for application, the decision and decision maker.

Where the decision maker is a Judicial Officer, orders about media access entered on JusticeLink are a suitable written record and hand signatures on application forms are not required in order for a Registry Officer to facilitate access. If the Registry requires a hard copy of the determination, JusticeLink outcomes can be generated as a document, printed from JusticeLink, and attached to the application.

A standard application form is available and preferred. However any written format can be accepted.

Record the type of identification sighted on the application form. There is no requirement to copy or scan ID for the purposes of the application.

All application forms must be stored in a dedicated folder in the registry. At no time are application forms to be stored on the court file.



Standard application form *Record of application by a non-party for access to material held by the court* is available on the Court Services Intranet.

Check identity of media reps

Registry staff are to check the identity of persons purporting to be a representative of a media organisation to ensure they have authority to make an application for access on behalf of a media organisation.

Record the type of identification sighted on the application form. There is no requirement to copy or scan ID for the purposes of the application.

Types of identification that will be acceptable include:

- Photo identification indicating that the person is employed by a media organisation; or
- Documentation (e.g. business card) identifying that the person is employed by a media organisation AND a photographic form of ID (e.g. drivers licence).

If registry staff have any concerns, confirmation of the person's status as a representative of a media organisation should be sought from the DCJ Media Unit.

**Check
identity of
non-party
applicants**

It may be appropriate to seek a non-party applicant to verify their identity to assist the determination of an access application.

Record details of the identification sighted on the application form.

**Check form
completed**

On the standard application form, non-party applicants are required to provide written acknowledgement that they are aware of and will comply with any legal restrictions or conditions upon their access to or use of information in court records (should their application be approved).

The application form should be checked to ensure that all acknowledgments have been provided.

Decisions, warnings and provision of access

Objective

To provide guidance on the application process for requests to access court records.

Important role of registrars

A registrar (or deputy registrar) has a difficult but important role in determining applications to access court records. There are many considerations to take into account and it is important that registrars have a good understanding of:

1. The general principle that justice is “open”,
2. Legislation, rules of court and other directions and policies that govern decision making,
3. Their responsibility to provide appropriate warnings and information about court orders or laws that limit the disclosure or publication of court information, in order to assist applicants to comply with their legal obligations and limit the potential for inadvertent publication or broadcasting of court information that contravenes the law or a court order, and
4. Possible consequences and impacts of their decisions on persons and organisations connected to the proceedings, or impacts on ongoing and future court proceedings.



The remainder of this guide provides guidance on the considerations for registrars when making access decisions.

Registrars are required to be familiar with the laws and rules that authorise or restrict access to court records.

Fair and transparent decisions

Registrars are required to determine each application for access on its merits. A registrar's decision, and their reasons for decision, must be recorded in writing and be retained with the court file.

Providing appropriate reasons adds integrity to the process and, particularly in the case of a refusal, enables the applicant and any judicial officer reviewing a decision to understand the considerations the original decision maker had taken into account.



A record of an application and decision should also be recorded on JusticeLink via an ROP entry. Sufficient information should be captured in the ROP to enable other staff that respond to public and media enquiries to quickly access the information

NOTE: Some staff, such as the DCJ Media Unit have only limited access to JusticeLink and cannot access or open documents loaded to JusticeLink.

Warnings on publication, broadcasting and distribution

Where access to a court record is granted, the applicant is to be given express warning about their responsibility to comply with any legislated or court ordered non-publication or suppression order.

The applicant is responsible for determining any law that may be applicable to the case, jurisdiction and/or the record accessed and compliance requirements.

However, it is appropriate for court registries to provide an applicant with sufficient information on any court ordered prohibition.

The standard application form contains a section for recording the applicant's written acknowledgment of any warnings that are given.

The applicant is to be advised that any alleged breach will be referred to NSW Police for investigation and possible prosecution.

Supervising access

Access to court records is to occur under supervision at the registry counter or another suitable space within court premises. Under no circumstances should journalists or other persons be permitted to remove court records from the registry or have unsupervised access.

Where a registrar decides that a person or agency may uplift records, this is to be clearly recorded in the access decision using the Determination section of the standard application form. Registry staff must make a record of the person that uplifted the record, the date taken and date returned (if applicable).

Review of registrars decision

Where an application for access to court records is refused by a registrar an application can be made to a judicial officer to review the registrar's decision. (Note: Sydney District Court can also refer a review to the judicial registrar)

Application is to be made via Application Notice in Local or Children's Court or notice of motion in the District Court.



A copy of the registrar's written decision and reasons for decision is to be provided to the applicant and a copy attached to the application for review for the information of the judicial officer reviewing the decision.

Non-publication and suppression orders

Objective	This section provides information about non-publication and suppression orders.
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Automatic suppression of defendant's name	<p>JusticeLink is configured to automatically suppress defendant names in certain cases such as Children's Court proceedings where it is required under applicable legislation.</p> <p>There is no automatic suppression of a defendant's name in sexual assault proceedings; a court must first make an order. Registry staff may only suppress the name following the court's order.</p>
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[Court Services Bulletin 2009/0020]

Court can make order	<p>When considering whether to issue a non-publication or suppression order, the court must take into account that a primary objective of the administration of justice is to protect the public interest in open justice.</p>
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A court can prohibit or restrict the publication or other disclosure of information tending to reveal the identity of a person connected to proceedings, or evidence given in proceedings. The court can make these orders either on its own initiative or on the application of a party or other person with a sufficient interest in the proceedings.

It is an offence for a person to contravene a suppression or non-publication order made by the court where the person is reckless as to whether a suppression or non-publication order applies.



Court Suppression and Non-publication Orders Act 2010

Recording orders on JusticeLink	<p>It is important that details of a non-publication or suppression order are captured fully within the outcome on JusticeLink. Full details in the outcome ensures other staff that access JusticeLink information, such as the DCJ Media Unit, can see the full order.</p>
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A copy of any written court order must also be uploaded to JusticeLink.



The DCJ Media Unit has restricted access to JusticeLink and cannot access the documents tab. Accordingly, full information must be included in the outcome.

Disclosure of information relating to order	<p>A suppression order does not prevent a person from disclosing information (other than by publication) in the course of performing their duties in a public official capacity, either:</p> <ul style="list-style-type: none">• In connection with the conduct of proceedings or enforcement of a penalty, or
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- Pursuant to a procedure for informing news media organisations of the existence of a suppression/non-publication order.

Any person provided with information relating to a case that has a non-publication or suppression order must be advised of the existence of the order and with sufficient details to enable their compliance with the order.



Section 15, *Court Suppression and Non-publication Orders Act 2010*

Publishing and broadcasting court information

Objective

To provide information about the restrictions on publishing and broadcasting information from a court record.

Requirement to be aware of legislation and restrictions

It is the responsibility of the person obtaining access to a court record to be aware of any legislative or court ordered restrictions on publishing or broadcasting information in connection with the relevant court proceedings.

Certain legislation may also provide penalties for breaching restrictions on publishing and broadcasting court information.



A list of the common legislative restrictions is provided in Part 5 of this guide.

Registry staff to warn of publication restrictions

Any person obtaining access to a court record is to be reminded that they must familiarise themselves with relevant legislation that restricts the publishing or broadcasting of the information obtained.



A person may be subject to prosecution and penalty for breaching a prohibition on publication or broadcasting court information.

Court ordered non-publication or suppression orders

Court registry staff providing access to a court record or court result must alert the person or media representative of any court ordered non-publication or suppression order to enable the person to comply with the order.

Ordinarily, a non-publication or suppression order will be noted on the cover of the court file and a completed record of order form may be on the court file. Verification of the terms of the order and its currency should be made by checking the details recorded on JusticeLink. Orders can be found in the Outcomes tab.



Care must be taken to provide sufficient information to enable compliance with the court order.



JusticeLink User Guide *Suppression* is available on the intranet.

Medical records – non-parties

Non-party access should not ordinarily be granted to material containing sensitive personal information including medical records, mental health records and other similar material.

Information protection principles

Although privacy legislation does not prevent courts from granting access to court files, there are a number of privacy principles that may be appropriate to consider and balance with other considerations when making a discretionary decision about non-party access under rules of court.

These include whether it may be practical to:

- Inform the relevant party to the proceedings of the potential disclosure of court information to non-parties,
- Remove personal identifiers from court documents.



The information protection principles are located in Part 2, Division 1, *Privacy and Personal Information Protection Act 1998*.

GIPA does not generally apply to court records

The *Government Information (Public Access) Act 2009* (GIPA Act) creates the system for freedom of information in NSW. Under the Act, individuals can gain access to government information.

Schedule 2 of the GIPA Act provides that the Act does not apply to a court in the exercise of its judicial functions. Access to court records falls within the definition of a court's 'judicial functions' and therefore **court records are not considered "government information"** under the GIPA Act.

Accordingly, an application for access to court records is not made under the GIPA Act. Consideration of applications for access to court records must be made under other applicable legislation and rules of court.

For further information relating applications that fall under the Government Information (Public Access) Act 2009 please see the short form procedure guide [Government Information \(Public Access\) Act 2009 \(GIPA\)](#).



Schedule 2, *Government Information (Public Access) Act 2009*

PART 2 Overview of jurisdictions

Local Court proceedings

Objective

This section provides information about requests for access to court records in different types of proceedings in the Local Court.

Criminal and application proceedings

Different rules apply to parties and non-parties as follows:

Party to proceedings

In criminal and application proceedings, a party is entitled to access a copy of the court record or transcript of evidence taken at the proceedings, or to obtain a copy of the court record on payment of a fee (r 8.10, Local Court Rules 2009).

A party includes:

- A litigant in person
- An accused person
- The solicitor or barrister on the record or agent

Where a person requests access to historical records of proceedings which involved the person either directly or indirectly, access will normally be granted. These cases may require the registrar to facilitate access to the State Records Authority by providing letters of permission to members of the public to access these records.

Bulletin 2003/0155]

[Court Services

Non-parties

In criminal and application proceedings, a non-party may gain access to a copy of the court record or transcript of evidence taken at the proceedings, or obtain a copy of the court record on payment of a fee, with the leave of the magistrate or registrar (r 8.10). The magistrate or registrar may grant leave if he or she is of the opinion that it is appropriate to do so.

In determining whether it is appropriate to grant leave, the magistrate or registrar is to have regard to the following matters:

- The principle that proceedings are generally to be heard in open court,
- The impact of granting leave on the protected person or victim of crime,
- The connection that the person requesting access has to the proceedings,
- The reasons access is being sought,
- Any other matter that the magistrate or registrar considers relevant.

Media representatives

Media representatives have a limited entitlement to obtain access to certain court documents in criminal proceedings under s 314, *Criminal Procedure Act 1986*.

Where the limited entitlement does not apply, a media representative may seek access to court records as a non-party under r 8.10 of the Local Court Rules.

Media representatives may make a single application for access using the standard application form, which requires a registrar to consider the availability of the limited entitlement in s 314, or if the entitlement is unavailable, to consider whether or not a grant of leave for non-party access should be made.



Part 3 of this guide outlines the process and considerations for media access applications

AVO proceedings

Objective

This section provides information about access to documents and non-publication orders relating to AVO proceedings.

Application of court rules

Local Court rules apply to AVO proceedings that are initiated in the Local Court (s 91, *Crimes (Domestic and Personal Violence) Act 2007* (CDVPA)).

However, where the defendant is less than 18 when the application is made, the application is heard in the Children's Court. There are currently no court rules to entitle or enable a non-party to access court documents relating to AVO proceedings heard in the Children's Court.

Some appeals concerning AVOs are heard by the District Court (s 84(2), CDPVA). Accordingly, District Court rules apply.

Crimes (Domestic and Personal Violence) Act 2007

AVO proceedings are generally open to the public (s 58). However:

- Proceedings involving children are closed to the public (s 41).
- Any part of AVO proceedings where the defendant is also charged with a domestic violence offence in which a complainant gives evidence or a recording of the complainant's evidence is played must be held in closed court, unless the court directs otherwise (s 289U, *Criminal Procedure Act 1986* (CPA)). Any other part of the proceedings or the entire proceedings may be held in camera by order of the court (289UA CPA).

A person must not publish the name of a child under 16 who is involved in AVO proceedings before the proceedings or during the proceedings (s 45).

The court may also direct that the name of any other person involved in AVO proceedings must not be published (s 45).

Section 45 does not prohibit the publication of the name of the person with the consent of the person or of the court.

Access by parties

Local Court Rule 8.10 applies to applications to access records of AVO proceedings, which are application proceedings (8.10(1)).

Where the defendant is less than 18 when the application is made, the Children's Court provisions apply to applications for access by parties.

Access by non-parties

Local Court applications: Local Court Rule 8.10 applies to applications by non-parties, including media representatives. Section 314 CPA does not apply to AVO proceedings because they are not criminal proceedings.

