

## REQUESTS BY MEDIA FOR ACCESS TO COURT RECORDS

*Summary: This Circular sets out the Court's practice in relation to requests by media organisations for access to court records, in particular copies of video footage or images tendered in trial.*

### 1. Open justice

- 1.1 The Court has the power in both its civil and criminal jurisdiction to allow third parties, including the media, access to court records. In particular, this power allows the Court to release copies of transcripts and copies of video footage or images tendered in evidence in civil and criminal cases. In criminal cases, the power is contained in *Criminal Procedure Rules 2005* rule 51 (“CPR”). In civil cases, the power is contained in *District Court Rules 2005* rule 71 (“DCR”). In each case, the power may be exercised by a Judge or Registrar (“judicial officer”) and, in certain cases, by the Court’s media manager.
- 1.2 The Court’s power to allow access to, and provide copies of, court records is one way in which it can facilitate ‘open justice’. In the words of Lord Scarman in *Home Office v Harman* [1982] 1 All ER 532 at 547, “the common law by its recognition of the principle of open justice ensures that the public administration of justice will be subject to public scrutiny....Justice is done in public so that it may be discussed and criticised in public”. However, the principle of open justice is not an end in itself. “It is a means to an end; namely, to inform the public about the workings of the third arm of government and to ensure that courts and judges administer the justice system in a way that will maintain and foster its integrity, fairness and efficiency”: *Re Hogan; ex parte West Australian Newspapers Limited* [2009] WASCA 221 [50] (“*Hogan*”).
- 1.3 The facilitation of open justice needs to be balanced against other potentially competing interests. In the criminal jurisdiction, the interests of victims of crime is a relevant factor. *Victims of Crime Act 1994* (WA) s3(1) provides that judicial officers “are authorised to have regard to and apply the guidelines in Schedule 1 [to the Act] and they should do so to the extent that it is ... within or relevant to their functions to do so, and ... practicable for them to do so”. Relevantly, the Schedule provides that a “victim should be treated with courtesy and compassion and with respect for the victim’s dignity” (par 1) and the “privacy of a victim should be protected” (par 5).
- 1.4 Examples of competing interests which may tend to suggest that release of information is not appropriate include where release of the court record, in particular a video or image, may:

- Embarrass or humiliate the victim or another witness or expose them to risk of harm.
- Identify a child who is a witness or is otherwise involved.
- Identify a police undercover operative or a protected witness or otherwise prejudice an ongoing investigation.
- Undermine the interests of the person who made the video or image (who may have signed an exclusive deal to provide the video or image to a particular media outlet).

1.5 The Court will thus determine each application on a case by case basis.

1.6 The information set out in this Circular to Practitioners in no way limits the discretion of judicial officers in considering requests for the release of information. Judicial officers are not bound by this Circular, and will depart from it if considered appropriate in all the circumstances of the application before them.

## **2. Instances in which records will not be provided**

2.1 There are a number of instances in which the Court may not release information. CPR rule 51(5) provides that a record will not be provided where:

- (a) a suppression or other order has been made pursuant to *Criminal Procedure Act 2004* s171;
- (b) the record is a pre-sentence report which is protected by *Sentencing Act 1995* s22;
- (c) any other order or written law prohibits or restricts the publication or possession of the record to which the application relates (eg *Evidence Act 1906* (“EA”) s36C).

2.2 DCR r 71(7)(b) and (10) are to the same effect as CPR r 51(5).

2.3 Both DCR r71(7)(a) and CPR r 51(5) require the applicant to demonstrate “sufficient cause” to inspect or copy the record.

## **3. General matters**

3.1 All applications are to be made in writing, including by email.

3.2 The application should set out:

- The matter number.
- Where there is a current hearing, the name of the judicial officer presiding and the location of the hearing.
- Specific details to identify the record or exhibit sought to be released, for example, exhibit numbers.
- The grounds on which the application is made.
- Whether the application is being made on the basis that any video or image released will be pooled with any other media outlets and, if so, the name of those outlets.

- Any relevant publication deadlines.