Extreme care should be taken with requests by non-parties to access records of AVO proceedings as they frequently contain allegations which are not relied upon nor admitted to in court.

While it is open to a registrar in the exercise of their discretion to grant access, significant weight may be given to factors such as the existence of untested allegations when determining an application. In such circumstances, as a general rule, access would not ordinarily be granted to media or other non-parties.

Children's Court applications: Currently, there are no court rules that enable non-parties to access records of AVO proceedings. Accordingly, such an application must be refused.

Civil proceedings

Uniform Civil Procedure Rules

Rule 36.12 of the Uniform Civil Procedure Rules 2005 (UCPR) sets out the circumstances in which registrars may provide copies of particular court documents in civil proceedings in the Local Court, District Court and Supreme Court:

- Under r 36.12(1), upon application any person may obtain a copy of a sealed judgment or order.
- Under r 36.12(2), upon application a party to proceedings is entitled to be provided with a copy of any pleading or other document filed in the proceedings, while a non-party must have a 'sufficient interest' to be provided with a copy (see further below).

Provision of copies of court documents requires payment of a prescribed fee and is subject to any order of the court otherwise.



Rule 36.12, Uniform Civil Procedure Rules 2005

Non-party access to pleadings and filed documents

Under Rule 36.12(2) of the UCPR, upon application to the registrar a non-party may be provided with a copy of pleadings or other documents filed in the proceedings if it appears to the registrar they have a sufficient interest in the proceedings.

'Sufficient interest' is not defined in the *Civil Procedure Act 2005*. The term was defined in relation to defamation legislation by Hunt J in *Barbaro v Amalgamated Television Services Pty Ltd* to mean "not simply a matter of curiosity, but a matter of substance apart from its mere quality as news".

The Civil Trials Bench Book states that the principle of open justice is relevant to whether a non-party has a sufficient interest. Open justice will be weighed against competing considerations such as privacy to determine whether the non-party will be granted access.



Judicial Commission of New South Wales, Civil Trials Bench Book, [1-0200].

Civil Trials Bench Book is available on the Judicial Commission website.

Coronial jurisdiction

Objective

This section provides information about requests for access to court records in the coronial jurisdiction.

Coronial proceedings are centralised in the Sydney metropolitan region at the State Coroner's Court. Elsewhere across NSW, coronial proceedings are heard and determined by magistrates of the Local Court, who have Coroners' functions by virtue of their office (s 16, *Coroners Act 2009* (Act)).

The Coroner's findings are available to the public, but relatives and non-parties must apply for access to documents in the court file. Coroner's files contain particularly sensitive and personal material, so there are limitations on access to coronial documents.

Who can consider applications for access?

Access to records on coronial files are determined by a Coroner or Assistant Coroner. In relation to Assistant Coroners, only staff who are also a registrar or deputy registrar can consider applications for access.



Section 65, *Coroners Act 2009*

Access considerations

The Act provides that a Coroner or Assistant Coroner must be satisfied that it is appropriate for a person to be granted access to a file or part of a file.

A Coroner may specifically direct that a copy of the file or part of a file may not be supplied in specific proceedings (reasons for direction are to be recorded).

When determining whether it is appropriate to grant access a Coroner or Assistant Coroner is to have regard to:

- The principle that coronial proceedings are generally open to the public
- Where the file relates to a deceased person, the impact on relatives of the deceased person if access is permitted
- The connection that the applicant has to the proceedings
- The reason why access is being sought
- Any other relevant matter.

Fees may also apply to an access request.



When determining an application for access consideration must also be given to any order made regarding exclusion from proceedings or order made relating to the disclosure or publication of information. See Part 6.4 of the Act for more information.



General access provisions are in s 65 of the Act

Coroner's Court Procedural Bulletin 1 – Access to Coronial Documents

Access by relatives

The NSW Coroner's Court website provides information about access to coronial documents by relatives.

The **senior next-of-kin** of the deceased person can receive any documents on an active file free of charge by sending a request in writing to the court. For older files that have been archived the senior next-of-kin will have to pay a fee. The senior next-of-kin can also write to the court indicating that he or she does not want any court file documents relating to the matter to be sent to anyone else.

An immediate family member other than the senior next-of-kin may be able to access documents if the Coroner or Assistant Coroner is satisfied that it is appropriate for the family member to have access and if they pay the relevant fee.

A request for access cannot be granted if access would be contrary to a non-publication order issued by the Coroner under s 74 or s 75 of the Act.



A senior next-of-kin is the person with the closest relationship to the deceased person e.g. a spouse, a child, a parent, a sibling or an executor – refer to s 6A, *Coroners Act 2009*.

Access by non-parties

Non-parties may be able to access documents on the court file if it can be established that it is appropriate to grant them access to the information. Documents may be released to the following non-parties:

- A statutory body with a statutory function
- A member of the police force for law enforcement
- Researchers, for research approved by an ethics committee
- Anyone who can satisfy the Coroner that they have an appropriate interest in the court file.

A request for access cannot be granted if access would be contrary to a non-publication order issued by the Coroner under s 74 or s 75 of the Act.

Non-publication orders

A Coroner may make a non-publication order if it appears that a death or suspected death was self-inflicted. The non-publication order may prohibit the publication of a report of the proceedings until after the Coroner has made his or her findings, or of any matter that identifies a person as being the deceased person or a relative of the deceased person.

If the Coroner makes a finding that the death was self-inflicted, a report of the proceedings must not be published unless the Coroner grants an exemption. The Coroner may only grant an exemption if he or she is of the

opinion that it is in the public interest to permit the publication of a report of the proceedings.

In addition, a Coroner may order that any evidence in proceedings must not be published if the Coroner is of the opinion that it would be in the public interest to do so. This provision applies to all proceedings in the Coroner's Court (i.e. not only to self-inflicted deaths). In considering whether the order would be in the public interest, the Coroner may have regard to the following matters:

- The principle that coronial proceedings should generally be open to the public
- National security
- The personal security of the public or any person.

A person must not publish any of the following matters without the express permission of the Coroner:

- Any question asked of a witness that the coroner has disallowed
 - Any warning to a witness that he or she is not compelled to answer a question
 - Any objection made by a witness to giving evidence on the ground that the evidence may tend to prove that the witness has committed an offence
 - Any submissions or comments made by the coroner concerning whether an inquest should be suspended.
-

Children's Court proceedings

Objective

This section provides information about requests for access to court records in the Children's Court.

Safety and well-being of children is paramount

Children and young people are one of our most vulnerable client groups. Extreme care is to be taken when making decisions about access to information and records as inadvertent identification of children and their interactions with the court via news reports can have devastating consequences.

All decisions relating to access to information and records that involve children and/or their safety and well-being are to be made with the utmost care and consideration.



You can seek assistance and guidance from a magistrate or children's registrar on applications to access records in Children's Court proceedings.

Principles of open justice when proceedings conducted in closed court

The principle of open justice still applies to Children's Court proceedings conducted in a closed court. The interests of the child and the principle of open justice are balanced in provisions of both the *Children (Criminal Proceedings) Act 1987* (CCPA) and the *Children and Young Persons (Care and Protection) Act 1998* (CYP CPA):

- Subject to the court's discretion, the general public is excluded from court proceedings. However, media representatives are entitled to enter and remain in court during the hearing of the proceedings for the purpose of preparing a report of the proceedings that is to be distributed via a public news medium.
- However, the media is prohibited from publishing or broadcasting any information that may identify a child involved in the proceedings.



Exclusion of the general public from proceedings:

- Section 104B, CYP CPA
- Section 10, CCPA

Media entitled to hear proceedings:

- Section 104C, CYP CPA
 - Section 10(1)(b), CCPA
-

Publication of names and identifying information prohibited

Media representatives are to be reminded of the requirement for strict adherence to legislation that prohibits the identification of a child or young person involved in court proceedings. This prohibition extends to the broadcasting of any information, picture or other material **that could lead to** the identification of a child or identify a child's connection with court proceedings.



Specific prohibitions are provided at:

- Section 105, CYPCPA
 - Section 15A, CCPA
-

Protection of persons that make reports

In care proceedings, there are specific protections for persons who make reports or provide information. Release of any information that could identify the person that made the report may only be granted with the consent of the person (who made the report) or with leave of the court.



For more information refer to:
Section 29, CYPCPA

Access to parties - reports and final orders

The parties in Children's Court proceedings are entitled to a copy of reports filed with the court (at no charge).

Copies of final care orders are also to be provided to parties in the proceedings.



For more information refer to:

- Clause 18, Children's Court Rules 2000
 - Section 89, CYPCPA
-

Non-parties requests

Criminal proceedings: Under s 27 CCPA, laws relating to criminal proceedings in the Local Court are taken to apply in the Children's Court. An application for leave to access court records may therefore be made by a non-party and considered by a registrar or magistrate exercising their discretion under r 8.10 of the Local Court Rules 2009.

Media applicants: consistent with *AE v The Queen* [2010] NSWCCA 203, when considering an application an appropriate starting point is that media access should generally be available and the prohibition in s 15A should be effective to protect the child's interests by preventing publication of the child's name or identifying information.

However, the risk of identification of the child should be assessed in the circumstances of the individual application. There may be a sound basis for refusing an application or limiting the extent of the access granted where there is a real risk that the reporting of material in the court records will lead to the identification of the child, even if the report itself does not directly do so.

Adult co-accused: Where an adult co-accused is seeking access to Children's Court records and/or transcripts to assist with providing information to another court for the purpose of parity of sentence, the Children's Court records or transcript can be forwarded directly to the other court for the information of the judicial officer, rather than providing the records to the non-party.

District Court proceedings

Objective

This section provides information about requests for access to court records in the District Court.

Access by parties

Access to court records by parties to proceedings in District Court matters is provided in Part 52 rule 3(1), District Court Rules 1973. The rule provides that a party to proceedings can search the court file with leave of the court or registrar.



Part 52, rule 3 District Court Rules 1973.

Access by non-parties

A non-party may search the court file with the leave of the court or registrar pursuant to Part 52, rule 3(2), District Court Rules 1973.

Civil proceedings: District Court Practice Note (Civil) 11 provides guidance as to when the court will grant leave for a non-party to search the court file in civil proceedings. It provides that non-parties will normally be granted access to the following documents, unless the judge or registrar considers that the material or portions of it should be kept confidential:

- Pleadings and judgments in proceedings that have been concluded, except if an order has been made that they be kept confidential
- Documents that record what was said or done in open court
- Material that was admitted into evidence
- Information that would have been heard or seen by any person present in open court.

Access to other material will not be allowed unless a registrar or judge is satisfied that exceptional circumstances exist.

Access is not normally allowed prior to the conclusion of proceedings.



General litigation searches are not permitted in the District Court. Refer to separate topic in the procedure guide on Litigation Searches.

Sealed envelopes

Access is not permitted to sealed envelopes on District Court criminal files.

Broadcasting judgment remarks

Media representatives can apply to film and broadcast a judgment of the District Court.

There is a presumption in favour of permitting the broadcasting of judgment remarks by media representatives in the District Court by way of

filming the judgment. Specific application to broadcast a judgment must be made to the District Court Media Officer.

When an application is made, the court is to permit the broadcasting of judgment remarks unless an exclusionary ground applies. In addition, there must be no reasonable means to prevent the material giving rise to the exclusionary ground from being disclosed in the broadcast (s 179, *District Court Act 1973*). This section is an exception to the general rule in ss 9 and 9A of the *Court Security Act 2005* that prohibits the use of recording devices in courts (see p 70).

Exclusionary grounds include the following (s 179(3), *District Court Act*):

- The broadcast would be likely to identify a person in breach of a suppression or non-publication order
- The judgment remarks contain material subject to a suppression or non-publication order, or material prejudicial to other criminal proceedings, or material likely to reveal the existence of a covert operation
- The broadcast would pose a significant risk to the safety of a person involved in the proceedings
- The Chief Judge has directed that the judgment remarks should not be broadcast because the broadcast would be detrimental to the orderly administration of the court.

If permission for the broadcast is granted, under s 179(4) the broadcast must not record:

- The jurors
- An accused person
- A victim or their relatives.

Media representatives can apply for permission to broadcast judgment remarks by submitting an application form to the District Court Media Officer.



More information for media representatives about filming judgments is available on the District Court website / Practice & Procedure / Media Resources.

Drug Court

Objective

This section provides information about requests for access to court records in the Drug Court.

Non-publication order applies to all Drug Court proceedings

The Senior Judge of the Drug Court has issued a non-publication order that applies to all proceedings in the Drug Court.

The order states that Drug Court proceedings are open to the public. However, no information which could identify a Drug Court participant is to be published. This prohibition includes information that could identify anyone associated with a participant, for example, a family member, friend or employer. Attendees at the Drug Court, including media representatives, are also prohibited from publishing photographs of a participant or a person associated with a participant, or from publishing any other information likely to identify a participant.

If an applicant can show that special circumstances exist, the court may grant an exemption to the non-publication order.

Special provisions for 'protected information'

The *Drug Court Act 1998* provides specific protections for information that is considered **protected information**.

Protected information is any information provided to the Drug Court by a person who is involved in the administration of or provision of services in connection to a participant's program.

The Act provides that a person cannot be compelled to disclose or produce protected information to any court or tribunal or committee.

Access to protected information is not permitted unless ordered by a judicial officer.



Section 31, *Drug Court Act 1998*

Media access

Access is not provided under section 314 of the *Criminal Procedure Act 1986* as the Drug Court has issued a non-publication order in relation to all Drug Court proceedings.

However, the media may seek limited access as a non-party applicant under the relevant rules of the court that referred the proceedings to the Drug Court (the Local Court or the District Court).

Access to court records that relate to the participant's Drug Court program is not permitted.

However, access to court records that relate to the Drug Court's exercise of the referring court's jurisdiction (such as final sentencing proceedings) may be permitted at the discretion of the judicial officer or registrar.

Access by parties

Parties can apply for access to Drug Court records but consideration of access is limited to information that is not protected information unless access is permitted by a judicial officer or registrar.

The general non-publication order applicable to all Drug Court proceedings still applies.

Access by non-parties

A non-party can apply for access to Drug Court records but consideration of access is limited to information that is not protected information and required permission to be granted by a judicial officer or registrar.

The general non-publication order applicable to all Drug Court proceedings still applies and is to be taken into consideration for any access request.

Restriction on production of Drug Court records on subpoena

Protected information contained on a Drug Court file is not compellable on subpoena.

Any information on the file that is not protected information (such as the Court Attendance Notice, police facts sheet, criminal record) may be produced but a copy of the court's general non-publication order must be provided to the court or tribunal that has requested the record.



Section 31(3)(d), *Drug Court Act 1998*

PART 3 Media access to court records

Overarching principles and legislation

Objective

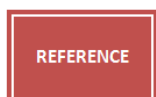
This section provides a summary of the key legislation and other considerations for determining applications to access court records made by media representatives.

Principle of open justice

Open justice is a fundamental principle within the Australian justice system that underlies the provision of access to court documents to media representatives and requires that courts should be open and accountable to public scrutiny. Judges have stated that:

- Public administration of justice tends to maintain confidence in the integrity and independence of the courts.
- The media's entitlement to report to the public what is seen and heard in open court is a corollary of the public's right of access to the courts, and is an essential attribute of the administration of justice in Australia.
- An important component of open justice is that media representatives should be able to access court documents, particularly where it would be difficult to understand proceedings without them due to practices such as the admission of documents that are not read out in court.

The principle of open justice generally requires that members of the public and media representatives are able to access documents on the court record, as well the court proceedings themselves. However, provision of access is to occur within the bounds of the laws that govern and in some circumstances restrict access.



Russell v Russell [1976] HCA 23 [8] (Gibbs J)

Re Chief Commissioner of Police (Vic) [2005] HCA 18 [119]

Two avenues for media to seek access to court records

Generally, a non-party who seeks access to court records may make an application under the relevant rules of court.

Where the non-party applicant is a media representative, the legal framework for obtaining access to court records is broader and more complex. It provides for two parallel avenues:

- A limited **entitlement** to access particular documents in criminal proceedings, assessed by a registrar under s 314 *Criminal Procedure Act 1986* (CPA), or
- A **grant of leave** by the registrar or judicial officer exercising their discretion pursuant to the relevant rules of court.

Both should be considered by a registrar when determining a media access application. If the entitlement in s 314 does not apply, the registrar should exercise their discretion under rules of court to consider whether or not to allow access to court records (or refer an application to a judicial officer if appropriate).



The flow chart below outlines steps for determining a media access application made to the Local Court. Processes in other jurisdictions may vary.

Applications by the media for access to court records



Definition of media representative

It is unclear whether the term ‘media representative’ in s 314 extends to ‘citizen journalists’ or news bloggers. ‘Media representative’ is not defined in the CPA.

Citizen journalists are not employed by news organisations but perform similar functions to traditional journalists. However, they are not bound by any industry code of conduct or subject to review mechanisms.

As it is not clear whether a citizen journalist is a ‘media representative’ for the purpose of s 314, registrars should consider applications by citizen journalists carefully and generally in accordance with the relevant court rules.



Registrars should inform citizen journalists of their obligation to familiarise themselves with the laws and penalties that restrict publication and broadcasting of certain court information.

Limited entitlement to access in criminal proceedings

Section 314 of the CPA provides that, on application to the registrar, a media representative is entitled to inspect certain documents relating to criminal proceedings, at any time from when the proceedings commence until the expiry of two working days after they are finally disposed of, for the purpose of compiling a fair report of the proceedings for publication.

Section 314 applies to finalised proceedings as well as to bail proceedings and preliminary (committal) proceedings.

[Court Services Bulletin 2003/0096]

While s 314 provides an ‘entitlement’, an application still needs to be made and considered by a registrar. Accordingly, staff are not to provide media with access to the court file except in strict compliance with a registrar’s determination.

Under s 314(2), a media representative is entitled to inspect the:

- Indictment
- Court Attendance Notice (CAN) or other commencing document
- Witness statements tendered as evidence
- Brief of evidence
- Police fact sheet (only in the case of a guilty plea)
- Transcripts of evidence
- Any record of a conviction or an order.

Other limitations on the entitlement are as follows:

- **A registrar is not to make documents available for inspection if they are subject to a non-publication or suppression order**, or the documents are prohibited from being published or disclosed under any other law (s 314(4)).
- **Access will not be granted** to sensitive material including medical records, mental health records and other similar material.

- Section 314 only provides for **access to inspect documents**. There is no entitlement to obtain **copies** of any court documents.



Member of the media may need to be reminded that it is an offence under the *Court Security Act 2005* to use mobile devices to photograph court documents.

If a media representative wishes to obtain copies of any court documents, a grant of leave under rules of court that permits copy access must be made.



Where no plea of guilty has been entered, police facts sheets to be returned to the police prosecutor at the end of any bail application.

Leave to access court records under rules of court where entitlement does not apply

The entitlement of the media to access certain documents provided in s 314 may not apply for a range of reasons, including where:

- The proceedings concerned are not criminal proceedings,
- The documents to which access is sought are subject to a suppression or non-publication order or statutory provision,
- Access is sought to material other than the types of documents in s 314(2),
- Copy access rather than inspection access is sought,
- More than two working days have elapsed since the final disposal of the proceedings.

In these situations, a non-party application for a grant of leave to access court documents can still be considered under the relevant rules of court (s 314(4A)).

The making and consideration of applications under rules of court **can occur at any time** and is not limited to circumstances where the application is made more than two working days after a matter is finally disposed of.

An application under rules of court does not provide the media with an entitlement to access court documents, but allows the court or registrar to exercise their discretion to permit or refuse access on such conditions as they determine.



Media applicants are **not** required to submit a separate application under rules of court if the registrar determines that the entitlement in s 314 does not apply.

The standard application form provides for a media application to be made and considered pursuant to both

avenues. It requires the decision-maker to record the provision under which an application is granted or refused.

Application of rules of court

Across the Local Court, District Court and Children's Court, different rules of court and/or particular considerations apply:

- **Local Court:** r 8.10 of the Local Court Rules 2009 (LCR) regulates applications for access to court records in criminal, committal and application proceedings. The list of considerations in r 8.10(5) **must** be taken into account by the decision-maker when determining whether or not to grant leave to a non-party to access court records.
- **Children's Court:** LCR 8.10 applies to criminal proceedings in the Children's Court due to s 27 of the *Children (Criminal Proceedings) Act 1987*. This provides for any laws relating to functions of Magistrates or the Local Court to apply in the Children's Court and any criminal proceedings before it. Particular consideration of the impact upon children involved in the proceedings will be relevant to, and may carry significant weight in, the determination of whether or not to grant access to court records.
- **District Court:** Pt 52 r 3(2) of the District Court Rules 1973 provides a general discretion for the court or registrar to grant a non-party application for access to court documents.

Rules of court provide a broad discretion for the decision-maker to take into account and determine the weight to be given to anything that they consider relevant when deciding whether or not to grant a media access application and any conditions of access.

The following section provides more detailed information about relevant considerations when exercising the discretion to grant or refuse leave to access court records pursuant to rules of court.



Part 2 of this guide contains information about the coronial jurisdiction and the Drug Court.

Applications under rules of court

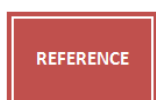
Objective

This section provides a summary of relevant considerations for determining applications to access court records made by media representatives pursuant to rules of court. It is based upon advice provided by the Crown Solicitor's Office obtained to assist registrars in the task of assessing relevant considerations for the purpose of determining these applications.

Preliminary issues

When considering an application for leave to access a court record, the registrar should keep in mind:

- **Burden of proof:** the burden is on the media applicant to establish that access should be given.
- **Starting position:** the decision-maker should proceed on the prima facie assumption that a fair and accurate report of the proceedings will occur.



Fairfax Publications Pty Ltd v Ryde Local Court [2005]
NSWCA 101, [51]

R (Cth) v Elomar & Ors (No. 3) [2008] NSWSC 1443, [24]

Non-publication orders and provisions

Where a non-publication order or provision applies in the proceedings, although the media is not entitled to inspect relevant court records pursuant to s 314(4), this does not prevent a grant of leave to access documents under rules of court.

The court or registrar is required to determine whether or not access should be granted in the exercise of their discretion. Consideration may be given to **both** of the following matters:

- The existence of the non-publication order or provision.
- Provision of access to the media would not generally constitute a “publication” and it is the responsibility of the media to know what prohibitions on publication apply.

Access should not be refused pursuant to rules of court where the **only** reason is the existence of a non-publication provision or order, without consideration of other relevant matters.



The standard application form requires acknowledgment by the applicant that they are aware of their responsibility to comply with any applicable limits upon publication, and that penalties may apply in the event of non-compliance.



Part 5 sets out details of more common non-publication and suppression provisions.

Suppression orders and provisions

If a suppression order or provision is in force that prohibits the disclosure of information, **significant caution should be exercised before granting access, including conditional access to redacted documents.**

Generally, access should not be provided unless appropriate redaction of the suppressed information can be made.

In assessing whether or not appropriate redaction of information subject to a suppression order or provision can be made, consideration should be given to:

- The terms of the suppression order or provision, including the information to which it applies,
- The extent to which the order will require the redaction of documents,
- The resources required to undertake redaction, including the availability of suitably experienced and trained staff, and
- The level of risk of errors in redaction and/or inadvertent disclosure of suppressed information.

Transcripts: if contemplating a grant of access that will require redaction of a transcript, the Reporting Services Branch (RSB) should be contacted for an assessment to be made of the time and resources required to redact suppressed information and the availability of such resources. Specific and detailed information is required as part of the transcript ordering process that identifies what is required to be redacted in accordance with the relevant suppression order or statutory provision



Generally, documents should **not** be redacted to remove information where a non-publication order or provision applies.

Media applicants are responsible for informing themselves of and complying with any applicable non-publication requirements.

The standard application form includes an acknowledgement by the applicant of these responsibilities.



RSB can be contacted at:

RSB.Client.Services@justice.nsw.gov.au

Part 1 of this guide provides more information about non-publication and suppression orders. Part 5 provides details of more common non-publication and suppression provisions.

LCR 8.10 considerations

When determining a non-party access application, consideration of the following matters is required for applications determined under LCR 8.10(5).

In the District Court, DCR Pt 52 r 3(2) provides a broad discretion but does not specify any required considerations. However, the discussion below may provide some general guidance on the exercise of the discretion under DCR Pt 52 r 3(2).

(a) Principle that proceedings are generally

In practice, the application of the principle of open justice means that a fair and accurate report of proceedings conducted in open court may be published in good faith, even if it would otherwise amount to defamation or

constitute contempt of court due to a risk of prejudice to pending proceedings.

It may be relevant to consider:

The particular documents sought

- **Police fact sheets:** the media's entitlement to access a police fact sheet under s 314 only applies if there has been a plea of guilty. Otherwise, access to a police fact sheet requires a grant of leave under rules of court.

Ordinarily, the practice in the Local Court is to return to the police prosecutor any police fact sheet and/or criminal history (see below) handed up in bail proceedings if no plea has been entered.

However, if a police fact sheet is on the court file and has been read out or handed up in the proceedings, then access should generally be granted for the purpose of preparation of a contemporaneous report of proceedings unless there is good reason not to.