3.3 The application should be addressed and sent to the Court as follows:

Type of application	Addressee	Fax	Email
Criminal - current trial or sentencing	Associate to presiding Judge	Perth: <a href="#">see website</a> Circuit courthouse: <a href="#">see website</a>	Associate to Judge – <a href="#">see website</a> cc: <a href="mailto:courttranscriptdc@justice.wa.gov.au">courttranscriptdc@justice.wa.gov.au</a>
Criminal – other	Principal Registrar	(08) 9425 2268	<a href="mailto:courttranscriptdc@justice.wa.gov.au">courttranscriptdc@justice.wa.gov.au</a>
Civil – current trial	Associate to presiding Judge	Perth: <a href="#">see website</a> Circuit courthouse: <a href="#">see website</a>	Associate to Judge – <a href="#">see attached</a> cc: <a href="mailto:courttranscriptdc@justice.wa.gov.au">courttranscriptdc@justice.wa.gov.au</a>
Civil other	Principal Registrar	(08) 9425 2268	<a href="mailto:courttranscriptdc@justice.wa.gov.au">courttranscriptdc@justice.wa.gov.au</a>

3.4 Media organisations are encouraged to apply by email. The purpose of having the applications to Associates copied to the general transcripts email address is to enable the Court to have a central record of all applications.

3.5 Applications sent by email should have a reference line as follows:

**Release of information – [case number] – [plaintiff/ accused name] – [Hearing details]**

For example:

**Release of information – CIV 1234 of 2010 – Smith - Trial before Judge Fenbury**

**Release of information – IND 1234 of 2010 – Jones - Trial before Judge Fenbury**

- 3.6 The judicial officer dealing with the application may require the applicant to provide further information or file an affidavit in support of the application (DCR r 71(2)(a)).
- 3.7 The judicial officer dealing with the application may also require the applicant to notify interested persons of the application (see CPR r 51(4)(b)).
- 3.8 The application may be granted on terms or conditions (CPR r 51(6A), DCR r 71(8)(b)). This could include a condition prohibiting republication or a condition that the names of child complainants (not otherwise covered by EA s36C) not be published without the written consent of the child’s parent: see generally, *Hogan*.
- 3.9 The judicial officer will also determine the costs associated with the application (CPR r 51(6), DCR r 71(9)).

## 4. Criminal jurisdiction

- 4.1 The Court will not usually release exhibits during a trial, at least not until the point in time where the jury has returned a verdict. Prior to that, the jury requires access to the exhibits as part of their deliberation processes. There is also the obvious risk of media reporting of the trial referring to the released material in a way that impacts on the deliberation by members of the jury.
- 4.2 Where the application is made in the course of a trial, up to and including the sentencing of the defendant, the request is to be made to the Associate to the trial Judge. Contact details for Associates are provided on the Court's website.
- 4.3 If the application is made after sentencing has taken place, it should be addressed to the Principal Registrar.
- 4.4 Media organisations are encouraged to send their request to the Court as soon as they identify an exhibit that they would like access to. The Court will endeavour to deal with the request so that if release is appropriate, it can be made either immediately after the verdict has been handed down or after sentencing.
- 4.5 The Court's preference is to release copies of exhibits immediately following the conclusion of the sentencing hearing. This allows the Court time to copy the exhibits in between the end of the trial and the sentencing.
- 4.6 Where there is a request made during a trial, the first issue for the Judge is a negative screen. If there are no circumstances in which the Judge would release the information, then the Judge, through their Associate, will advise the applicant of that decision.
- 4.7 If the Judge is of the view that it may be appropriate to release the exhibit, then the Judge may inform counsel either in open court or through his or her Associate that a request has been made to determine whether the prosecution or the defence have any objections to the exhibit being released.
- 4.8 Where an exhibit is to be released, the Court will if practicable make copies of the exhibit. This may not be possible at circuit locations, which may mean that release cannot be made until the Judge has returned to Perth.
- 4.9 Where an exhibit requires editing prior to release, the Court will need to be satisfied that there is a process in place for this to occur, without compromising exhibit. The Court will also need to be satisfied that editing the exhibit is practicable. An example is where the prosecutor or police media unit is able to provide edited or pixellated video footage using a copy exhibit. An alternative is to release a copy of an exhibit subject to a limit on republication as was done in *Hogan*.
- 4.10 Where one media organisation has been granted leave to inspect of obtain a copy of an exhibit, the Court's media manager may grant an oral application

for access to the same material to another media organisation (CPR r51(2), (3A)).

## **5. Civil jurisdiction**

- 5.1 Any person, including a media organisation, may inspect and receive a copy of any writ (including any endorsed statement of claim) filed in, or judgment or order of, the Court (DRC r71(1A)). This is subject to payment of the prescribed fee.
- 5.2 Applications to inspect or copy other records or exhibits are to be made in accordance with the procedure set out in Part 3 above.

**MICHAEL GETHING**  
**Principal Registrar**