- **Criminal histories:** a criminal history may be on the court file if handed up in bail or sentence proceedings. While the media may be entitled to publish details of prior convictions in the context of a fair and accurate report of proceedings if published in good faith, consideration should be given to factors such as:
 - The timing and/or contemporaneity of the report,
 - Any risk to the fairness of an imminent jury trial due to the publication of information prejudicial to the accused, and
 - Whether the criminal history contains spent convictions.
- **Exhibits:** media applications may seek access to exhibits tendered in the proceedings, such as CCTV footage.

The starting position is that if the material sought was played in open court, then access should be granted unless the decision-maker considers that the material or portions of it should be kept confidential.

The following factors may be relevant to the exercise of the discretion:

- Grief, distress and trauma caused to the family of a victim of violent crime and the community by repetition of images.
- Serious crimes including murder are not 'entertainment' and should not be the subject of repeated electronic reporting without other proper reasons.
- The privacy of persons not criminally involved in the events in question.
- The lack of control or recall over material published electronically on the Internet.
- The risk of provoking "copycat" offences (particularly in relation to terrorism offences).

Whether or not the information in the documents sought would have been seen or heard by a person present in open court

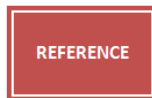
A media applicant should ordinarily be granted access to material that has been used in open court. While not applicable in the lower courts, Supreme Court Practice Note Gen 2 is instructive. It provides that access will normally be granted to non-parties in respect of material including:

- Documents that record what was said or done in open court,
- Material that was admitted into evidence, and
- Information that would have been seen or heard by any person present in open court, unless the judge or registrar considers that the material or portions of it should be kept confidential.

The stage of the proceedings

The matters identified above should be considered in the context of the stage and nature of the proceedings and their capacity to affect the proper administration of justice. The publication of certain material:

- May have the potential prejudice to the fairness of an imminent or ongoing jury trial, but may be less relevant in proceedings heard by a magistrate or before a judge alone, or
- May cease to be relevant after a verdict or sentence.



R v Abdallah (No. 3) [2020] NSWSC 121

(b) Impact of granting leave on the protected person or victim of crime

It may be relevant to consider:

- **Where a non-publication order or provision applies** to prevent the publication of information that would identify the protected person or victim of crime: the existence of this protection may be taken into account and given weight to determine that access may be granted, in the knowledge that the media is prohibited from publishing any identifying information.
- **Where the application relates to AVO proceedings:** the protections against identification contained in the non-publication provision in s 45, *Crimes (Domestic and Personal Violence) Act 2007* only apply in the course of the proceedings and do not continue once the proceedings have concluded. The registrar may take this into account and give weight to the fact that there is no longer non-publication protection when considering the impact of granting leave upon the protected person. The result may be that leave to access the court file is refused.
- In any case (particularly where no restrictions upon publicity apply) a broad range of factors may be relevant, such as:
 - **Increased risk to the person's safety, mental health and/or wellbeing:** in the context of the *Court Suppression and Non-publication Orders Act 2010*, consideration of the need for protection of a person's safety has been held to require consideration of the nature, imminence and degree of likelihood of harm occurring to the person. Where the

prospective harm is very severe, even if only a mere possibility, this may weigh in favour of refusing access.

- **The person's right to privacy:** there is not strictly a legal "right to privacy" and the principle of open justice has traditionally allowed for the reporting of the names and testimonies of witnesses (including victims) in the course of a fair and accurate report of proceedings. However, consideration may be given to restrictions upon the extent or manner of media access that enable a person's privacy to be balanced against the principle of open justice. For example, the registrar may allow access to inspect but not copy an exhibit comprising CCTV footage that depicts the victim and/or crime.

REFERENCE

AB (A Pseudonym) v R (No 3) [2019] NSWCCA 46, [56]-[59]

(c) Connection that the person requesting access has to the proceedings

LCR 8.10(5) applies to access applications by non-parties, including but not limited to media representatives.

This consideration, in combination with the following criterion, is directed towards ascertaining the reason/s for an application made by other non-parties and is not a significant consideration in relation to media applicants.

(d) The reason access is being sought

In the case of media applicants, there is overlap between this criterion and the principle of open justice: access is generally sought for the purpose of providing a fair, accurate and contemporaneous report of proceedings in open court.

It may be relevant to consider:

- **Contemporaneity:** although LCR 8.10 does not impose a time limit on the making of an application (c.f. s 314), where the application relates to recently heard proceedings for the purpose of a contemporaneous report this may weigh in favour of granting access.
- Conversely, if proceedings have not been heard recently, the reason for seeking access may:
 - Be less compelling because the principle of open justice carries less weight – for example, where the application is seeking access to records for a historical story, or
 - Weigh against a grant of access where there is a risk of publication of prejudicial material (for example, publication of a report of bail or committal proceedings shortly before an accused person's trial).

A lack of contemporaneity between proceedings and a report may demonstrate a lack of good faith even if the report is fair and accurate.

REFERENCE

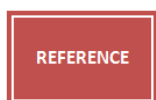
R v Scott and Downland Publications Ltd [1972] VR 633, 675

(e) Any other reason the decision-maker considers relevant

This criterion confers a wide discretion to consider and determine the weight to be given to any other matter that the decision-maker considers relevant. Some examples include:

- **Untested allegations:** prior to the conclusion of proceedings, access will not normally be given to material on a court file that contains untested, unsworn and/or hearsay allegations and has not been read in open court or admitted into evidence. This is a significant consideration.
- **Defendant's private rights:** conversely, a part of the principle of open justice is that a defendant does not have a right of confidentiality. Ordinarily, unless there is a court-ordered restriction, a fair and accurate report may include the names of parties and witnesses and the evidence given in the proceedings.

The adverse consequences for a party of a fair and accurate report may be a relevant consideration. However, this is to be balanced with and will typically carry less weight than other considerations.



Fairfax Publications Pty Ltd v Ryde Local Court [2005] NSWCA 101, [72]

Hogan v Hinch (2011) 243 CLR 506, [22]

Conditions of access

A discretionary grant of leave to access documents pursuant to the Rules provides the decision-maker with capacity to specify conditions upon a grant of leave if appropriate in the circumstances. For instance:

- **Redactions:** where information in court documents cannot be disclosed due to the existence of a suppression order or provision prohibiting disclosure, it is open to the decision-maker to grant access to redacted documents. However, significant caution should be exercised and consideration should be given to the matters outlined on p 49 above.
- **Form of access:** while s 314 provides for a media representative's entitlement to inspect court documents, a media applicant may seek access to copy material pursuant to the Rules.
 - Payment of the prescribed fee is required to obtain a copy of documents on the court record or transcript of evidence taken at the proceedings (LCR 8.10(3)(b)).
 - Conditions around the form of access granted may be used to address particular considerations or concerns relevant to the decision of whether or not to grant access (e.g. permitting inspection rather than copy access of an exhibit comprising video footage depicting a victim).

Other provisions affecting media access to court proceedings and records

Objective

This section provides information about other general access provisions that apply to the media.

Prescribed sexual offence proceedings

Section 291C of the *Criminal Procedure Act 1986* (CPA) provides that media representatives can access proceedings held in camera, but not by being present in the courtroom. Where s 291C(2) applies, the media representative should contact the registrar of the court where the proceedings are to be held. The registrar will discuss with the media representative (following consultation with the judicial officer) the reasonable and practical options available. Wherever possible, the application is to be made as soon as possible and prior to the date of hearing. The longer the period of notice given to the registrar the more likely it will be that a practical arrangement can be made.

Any additional costs incurred in making arrangements pursuant to s 291C(2) are to be met by the media representative (e.g. cost of installing live audio visual feeds). The registrar may require an undertaking to be given by the media representative to pay the additional costs.

If the media is given electronic access to the evidence, the media must not make an electronic recording of the proceedings.



The District Court has issued a Practice Note relating to media access to sexual assault proceedings held in camera. Refer to District Court Practice Note Criminal 4 available on the District Court website.

Domestic violence complainants

Part 4B, Division 5 CPA provides arrangements for the giving of evidence by complainants in certain domestic violence (DV) proceedings:

- Criminal proceedings for a domestic violence offence
- ADVO application proceedings where the defendant is charged with a domestic violence offence.

Any part of DV proceedings (ADVO and criminal) in which a complainant gives evidence or a recording of the complainant's evidence is played **must** be held in closed court, unless the court directs otherwise (s 289U).

The court has discretion to direct (of its own motion or on application) for any other part of proceedings for a domestic violence offence (criminal proceedings only), or the entire proceedings, to be held in camera (s 289UA).

Complainants are entitled to give evidence in DV proceedings (ADVO and criminal) by AVL or other alternative arrangements (screens and planned seating arrangements) (s 289V).

Media access to records of proceedings held in closed court: There is no equivalent provision to s 291C (which applies in relation to prescribed sexual offence proceedings) that makes arrangements for media

representatives to have access to proceedings held in closed court under Pt 4B Div 5.

As a result, if an application is made by a media representative for access to court records in DV proceedings under Pt 4B Div 5, if a document contains information relating to a part of the proceeding that was held in closed court (e.g. a transcript of the complainant's evidence or a recorded statement):

- Access is not available under s 314 CPA (see s 314(4)), and
- This would be a strong consideration that weighs in favour of refusing access when making a discretionary access decision under rules of court.

Access to audio visual exhibits

Members of the media will often seek to obtain copies of audio visual exhibits that have been tendered as evidence. Audio visual exhibits are 'documents' by virtue of the definition in s 21, *Interpretation Act 1987*, so should be treated in the same manner as any other request to access court documents.

As s 314 CPA provides no entitlement to obtain copies of documents, requests for copies of audio visual exhibits must be considered under the rules of court.

Requests for copies of audio-visual exhibits can be problematic for registrars, particularly if a decision is required quickly. Decisions can be impeded by:

- Requests made while the court is still hearing the evidence,
- Registrars will not have viewed the footage prior to receiving the request,
- Registrars have limited capacity to seek the views of prosecutor, accused and other interested parties,
- The footage may be subject to copyright.

These challenges make it acceptable for registrars to refer requests for copies of audio visual exhibits to the judicial officer hearing the proceedings. The judicial officer will be familiar with the content of the exhibit and be better placed to properly weigh the public interest in open justice with other considerations such as the impact that granting access might have on the victim, the accused and/or other persons connected to the proceedings. Where the request is made on the day of the hearing, the judicial officer is generally in a better position to canvas the attitude of interested parties before determining the request.

If access to a copy of the exhibit is granted:

- Enquiries should be made of the tendering party as to whether a duplicate of the exhibit is readily available that could be released to the registry to facilitate copying.
- If not, registry staff are not expected to make copies of the exhibit; media representatives will be expected to make their own copies using their own equipment and resources.
- The original exhibit is not to leave the courtroom whilst the judicial officer is still hearing the case unless the judicial officer permits

otherwise. Therefore, if a duplicate of the exhibit is not available to facilitate the making of further copies, media representatives will be required to wait until the court has risen before being able to access the original exhibit to make a copy.

- Original exhibits must be accounted for at all times by registry staff. If a copy must be made from the original exhibit, this must be done under the supervision of registry staff.
- If more than one media representative has been granted copy access to the same exhibit and there is insufficient time for each to make their own copy, the registrar may nominate one media representative to make and distribute copies to all other media representatives to whom copy access has been granted. Ideally, any such arrangement should be included as a condition of the grant of access in order to prevent the nominated media representative from claiming 'exclusive' access.

Access to returned exhibits

If it is practicable to do so, at the conclusion of the hearing, and once any access (if granted) has been exercised, all exhibits in non-paper form should be returned to the producing party.

Registrars are not required to make documents available for inspection that are not in the possession or control of the registrar. Accordingly, any application to access a returned exhibit should be refused.



Section 314(3) CPA

Review of registrar's decision

In Local Court proceedings, where a registrar refuses access to court records, the applicant can make an application for a review of the registrar's decision by a magistrate by way of Application Notice.

[Court Services Bulletin 2007/0045]

PART 4 Access by other agencies and non-parties

Working with children checks

Objective

This section provides information about the entitlement to access certain documents by the Office of the Children's Guardian for the purpose of conducting a working with children assessment.

Access to records by Office of the Children's Guardian

The Office of the Children's Guardian can compel any government agency to provide it with information relevant to conducting an assessment of whether a person poses a risk to the safety of a child for the purpose of employment.

The Office of the Children's Guardian will access criminal records from NSW Police and may require access to relevant court records to assist with an assessment. The Office of the Children's Guardian will provide a written notice to a court seeking access to records relevant to the assessment.

Generally no fee is payable for records provided to Office of the Children's Guardian.



Section 31, *Child Protection (Working with Children) Act 2012*

National Disability Insurance Scheme (NDIS) worker checks – NDISWC

Objective

This section provides information about the entitlement to access certain documents by the National Disability Insurance Agency (NDIA) for the purpose of conducting a NDISWC.

Access to records by NDIS

From 1 February 2021, the NDIA can compel any government agency to provide it with information relevant to conducting an assessment of whether a NDIS worker poses a risk to the safety of a child or vulnerable person for the purpose of provision of services through the National Disability Insurance Scheme (NDIS).

This may include access to relevant court records. The NDIA should forward an email request for information to the relevant court citing the applicant details, case number, Court date/location and offence details and a list of documents sought will also be included. These documents need to be scanned and emailed back to the NDIA.

If the court records are no longer held on site, court staff are to forward the request to State Records or the Government Records Repository (GRR), who will action the request and forward the documents directly to the NDIA. Court staff must also cc the NDIA worker who requested the documents into this email thread, to ensure that they are aware that the documents will be retrieved from the archives. To facilitate archive retrieval, requests must contain easily identifiable information, being the box bar code for GRR, or the container number for the State records.

Generally no fee is payable for records provided to the NDIA as these applications are covered under the funding arrangement with the Office of the Children's Guardian.



Section 30, *National Disability Insurance Scheme (Worker Checks) Act 2018*

Litigation searches

Objective

This section provides information about restrictions where access to a court record is sought for the purpose of a litigation search.

Litigation searches – Local Court

Requests by legal practitioners or debt collection agencies to search records held at the Local Court to determine whether there are any proceedings involving a particular person or corporation should be denied. These are known as “litigation searches.”

The legal practitioner involved does not have a sufficient connection to the proceedings to be granted access.

[Court Services Bulletin 2002/0079]

Litigation searches – District Court

In 2004 the Principal Registrar of the District Court introduced restrictions on the search of court records for the purpose of a litigation search. The restriction is based on:

- There being no means by which to validate the identity of any match found against the named party
- The search is conducted through a computer system primarily designed for case management
- The search could result in the provision of false, incomplete or misleading information
- A concern that the privacy of individuals incorrectly identified may be breached.

An exception can be made where special circumstances can be established (e.g. the applicant establishing that the result of the search is required for, and will form part of evidence in proceedings before a court.

Where an exception is granted the applicant is to provide an undertaking that acknowledges that the result of a search is not conclusive evidence that the named party has, or has not been involved in litigation before the District Court, and to issue to anyone who intends to rely upon the result of the search a warning as to its inconclusive nature.

A fee may be charged for conducting a search.

Records held by State Records

Objective

This section provides information about access to records held at State Records.

Records held at State Records

Where a person requests access to historical records of proceedings for family history research purposes and the person is an immediate family member of the person involved in the proceedings, then access will normally be granted. If the request is made by another family member, access will be granted if the family member involved gives their consent or is no longer living.

[Court Services Bulletin 2003/0155]

These cases may require the registrar to facilitate access to the State Records Authority by providing letters of permission to members of the public to access these records. Letters of permission should be provided to the Manager, Public Access at State Records as well as to the person requesting access. The letter should specify the following:

- that access/permission to copy is granted
- the records to which access is granted
- date
- date on which the letter becomes invalid (e.g. 12 months from the date of the letter).

Persons granted access should be able to search a charge index to locate matters. It is not appropriate to provide members of the public with a general right to search through court records.

If the court in which the proceedings were held is closed, the court to which the records were transferred is responsible for providing letters of permission.

Requests from employers

Objective

This section provides information to assist in the determination of applications to access records made by an employer.

Written authority to access records

An employer seeking access to court records can produce a written authority from the person to whom the record relates. On the production of the authority access to court records can be considered.

Application as a non-party

An employer may not always be able to produce a written authority to access a person's records, such as where the employee is no longer employed by the employer.

Registrars can consider an employer application to access a court record as a non-party pursuant to relevant court rules. The employer should provide the reason that they seek the access to assist with the decision.

Registrars may receive requests for copies of court records or transcripts from schools or other employers. Care must be taken when determining this type of application. Consideration should be given to providing a certificate of conviction or notice of court result rather than providing copies of court records.

Provision of a transcript would generally be provided direct to the NSW Ombudsman (if requested by the Ombudsman), rather than providing to the school or employer.

Requests from school or employer to support report to Ombudsman

Registrars may receive requests for copies of court records or transcripts from schools or other employers. Care must be taken when determining this type of application. Consideration should be given to providing a certificate of conviction or notice of court result rather than providing copies of court records.

Provision of a transcript would generally be provided direct to the NSW Ombudsman (if requested by the Ombudsman), rather than providing to the school or employer.



Employers have an obligation to report certain convictions to the NSW Ombudsman per section 25C, *Ombudsman Act 1974*

Researchers

Objective	This section provides information to assist considering requests to access court records by persons undertaking research.
Researcher must demonstrate sufficient cause to gain access	<p>On occasion researchers seek to access court records to obtain information which may assist them in the preparation of reports or publications. A researcher must demonstrate that they have sufficient cause why access should be approved. The researcher may also be required to produce evidence that they have approval from a relevant Ethics Committee to undertake the research.</p> <p>A researcher may demonstrate that they have sufficient cause to gain access to court record if they can show that the purpose of the study will provide some public benefit and will be used in the public domain.</p>
Researcher to provide sufficient details to identify records	The researcher must provide the necessary details to enable the relevant records to be located. If the records sought include material that would normally be considered as unavailable due to their confidential nature, written undertakings may be required.
Security and confidentiality of information accessed	A researcher may be required to provide information in support of their application to access records that demonstrates how they intend to use, secure and store information obtained.
Accessing records from multiple locations	Where a researcher seeks to undertake a large scale research project that will require access to records from multiple locations the researcher is to be referred to the Executive Director's office (or State Coroner if it relates to coronial records) to enable a coordinated approach.
Researcher responsible for costs	A researcher may be required to pay fees for the retrieval and access to court records. Registrars are to liaise with Regional Directors if research is requested and will require significant court registry time to assist.

Access by other NSW government agencies

Objective This section provides information about requests from other NSW government agencies for access to court records .

Restrictions on access For all agencies, it is only appropriate to grant access to the specific documents they are entitled to access. It is not appropriate to grant access to the entire court file, especially where the file contains sensitive material such as medical reports that are not to be provided to other government agencies.

[Court Services Bulletin 2014/0090]

Reports to Ombudsman Government agencies are required to report any allegation or conviction to the NSW Ombudsman relating to a “reportable allegation or reportable conviction”, as defined in the Act.

Registrars may receive requests for copies of court records or transcripts from schools or other employers. Care must be taken when determining this type of application. Consideration should be given to providing a certificate of conviction or notice of court result rather than providing copies of court records.

Provision of a transcript would generally be provided direct to the NSW Ombudsman (if requested by the Ombudsman), rather than providing to the school or employer.



Section 25C, Ombudsman Act 1974

Evidence in disciplinary proceedings Requests for copies of court papers and/or transcripts may be received where agencies are seeking the records to produce as evidence in disciplinary or dismissal proceedings in a tribunal.

In many cases this will relate to proceedings such as sexual assault cases that contain sensitive information, and care must be taken when determining this type of application as tendered tribunal evidence may be published with the tribunal’s decision.

Consideration should be given to providing a certificate of conviction or notice of court result rather than providing copies of court records.

Where a transcript is to be provided a redacted transcript should be requested from Reporting Services Branch to ensure the names and personal information of witnesses and victims are protected.

Australia Bureau of Statistics and Australian A person may disclose information obtained in the exercise of functions under the Act (s 66(2) (f) and (f1)) if the person’s name and other identifiers have been removed.

Institute of Criminology

"Information" includes records of warnings, cautions or conferences under the Act.



Young Offenders Act 1997

Advocate for Children and Young People

Arrangements may be made for an agency to provide information or access to documents required by the Advocate in relation to services or issues affecting children and young people. Access to documents includes providing copies of documents.



Section 16, Advocate for Children and Young People Act 2014

BOCSAR

A suppression order does not prevent the disclosure of information (other than by publication) to the Bureau of Crime Statistics and Research (BOCSAR) for the purposes of the compilation of crime statistics.



Court Suppression and Non-publication Orders Act 2010

Young Offenders Act 1997

Young Offenders Regulation 2016

Central Referral Point

If an agency believes on reasonable grounds that a person is subject to a domestic violence threat, the agency may disclose personal information or health information about the threatened person and any other person that the agency reasonably believes is the cause of the threat to the central referral point or a local co-ordination. The central referral point is the Secretary of the Department of Justice and a local co-ordination point is a support agency or service nominated by the Minister.

If a person in need of protection or their guardian applies to the Local Court for an interim AVO or an AVO, the Local Court may disclose personal information or health information about the person and any associated respondent to the central referral point, unless the person in need of protection objects to the disclosure.



Part 13, Crimes (Domestic and Personal Violence) Act 2007

Commissioner of Police or supervising authority (registrable offenders)

A government agency may disclose information about a registrable person under this Act to the Commissioner of Police or a supervising authority (i.e. an authority which has control of the person).



Cl 4, Child Protection (Offenders Registration) Regulation 2015

Fines Commissioner

Government agencies are authorised and required, if requested, to provide the Fines Commissioner with available information about the criminal record of a fine defaulter for the purposes of the Commissioner taking action against the person to enforce payment of a fine (*Fines Act 1996*, s 117).



Section 117, *Fines Act 1996*

Management of high risk offenders

Agencies are under a duty to co-operate with other agencies in relation to risk assessment and management of high risk offenders. The duty to co-operate includes the duty to disclose information to other agencies that is likely to be of assistance to the other agency in the exercise of its high risk offender functions.

Agencies may enter into arrangements (known as co-operative protocols) with each other to enable information to be shared and to enable the co-operative management of offenders. Under a co-operative protocol, each agency is authorised to request and receive information held by another agency and to disclose information to another agency without the consent of any person concerned. The agencies may only exchange information to the extent that the information is reasonably necessary to assist in the exercise of functions of the agencies.



Sections 24AF and 24AG, *Crimes (High Risk Offenders) Act 2006*

Crown Solicitors Office – Terrorism high risk offenders

With respect to the above, some of the high-risk offender requests received are from Crown Solicitors Office pursuant to 58(1) of the Terrorism (High Risk Offenders) Act 2017. With respect to ‘offender information’ as defined by s57, Crown Solicitors have been informed that court services records are date based not offender based. Further, specific documentation that relates to an offender’s overall criminal behaviour and related intelligence would best be provided by agencies with ongoing ‘case management’ involvement. Accordingly, registrars are only required to provide documentation relating to specific court proceedings, not multiple court appearances. When responding to these requests registrars should however provide a cover letter advising that the documents only relate to a specific court proceeding and are not indicative of every court proceeding relevant to that individual.

As a guide for registrars, the following documents are likely to meet the requirements of these requests:

- court attendance notices
- facts sheets on the entering of a plea of guilty
- breach proceedings
- medical/psychiatric/psychological reports
- judges sentencing remarks (if on file)
- court outcome, eg community based order

Further to the above, section 50(1) Terrorism (High Risk Offenders) Act (2017) outlines these are civil proceedings. Accordingly, s.18(2) Civil

Procedure Act 2005 applies and no photocopying or other fees would be applicable for acting on behalf of the Crown.

**Roads and
Maritime
Services
(RMS)**

From time to time RMS may requests copies of fact sheets from courts as part of their process in approving applications relating to the Authorised Inspection Scheme. Accreditation enables inspection station to conduct safety checks for unregistered and interstate vehicles.

RMS policy requires all applicants to the scheme be subject to a character check. A criminal records check is conducted through NSW Police. On occasions it is necessary to obtain access to court papers to clarify matters relating to the criminal record. Registrars should facilitate these requests.

**DCJ
statutory
review –
sexual
consent
legislation**

The Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 commenced on 1 June 2021. The amendments contain statutory provisions which require DCJ to undertake a review of the amendments.

Registrars will receive transcript/sound recording requests to meet the requirements of this statutory review. A fee exemption has been approved by the Executive Director of court services. The [fee exemption table](#) is located on the intranet.

PRL (on behalf of DCJ) have written to Heads of Jurisdiction for Local and District Court regarding this statutory review and have undertaken that all staff involved will comply with statutory publication restrictions applicable to sexual offence matters (section 578A of the Crimes Act 1900), and any additional suppression or non-publication orders.

Members of Parliament

Objective

This section provides information about requests by Members of Parliament to access court records.

Members of Parliament

Registry staff may receive requests for access to information from Members of Parliament (MPs) or their staff. MPs should not contact a government sector employee directly but should instead write to the responsible Minister (i.e. the Attorney General) consistent with the requirements of Premier's Memorandum C2018-05. This policy is intended to ensure that the information received by MPs is accurate and as complete as possible.

Where a Member of Parliament, irrespective of political affiliation, makes an oral enquiry direct to an agency, the Member should be informed that the substance of the enquiry will be relayed to the Minister's office which will make contact with the Member. Responses to oral or written requests for information should be channelled through the Minister's office.

These requirements do not apply to a Member of Parliament in respect to his/her electoral district. Members may communicate directly with courts located within their electoral district and arrange inspections of the location by direct contact with the Registrar.

Should a member of the public or a representative of a political party seek access to court records for the purposes of determining suitability as a proposed candidate, please refer to the relevant sections of this guide for determining access to file by a non party.

Registry staff are to send requests from MP's to the Office of the Executive Director for preparing a submission to the Attorney General. Should registrars have further questions regarding the process or if a visit is arranged please notify courtservices@justice.nsw.gov.au



Department of Premier and Cabinet Circular C2018-05
Provision of Information to Members of Parliament

Local Courts Circular 1993/17

PART 5 Common publication and broadcasting restrictions

Prohibitions on publication and/or broadcasting

Objective

This section provides a list of the common prohibitions on publishing and broadcasting information relating to court records.



This is not an exhaustive list. Any person that has access to court records must make undertake their own research as to any law that prohibit the publication, disclosure or broadcasting of the information accessed.

Bail Act 2013

A person must not publish the name of a prohibited associate of an accused person or any information which could identify someone as a prohibited associate of an accused person (s 89).

Child Protection (Offenders Prohibition Orders) Act 2004

A person must not publish any of the following (s 18):

- information that identifies someone as the subject of a prohibition order
- the name of any victim of a registrable offence committed by a registrable person (a registrable person is someone who has committed a registrable offence i.e. a violent or sexual offence against a child victim)
- the name of a person at risk because of the conduct to be prohibited by the order
- Any information likely to identify a victim or a person at risk.

This requirement also applies to prohibition orders issued in other States or Territories (Regulation, cl 8).

Child Protection (Offenders Registration) Act 2000

A person must not disclose any information about a registrable person under this Act, unless the disclosure (s 21E):

- is made in administering the Act or for law enforcement purposes
 - is made with consent
 - is ordered by a court
 - is made with consent of the Commissioner of Police for the purpose of ensuring the protection of a child or children generally
 - is made to the Minister or with consent of the Minister
 - Is authorised under any this Act or any other law.
-

Children and Young Persons (Care and Protection) Act 1998

Where a person makes a report to the Secretary in respect of a child at risk of significant harm, which is used in care proceedings in the Children's Court, coronial proceedings or other proceedings authorised by subs (1)(d), the identity of the person who made the report must not be disclosed unless consent is given or leave of the court is obtained (s 29(1)(f)).

**Children
(Criminal
Proceedings)
Act 1987**

A person must not publish the names of the following persons in connection to criminal proceedings (s 15A):

- a person who committed the offence when he or she was a child
- a witness who was a child when the offence was committed
- a person mentioned in proceedings in relation to something that occurred when the person was a child
- a child involved in proceedings
- A sibling of the victim of an offence, when the offence was committed when the sibling was a child.

This prohibition does not apply where the court authorises the publication of the name of a person who has been convicted of a serious children's indictable offence (s 15C), or where the court or the person has given consent to the publication (s 15D), or where the child is deceased and the senior next of kin of the child consents to the publication (s 15E).

**Court
Security Act
2005**

A person must not use any recording device in a courtroom, or otherwise transmit information from the courtroom, for example, by posting on social media, unless the transmission has been approved by the judicial officer (s 9A).

NOTE: In the District Court, there is an exception for the broadcasting of judgment remarks by media representatives when approved (*District Court Act 1973*, s 179).

**Crimes
(Appeal and
Review) Act
2001**

A person must not publish any matter that would identify an acquitted person who could be retried under this Act, unless the publication is authorised by the court before which the retrial is being heard. The court can only authorise publication if it is satisfied that it is in the interests of justice to do so (s 111).

**Crimes
(Domestic
and Personal
Violence) Act
2007**

The name of a child under the age of 16 years who is involved in AVO proceedings (whether as a person in need of protection, a witness or who is otherwise likely to be involved) must not be published or broadcast before the proceedings are commenced or after the proceedings have been commenced and before they are disposed of (s 45(1)).

The court may also make such an order in relation to any other person involved in AVO proceedings (s 45(2))

**Crimes
(Forensic
Procedures)
Act 2000**

A person must not publish information that would identify a person who is the subject of a forensic procedure, unless the person has been charged with the offence or the magistrate authorises the publication (s 43).

Crimes (Sentencing Procedure) Act 1999	<p>A person must not publish the following information about a person (other than the offender) who is specified in a parole order (s 51B) or non-association order (s 100H):</p> <ul style="list-style-type: none"> • the name of the person • Any other information which could identify the person.
Crimes Act 1900	<p>A person must not publish the name of a complainant or any information likely to identify the complainant in prescribed sexual offence proceedings. This prohibition does not apply if the publication is authorised by the judge or made with consent or made after the complainant's death (s 578A).</p>
Criminal Procedure Act 1986	<p>A person must not publish a recorded statement except for the legitimate purposes of a criminal investigation or, if the person is a public official, in the proper exercise of the person's official functions (s 289P). A recorded statement is a recording of a statement made by a complainant in relation to a domestic violence offence (s 289D).</p>
Criminal Records Act	<p>It is an offence for a person who has access to criminal conviction records to disclose information about spent convictions (s 13). Some exceptions apply – see p 35 below.</p>
Drug and Alcohol Treatment Act 2007	<p>A person must not publish the name of a person or information likely to identify a person involved in proceedings under the Act, including witnesses (s 41).</p>
Evidence Act 1995	<p>A person must not publish any question that the court has disallowed under s 41(improper questions), or that the court has disallowed because any answer to the question would contravene the credibility rule, or in respect of which the court has refused to give leave under Part 3.7(Credibility).</p> <p>A person may publish any question referred to above with the expression permission of a court (s 195).</p>
Evidence (Audio and Audio Visual Links) Act 1998	<p>A court may prohibit or restrict the publication of evidence given in proceedings where evidence is taken or submissions are made involving audio and audio visual links, or the name of a party to or a witness in the proceeding (s 15).</p>
Jury Act 1977	<p>A person must not publish any information which is likely to lead to the identification of a juror or former juror (s 68).</p>
Law Enforcement	<p>The court must suppress evidence to ensure that the identity of a person using an assumed identity is not disclosed. For example, the court may allow</p>

**and National
Security
(Assumed
Identities)
Act 2010**

a person to appear before it under the assumed name, and the court may prohibit the publication of information that identifies or might identify any person called to give evidence.

The court may decide not to issue such orders if it considers that the interests of justice require otherwise (s 34).

**Law
Enforcement
(Controlled
Operations)
Act 1997**

The court must suppress evidence given before it to ensure the identity of a participant in an authorised operation is not disclosed. For example, the court may allow a person who has been authorised to participate in the operation under an assumed name to appear before it under that name, and the court may prohibit the publication of information that identifies or might identify any person called to give evidence.

The court may decide not to issue such orders if it considers that the interests of justice require otherwise (s 28).

**Lie Detectors
Act 1983**

The court may make an order forbidding the publication of evidence relating to output from a lie detector instrument or apparatus (s 6).

**Surveillance
Devices Act
2007**

The court must make orders prohibiting or restricting publication of information that could reveal details of surveillance technology or methods of installation, use or retrieval of surveillance devices, unless it considers that the interests of justice require otherwise (s 42).

A person is not entitled to search any protected information in the custody of a court unless the court orders otherwise in the interests of justice (s 43).

**Vexatious
Proceedings
Act 2008**

A court may prohibit or restrict the publication of any report of the proceedings, or evidence given in the proceedings, or matters contained in documents filed with the court or received in evidence before the court. A court may make this order if it is satisfied that it is necessary to protect the welfare of a person or for any other reason (s 17).

**Witness
Protection
Act 1995**

The court must suppress the publication of evidence given before the court in order to ensure that the identity of the participant witness is not disclosed (s 26).

A person must not disclose information about the identity or location of a person who is or has been a participant in a witness protection program in NSW or elsewhere in Australia, which compromises the security of the person (s 32).

**Young
Offenders
Act 1997**

A person must not publish the name of a child or any information that identifies or could identify a child dealt with under this Act (s 65).

A person who acquires information in the exercise of functions under this Act must not disclose the information except when exercising functions under the Act (s 66). Exceptions apply to allow information to be divulged to:

- the child, the person responsible for the child or the child's legal representative
 - investigating authorities or a court to determine whether to take action under this Act
 - the Children's Court in relating to sentencing proceedings
 - a youth liaison officer in relation to s 16A
 - an authorised officer of the Department of Justice either generally or in connection with the Youth on Track scheme or similar program
 - BOCSAR
 - Australian Bureau of Statistics (ABS)
 - Ombudsman.
-

Registrars' guide: media applications for access to court records

Introduction

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This document, together with the following annexures, summarises key information and advice for the assistance of registrars:

- A. [Application of s 314 and Rules by jurisdiction](#)
- B. [Flow chart – process for considering access applications under s 314 and/or Rules](#)
- C. [Checklist of relevant considerations](#)
- D. [Extracts of relevant legislation and Rules](#)

Preliminary issues

When considering an application for leave to access a court record under the Rules, the decision-maker should bear in mind the following:

- **Burden of proof:** the burden is on the media applicant to establish that access should be given (*Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, [51]).
- **Starting position:** the decision-maker should proceed on the prima facie assumption that a fair and accurate report of the proceedings will occur (see *R (Cth) v Elomar & Ors (No. 3)* [2008] NSWSC 1443, [24]).

Relevant considerations

1. Existence of a non-publication provision or order

Where a non-publication order or provision applies in the proceedings, a media applicant is not entitled to inspect relevant documents pursuant to s 314(4). However, they may do so with leave pursuant to the Rules, allowing the court or registrar to exercise their discretion to permit (or refuse) access.

Registrars have specifically sought guidance on relevant considerations when exercising their discretion in such circumstances. Consideration may be given to **both** of the following matters:

- The existence of the non-publication order or provision.
- Provision of access to the media would not generally constitute a “publication” and it is the responsibility of the media to know what prohibitions on publication apply.

Note: the standard access application form includes an express acknowledgment by the applicant that they are aware of their responsibility to comply with any applicable limits upon publication, and that penalties may apply in the event of non-compliance.

However, the decision-maker would be in error if access is refused under the Rules having regard **only** to the existence of a non-publication provision or order, without considering other relevant matters.

2. Existence of a suppression order

A suppression order will normally prohibit any disclosure of particular information to the media. If a suppression order or provision is in force, **significant caution should be exercised before granting access to a court record**. Generally, access should not be provided unless appropriate redaction of the suppressed information can be made. In assessing this, relevant considerations include:

- The terms of the suppression order or provision, including the information to which it applies,
- The extent to which the order will require the redaction of documents,
- The resources required to undertake redaction, including the availability of suitably experienced/trained staff, and
- The level of risk of errors in redaction and/or inadvertent disclosure of suppressed information.

3. Local Court Rule 8.10(5) considerations

Local Court Rule 8.10 applies as follows:

- **Local Court:** to criminal, committal and application proceedings.

Note: in coronial proceedings, access to documents is regulated by provisions in the *Coroners Act 2009*. A summary is set out in *Coroner's Court Procedural Bulletin 1 – Access to Coronial Documents*. Contact the NSW State Coroner's Court on (02) 8584 7777 for further information.

- **Children's Court:** the application of LCR 8.10 extends to the criminal jurisdiction of the Children's Court due to s 27 of the *Children (Criminal Proceedings) Act 1987* ('CCPA'), which provides for any laws relating to functions of the Local Court or Magistrates to apply in criminal proceedings before the Children's Court.

Note: LCR 8.10 **does not** apply to care proceedings or other application proceedings before the Children's Court, including bail applications, which are regarded as distinct from criminal proceedings under s 12A, CCPA. There is no statutory or other source of power to grant a non-party access to court documents in these proceedings.

- **District Court:** LCR 8.10 does not apply to criminal proceedings in the District Court. DCR Pt 52 r 3(2) provides a general discretion for the court or registrar to grant a non-party application for access to court documents. However, the matters listed in LCR 8.10(5) may be of practical assistance when considering an application in the District Court.

Note: DCR Pt 52 r 3 does not contain a statement of application, but in practice has been approached as applying to criminal proceedings.

A discretionary decision

A decision under the Rules is discretionary in nature. In many applications there may be tension between the various considerations that must be assessed in the exercise of the discretion. Some considerations may weigh in favour, while others weigh against, a grant of access. The decision-maker's role is to take into account all required considerations, assess the relative importance of each consideration and determine where the balance lies, to reach a decision on whether a grant of access is appropriate and if so, the conditions of that access.

The considerations under LCR 8.10(5) are as follows (see Annexure C for a checklist of issues that may be relevant to each consideration):

(a) Principle that proceedings are generally to be held in open court

Case law emphasises the importance of the principle of open justice. In practice, this means that a fair, accurate and contemporaneous report of proceedings conducted in open court may be published in good faith, even if it would otherwise amount to defamation or constitute contempt of court due to a risk of prejudice to pending proceedings.

Matters relevant to the consideration of this criterion include:

- **The particular type/s of documents or material sought by the application**

- **Police fact sheets:** the media's entitlement to access a police fact sheet under s 314 only applies if there has been a plea of guilty. Otherwise, access to a police fact sheet requires a grant of leave under the Rules.

Ordinarily, the practice in the Local Court is to return to the police prosecutor any police fact sheet and/or criminal history (see below) handed up in bail proceedings if no plea has been entered. However, if a fact sheet is on the court file and has been handed up or read out in the proceedings, then access should generally be granted for the purpose of preparing a contemporaneous report of proceedings unless there is good reason not to.

- **Criminal histories:** a criminal history may be on the court file if handed up in bail or sentence proceedings. While the media may be entitled to publish details of prior convictions in the context of a fair and accurate report of proceedings if published in good faith, consideration should be given to factors such as:
 - The timing and/or contemporaneity of the report,
 - Any risk to the fairness of an imminent jury trial due to the publication of information prejudicial to the accused, and
 - Whether the criminal history contains spent convictions (see below).
- **Spent convictions:** generally, convictions for certain less serious offences becomes spent upon completion of a crime-free period of 10 years or, in the case of an order of the Children's Court, of 3 years (ss 8 – 10, *Criminal Records Act 1991* ('CRA')).

Where the court file contains information about a spent conviction, CSO advises that a court does not come within the definition of a 'public authority' that is prohibited from disclosing a spent conviction under s 13 CRA.

While not bound by s 13, it is open to the registrar when exercising their discretion to have regard to the public policy considerations underlying the provision, including the stated object of the CRA to limit the effect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour. This consideration may carry particular weight in the case of children who have been the subject of a Children's Court order, noting the comparatively short crime-free period that applies under the CRA.

Note: this may be relevant to information on the court record about a person's prior criminal history or the current proceedings. The CRA provides that certain court outcomes, such as a finding of guilt without proceeding to conviction where no further condition is imposed, is immediately taken to amount to a spent conviction (ss 5, 8(2)). The definition of 'spent conviction' also extends beyond the finding itself to include 'the charge to which the spent conviction relates' (s 4(2)(a)).

- **Exhibits:** the media may apply for access to exhibits tendered in the proceedings, such as CCTV footage. The starting position is that if the material was played in open court, then access should be granted unless the decision-maker considers that the material or parts of it should be kept confidential (*R v Abdallah (No. 3)* [2020] NSWSC 121, [15]).

The following factors may be relevant to the exercise of the discretion:

- Grief, distress and trauma caused to the family of a victim of violent crime and the community by repetition of images.
- Serious crimes including murder are not ‘entertainment’ and should not be the subject of repeated electronic reporting without other proper reasons.
- The privacy of persons not criminally involved in the events in question.
- The lack of control or recall over material published electronically on the Internet.
- The risk of provoking “copycat” offences (particularly in relation to terrorism offences).

Note: It may be open in the circumstances of the case to grant conditional leave to recognise the principle of open justice while protecting other relevant interests (e.g. granting leave to inspect documents or exhibits, enabling the media to report what is depicted, without granting copy access – see *DPP (Cth) v Alameddine* [2017] NSWLC 7).

- **Whether or not the information in the documents sought would have been seen or heard by a person present in open court:** A media applicant should ordinarily be granted access to material that has been used in open court.

While not applicable in the lower courts, Supreme Court Practice Note Gen 2 is instructive (see also District Court PN Civil No 11 at [2]). It provides that access will normally be granted to non-parties in respect of material including:

- Documents that record what was said or done in open court,
- Material that was admitted into evidence, and
- Information that would have been seen or heard by any person present in open court, unless the judge or registrar considers that the material or portions of it should be kept confidential.

- **The stage of the proceedings:** the matters identified above should be considered in the context of the stage and nature of the proceedings and their capacity to affect the proper administration of justice. For example, the publication of certain material:

- May have the potential prejudice to the fairness of an imminent or ongoing jury trial, but may be less relevant in proceedings heard by a magistrate or before a judge alone, or
- May cease to be relevant after a verdict or sentence.

- **The principle of open justice still applies to Children’s Court criminal proceedings conducted in a closed court.** The interests of the child and the principle of open justice are balanced in two provisions of the CCPA:

- s 10 provides that subject to the court’s discretion, the general public is excluded from court proceedings. However, media representatives are entitled to enter and remain in court during the hearing of the proceedings for the purpose of preparing a report of the proceedings that is to be distributed via a public news medium.
- s 15A prohibits the media from publishing or broadcasting any information that may identify a child involved in the proceedings.

The NSW Court of Criminal Appeal has observed that as a result of these provisions, the general public may only learn of the administration of justice in a particular case through a

public news medium (rather than through attendance at court) in circumstances where the identity of the child will be protected from publication: *AE v The Queen* [2010] NSWCCA 203.

Consistent with this authority, an appropriate starting point when considering an application is that media access should generally be available and the prohibition in s 15A should be effective to protect the child's interests by preventing publication of the child's name or identifying information.

However, the risk of identification of the child should be assessed in the circumstances of the individual access application. There may be a sound basis for refusing an application and/or limiting the extent of the access granted where there is a real risk that the reporting of material in the court records will lead to the identification of the child, even if the report itself does not directly do so. For example, where:

- The circumstances of an alleged offence are so distinctive that any report is likely to identify the child involved.
- Material is already in the public domain that publication of information contained in the court record may enable identification of the child.

(b) Impact of granting leave on the protected person or victim of crime

Matters relevant to the consideration of this criterion include:

- **Where a non-publication order or provision applies** to prevent the publication of information that would identify the protected person or victim of crime: the registrar may take into account the existence of that protection and determine that access may be granted, in the knowledge that the media is prevented from publishing any identifying information.
- **Where the application relates to AVO proceedings:** the protection contained in the non-publication provision in s 45, *Crimes (Domestic and Personal Violence) Act 2007* only applies in the course of the proceedings and does not continue once the proceedings have concluded. The registrar may take this into account and give weight to the fact that there is no longer non-publication protection when considering the impact of granting leave upon the protected person. The result may be that leave to access the court file is refused.
- In any case (particularly where no restrictions upon publicity apply) a broad range of factors may be relevant, such as:
 - **Increased risk to the person's safety, mental health and/or wellbeing:** in the context of the *Court Suppression and Non-publication Orders Act 2010*, consideration of the need for protection of a person's safety has been held to require consideration of the nature, imminence and degree of likelihood of harm occurring to the person. Where the prospective harm is very severe, even if only a mere possibility, this may weigh in favour of refusing access (c.f. *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46, [56]-[59]).
 - **The person's right to privacy:** although there is not strictly a legal "right to privacy" and the principle of open justice has traditionally allowed for the reporting of the names and testimonies of witnesses (including victims) in the course of a fair and accurate report of proceedings, consideration may be given to restrictions upon the extent or manner of media access that enable a person's privacy to be balanced against the principle of open

justice. For example, the registrar may allow access to inspect but not copy an exhibit comprising CCTV footage that depicts the victim and/or crime.

(c) Connection that the person requesting access has to the proceedings

This criterion appears to be directed to applications made by non-parties other than media representatives and is not a significant consideration in relation to media applicants.

(d) The reason access is being sought

In the case of media applicants, there is a degree of overlap between this criterion and the principle of open justice: access is often sought for the purpose of providing a fair, accurate and contemporaneous report of proceedings in open court.

Relevant considerations include:

- **Contemporaneity:** although LCR 8.10 does not impose a time limit on the making of an application (c.f. s 314), where the application relates to recently heard proceedings for the purpose of a contemporaneous report this may weigh in favour of granting access.

Conversely, if proceedings have not been heard recently, the reason for seeking access may:

- Be less compelling because the principle of open justice carries less weight – for example, where the application is seeking access to records for a historical story, or
- Weigh against a grant of access where there is a risk of publication of prejudicial material (for example, publication of a report of bail or committal proceedings shortly before an accused person's trial).

A lack of contemporaneity between proceedings and a report may demonstrate a lack of good faith even if the report is fair and accurate (see *R v Scott and Downland Publications Ltd* [1972] VR 633, 675). For example, this may occur where access to a court record relating to an old conviction is sought to prepare a report in relation to an upcoming trial.

(e) Any other matter the decision-maker considers relevant

This criterion confers a wide discretion to consider and determine the weight to be given to any other matter that the registrar considers relevant. Some examples include:

- **Untested allegations:** prior to the conclusion of proceedings, access will not normally be given to material on a court file that may contain untested, unsworn and/or hearsay allegations and has not been read in open court or admitted into evidence. This is a significant consideration when determining an application (*Fairfax v Ryde Local Court*, [72]).
- **Defendant's private rights:** conversely, a part of the principle of open justice is that a defendant does not have a right of confidentiality. Ordinarily, unless there is a court-ordered restriction, a fair and accurate report may include the names of parties and witnesses and the evidence given in the proceedings (*Hogan v Hinch* (2011) 243 CLR 506, [22]).

The adverse consequences for a party of a fair and accurate report may be a relevant consideration. However, this is to be balanced with and will typically carry less weight than other considerations. CSO advises that a decision to refuse access to a document used in open court should generally only be made in exceptional circumstances.

Conditions of access

A discretionary grant of leave to access documents pursuant to the Rules provides the decision-maker with capacity to specify conditions upon a grant of leave if appropriate in the circumstances. For instance:

- **Redactions:** although CSO advises that it is open to the registrar to grant access to redacted documents, significant caution should be exercised if this is contemplated. In the absence of a suppression order or provision creating a legal prohibition on the disclosure (as opposed to the publication) of certain information, consideration of the following factors may weigh against the redaction of documents:
 - **Impact of redactions on media's ability to accurately report:** in some instances the removal of information from court documents has the potential to adversely affect the accuracy of a report of proceedings. For example, where the accused is charged with offences against multiple victims it may not be possible to distinguish which charges relate to which victims if the victims' names are fully redacted.
 - **Resources required to redact information:** an assessment should be made of the extent of documents to be redacted, the time and resources required to undertake redaction (including the availability of suitably experienced/trained staff), and the level of risk of errors in redaction.
 - **Transcripts:** if contemplating a grant of access that will require redaction of a transcript, the Reporting Services Branch (RSB) should be contacted at [RSB - Head Office@agd.nsw.gov.au](mailto:RSB-HeadOffice@agd.nsw.gov.au) for an assessment to be made of the time and resources required to redact suppressed information and the availability of such resources. Specific and detailed information is required as part of the transcript ordering process that identifies what is required to be redacted in accordance with the relevant suppression order or statutory provision.

Note: in general, documents should **not** be redacted to remove information where a non-publication order or provision applies to the information. It is incumbent on the media to comply with any applicable non-publication orders and provisions in accordance with the mandatory acknowledgement set out on the standard access application form. However, it remains open to the decision-maker to provide access to redacted documents if considered appropriate in the circumstances of the case (e.g. where there is a risk of indirect identification of a child – see pp 5-6 above).

- **Form of access:** s 314 provides for a media representative's entitlement to **inspect** certain material on the court file. In circumstances where the media representative seeks access to **copy** material, an application is to be made pursuant to the Rules.
 - **Payment of the prescribed fee** is required to obtain a copy of documents on the court record or transcript of evidence taken at the proceedings (LCR 8.10(3)(b)).
 - Conditions around the form of access granted may be used to address particular considerations or concerns relevant to the exercise of the discretion as to access (e.g. permitting inspection rather than copy access of an exhibit comprising video footage depicting a victim).

Application of media access provisions by jurisdiction

s 314 CPA		Limited media entitlement to inspect certain court documents for purpose of a fair, accurate and contemporaneous report of criminal proceedings	
	Local Court	District Court	Children's Court
<i>Applies to</i>	Criminal proceedings	Criminal proceedings	Criminal proceedings (via s 27, CCPA)
<i>Limits</i>	Documents not to be made available under s 314 where court order or statutory provision prevents disclosure or publication (s 314(4)) E.g. no identification of complainant in prescribed sexual offence proceedings (s 578A CPA)	Documents not to be made available under s 314 where court order or statutory provision prevents disclosure or publication (s 314(4)) E.g. no identification of complainant in prescribed sexual offence proceedings (s 578A CPA)	In practice, inspection access rarely available under s 314 due to s 314(4) and prohibition upon identification of child involved in proceedings (s 15A CCPA)
<i>Decision by</i>	Registrar	Registrar	Registrar
Rules		Provisions for discretionary grant of access to non-parties to access, including media applicants not entitled to access under s 314 CPA (see s 314(4A))	
	Local Court - LCR 8.10	District Court - DCR Pt 52 r 3	Children's Court - LCR 8.10
<i>Applies to</i>	Committal proceedings, summary proceedings and application proceedings	Civil proceedings <i>Rule does not have a statement of application but in practice has been approached as applying to criminal proceedings.</i>	Criminal proceedings only (via s 27, CCPA)
<i>Limits</i>	<ul style="list-style-type: none"> Exercise of discretion requires consideration and balancing of all factors listed in r 8.10(5) 	<ul style="list-style-type: none"> No guidance in rule as to relevant considerations for exercise of discretion. LCR considerations may be instructive. 	<ul style="list-style-type: none"> Does not apply to care and other application proceedings Criminal proceedings does not include bail applications (see s 12A, CCPA)
<i>Decision by</i>	Magistrate or registrar	Judge or registrar	Magistrate or registrar

CPA means the *Criminal Procedure Act 1986*

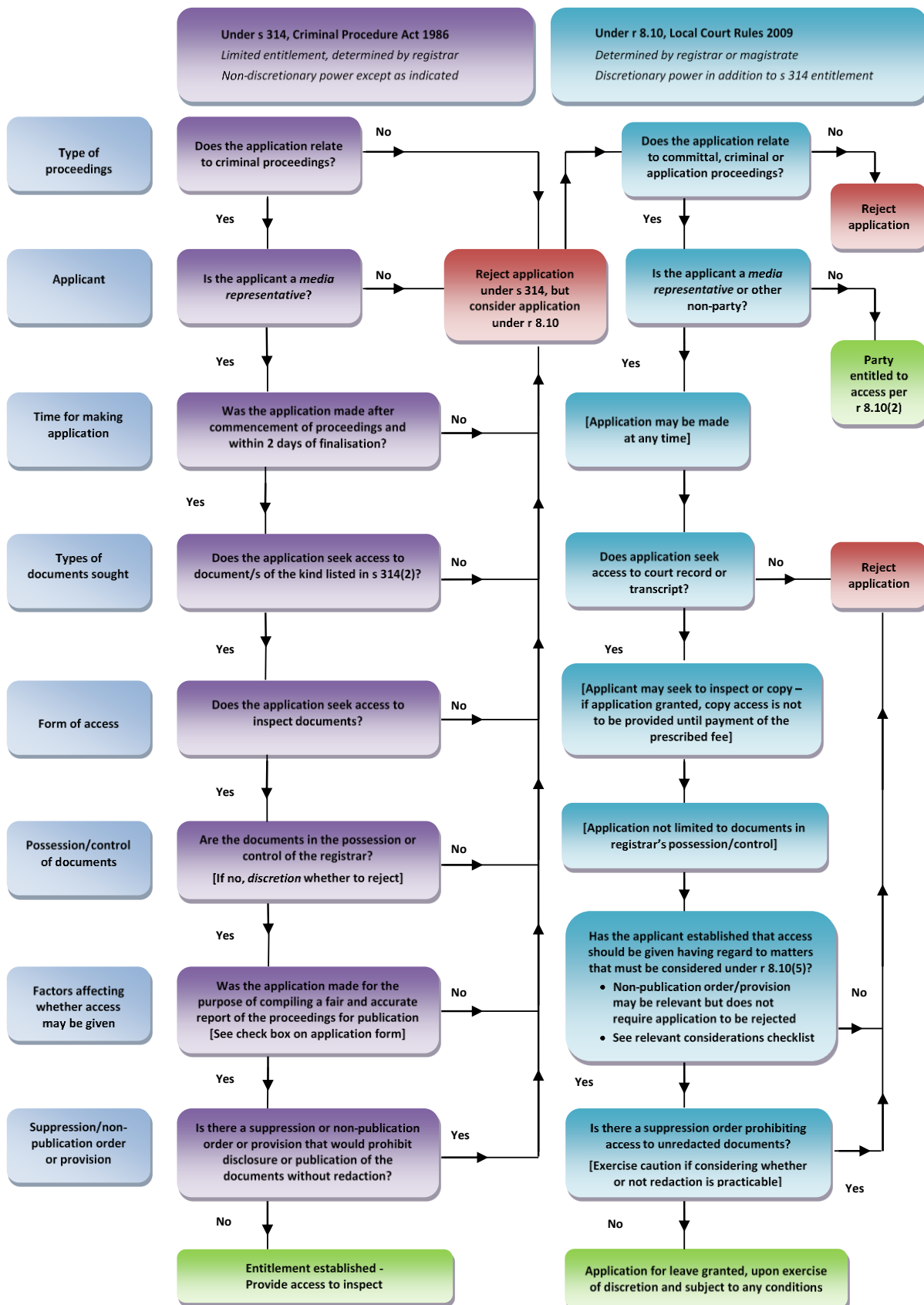
CCPA means the *Children (Criminal Proceedings) Act 1987*

DCR means the *District Court Rules 1973*

LCR means the *Local Court Rules 2009*

Annexure B

Applications by the media for access to court records



Checklist of relevant considerations

Note: This is a non-exhaustive guide. Under LCR 8.10(5)(e), a decision-maker may take into account any matter they consider relevant when determining whether to grant leave to access a court record.

(1) Preliminary issues

- **Burden of proof** is on the media applicant to establish that access should be given.
- **Starting position** on which the decision-maker should proceed is the prima facie assumption that a fair and accurate report of the proceedings will occur.

(2) Considerations under LCR 8.10(5)

(a) The principle that proceedings are generally to be held in open court:

- What materials are being sought (e.g. police fact sheets, criminal histories, spent convictions, exhibits)?
- Would the information in the materials sought have been seen/heard by a person present in open court?
- At what stage of the proceedings is the application being made? Is there a potential impact upon the administration of justice?

(b) The impact of granting leave on the protected person or victim of crime:

- Does a non-publication order or provision apply to prevent the publication of information that would identify the victim? This protection may reduce the impact upon the victim of granting leave.
- Is there any other specific information available about the potential impact upon the victim (e.g. increased risk to safety, mental health and/or wellbeing)?
- Having regard to the material sought, can steps be taken to balance the victim's privacy against the principle of open justice (e.g. by only allowing access to inspect an exhibit that depicts the victim)?

(c) The connection that the person requesting access has to the proceedings:

- This is more relevant to consideration of applications by other non-parties rather than media applicants.

(d) The reasons access is being sought:

- On the application form, has the media applicant nominated the reason for seeking access as being "to prepare a fair and accurate report of current proceedings"? If not, what is the other specified reason?
- Is there contemporaneity between the proceedings and the report? If not, consider whether the principle of open justice may be less compelling or whether in the circumstances a grant of access may risk prejudice to the proceeding (e.g. publication of a report of committal proceedings shortly before trial).

(e) Any other matter that the decision-maker considers relevant:

- This is a wide discretion to consider and determine the weight to be given to any other relevant matter, e.g.:
 - If the material sought contains allegations not read in open court or admitted into evidence this may weigh in favour of refusing access.
 - Arguments as to a defendant's private rights or the adverse consequences for a party of a fair and accurate report may be relevant, but typically carry less weight than other considerations.
 - The existence of a non-publication order or provision, and whether or not the media applicant has provided signed acknowledgement of their responsibility to comply with it.
 - The existence of a suppression order that prohibits access to any suppressed information.
- The fact that a media applicant is not entitled under s 314 to access documents (including due to an applicable non-publication provision) is not by itself a proper reason to refuse an application. This is because a grant of leave under LCR 8.10 is a separate, parallel avenue to the limited entitlement in s 314.

(3) Conditions of access

Leave may be granted on a conditional basis if appropriate in the circumstances, e.g.:

- **Redactions:** although it is open to the decision-maker to grant access to documents that have been redacted, this approach is not ordinarily advisable.
 - **If a suppression order is in place:** the information to which the order applies cannot be disclosed. Significant caution should be exercised if considering a grant of access to redacted documents. If the documents include transcripts, RSB should be contacted at RSB - Head Office@agd.nsw.gov.au and specific information provided to enable assessment of the time and resources required to redact suppressed information and the availability of such resources.
 - **If a non-publication order or provision applies:** documents should **not** be redacted to remove the information to which the order or provision applies. The media applicant is responsible for informing themselves of and complying with any applicable orders or provisions, and is required to acknowledge this in their application.
- **Form of access:**
 - **Copy access** requires payment of the prescribed fee (LCR 8.10(3)(b)).
 - Limitations on access may be used to address particular concerns relevant to the decision of whether to grant access (e.g. permitting inspection rather than copy access of an exhibit comprising video footage depicting a victim).

Annexure D

Limited media entitlement to access court documents

Section 314 of the *Criminal Procedure Act 1986*

Applies to District Court, Local Court and Children's Court

314 Media access to court documents

- (1) On application to the registrar, a media representative is entitled to inspect any document relating to criminal proceedings, at any time from when the proceedings commence until the expiry of 2 working days after they are finally disposed of, for the purpose of compiling a fair report of the proceedings for publication.
- (2) The documents that a media representative is entitled to inspect under this section are copies of the indictment, court attendance notice or other document commencing the proceedings, witnesses' statements tendered as evidence, brief of evidence, police fact sheet (in the case of a guilty plea), transcripts of evidence and any record of a conviction or an order.
- (3) The registrar is not required to make documents available for inspection if the documents are not in the possession or control of the registrar.
- (4) The registrar must not make documents available for inspection if—
 - (a) the proceedings are subject to an order prohibiting their publication or a suppression order, or
 - (b) the documents are prohibited from being published or disclosed by or under any other Act or law.
- (4A) This section does not limit the operation of any other Act or law under which a person may be permitted to inspect documents relating to criminal proceedings.
- (5) (Repealed)

Leave to access court documents

Rule 8.10 of the *Local Court Rules 2009*

Applies to the Local Court and the Children's Court (see below)

8.10 Copies of court records

- (1) This rule applies to committal proceedings, summary proceedings and application proceedings.
- (2) A party to the proceedings is entitled to—
 - (a) access to a copy of the court record or transcript of evidence taken at the proceedings, or
 - (b) on payment of any fee prescribed by regulations made under the *Criminal Procedure Act 1986* or the *Local Court Act 2007*, obtain a copy of the court record or transcript of evidence taken at the proceedings.
- (3) A person who is not a party to the proceedings may, with the leave of a Magistrate or registrar—
 - (a) have access to a copy of the court record or transcript of evidence taken at the proceedings, or
 - (b) on payment of the prescribed fee, obtain a copy of the court record or transcript of evidence taken at the proceedings.
- (4) A Magistrate or registrar may grant leave for the purposes of subrule (3) if of the opinion that it is appropriate to do so in the circumstances.
- (5) In determining whether it is appropriate to grant a person leave for the purposes of subrule (3), the Magistrate or registrar is to have regard to the following matters—
 - (a) the principle that proceedings are generally to be heard in open court,

- (b) the impact of granting leave on the protected person or victim of crime,
 - (c) the connection that the person requesting access has to the proceedings,
 - (d) the reasons access is being sought,
 - (e) any other matter that the Magistrate or registrar considers relevant.
- (6) In this rule, **court record** does not include a video recording of the proceedings in the Court.

Section 27 of the *Children (Criminal Proceedings) Act 1987*

27 Application of Criminal Procedure Act 1986 and other Acts

- (1) Subject to Part 2 and to the rules of the Children's Court, any Act or other law relating to the functions of the Local Court or Magistrates or to criminal proceedings before them applies to—
 - (a) the Children's Court, and
 - (b) any criminal proceedings before the Children's Court.
 - (2) In particular (and subject to Part 2 and to the rules of the Children's Court), the provisions of the *Criminal Procedure Act 1986* that apply to the Local Court and any criminal proceedings before the Local Court apply to the Children's Court and any criminal proceedings before the Children's Court.
 - (2A) Despite subsection (2), section 211A of the *Criminal Procedure Act 1986* does not apply in respect of criminal proceedings before the Children's Court.
 - (2B) *Despite* subsection (2) (and subject to Divisions 3, 3AA and 3A), Part 2 of Chapter 3 of the *Criminal Procedure Act 1986* does not apply to indictable offences that are not serious children's indictable offences.
- Note.** Part 2 of Chapter 3 of the *Criminal Procedure Act 1986*, which deals with committal proceedings, applies to serious children's indictable offences.
- (3) If this *Part* and any Act or other law applied by this section (other than the *Bail Act 2013*) are inconsistent, this *Part* shall prevail to the extent of the inconsistency.

Part 52 Rule 3 of the District Court Rules 1973

Applies to the District Court

3 Searches

- (1) A party to any proceedings may search the file kept by the registrar in respect of the proceedings.
cf DCR r 17 (1).
- (2) A person other than a party to any proceedings, or the solicitor for the party, shall not search the file kept by the registrar in respect of the proceedings except by leave of the Court or registrar.
cf DCR r 451.
- (3) (Repealed)
- (4) No person shall search any book of record kept by the registrar except by leave of the Court or registrar.
- (5) Subrules (2) and (4) do not apply in respect of proceedings under section 134 (1) (c) of the Act.