



The Rules Committee

CONSULTATION ON

Accessing Court Documents in Civil and Criminal Proceedings

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Introduction

1. The Rules Committee is reviewing the access to court documents rules regulating access to court documents in civil and criminal proceedings in the District Court, High Court and Court of Appeal.¹
2. In 2009 the Rules Committee significantly reformed the access to court documents rules with the introduction of the High Court (Access to Court Documents) Amendment Rules 2009, the Court of Appeal (Access to Court Documents) Rules 2009, the District Courts Rules 2009 and the Criminal Proceedings (Access to Court Document) Rules 2009.
3. Over five years have elapsed since the introduction of these reforms. This provides an ideal time to evaluate the effectiveness of the reforms by assessing whether the rules are functioning as intended and considering whether the access to court documents rules can be improved.
4. The principle of open justice is often treated as the starting point when an application for access is filed, but it is only one of the matters to be considered.² Open justice is not to be treated as coincident with the wish of the media to provide entertainment and maximise the audience, with consequent profits. It involves the open functioning of the judicial process, so

¹ The Family Court Rules 2002 are not within the scope of the Rules Committee's rule-making power and are not part of this review.

² *Schenker AG v Commerce Commission* [2013] NZCA 114 at [37].

that there is public scrutiny of the courts, and so that public confidence in the process and decisions of courts is maintained.

5. The distinction between seeking information under the Official Information Act and access to court documents is important. There is a difference between the administration of public policy by public organisations, and the administration of justice. The difference is particularly obvious in civil cases. Privacy is not necessarily surrendered when a party subjects itself or is subjected to the court process, and private information may not immediately assume a public character. However, the public has a legitimate interest in knowing who is before the courts and the subject matter of proceedings, and the starting presumption is that the in-court process itself must be public.
6. The digital age has changed the nature of publicity. One particular change has been the end of the practical obscurity that would descend on court documents with the passage of time. Documents once released have an indefinite digital life and, without particular expense or effort, can be re-publicised long after a trial. It must be asked what the public good is in allowing access to court documents when the court process is long over.
7. Those themes are developed in this consultation document, which analyses the current regime for accessing court documents in both civil and criminal proceedings, identifies issues or aspects of the rules where reform may be necessary, and sets out proposed reforms. The Rules Committee invites submissions on the effectiveness of the current rules and on the proposed rules. Please provide submissions or comments to Harriet Bush, the Clerk to the Rules Committee, by Friday 19 June 2015.

The existing rules

Civil Proceedings

8. In civil proceedings, access to court documents is regulated by the High Court Rules, the District Courts Rules 2014 and the Court of Appeal (Access to Court Documents) Rules 2009.³ Under these rules, applications to access court documents are treated differently depending on who is making the application and when the application is made.
 - (i) *The rights of the general public and parties to access documents*
9. Parties to the proceeding and their lawyers have a general right to access the court file⁴ and documents⁵ relating to the proceeding.⁶ This is on the basis that the proceeding concerns the rights and interests of the parties themselves and they should be able to access and inspect the documents relating to the proceeding held by the court.
10. The general public also has a right to access the formal court record.⁷ Unlike the court file, which encompasses all documents relating to a proceeding, the formal court record only relates to documents that are public in nature, such as judgments, orders, minutes of the court and a published list giving notice of a hearing.⁸ As courts of record,⁹ the High Court, District Courts and Court of Appeal hold the formal court record for the purpose of

³ High Court Rules (HCR), Part 3, subpart 2; District Court Rules 2014 (DCR), Part 3; and Court of Appeal (Access to Court Documents) Rules 2009 (CA(Access)R).

⁴ The “court file” is a collection of documents in the custody or control of the court that relate to the proceeding: HCR, r 3.5; DCR, r 3.1; and CA(Access)R, r 3.

⁵ “Document” is defined in r 3.5 of the HCR, r 3.1 of the DCR and r 3 of the CA(Access)R in expansive terms and includes all evidence (whether or not in a written medium) but excludes notes made by the Judge or material that relates to the administration of the court.

⁶ HCR, r 3.8; DCR, r 3.4; and CA(Access)R, r 6.

⁷ HCR, r 3.7; DCR, r 3.3; and CA(Access)R, r 5.

⁸ HCR, r 3.5; DCR, r 3.1; and CA(Access)R, r 3.

⁹ The High Court is a court of record under s 3(1) of the Judicature Act 1908, the District Court by virtue of s 3(1) of the District Courts Act 1947 and the Court of Appeal under s 57(1) of the Judicature Act 1908.

maintaining an accurate record of a court proceeding and the public have a general right to access these documents.¹⁰

11. While expressed in terms of rights, both the right of the parties to access the court file and the right of the public to access the formal court record may be limited by an order restricting access to the court file and/or the formal court record.¹¹ If such an order applies, parties and the general public have to apply for permission in the manner set out below in (ii).

(ii) Seeking permission to access court documents

12. A person who is not a party to the proceeding does not have a general right to access documents on the court file. Court documents are provided to the court to resolve a dispute between two or more parties and/or the State. The documents do not become public simply by virtue of being held by the court and the court has inherent judicial control over these documents.¹²

13. While a person who is not a party to the proceeding does not have a right to access a document on the court file, he or she may obtain permission from the court to do so. There may be a legitimate public interest in releasing the documents. In determining whether there is a public interest in giving access to the documents, the court must consider the request:¹³

... in the context of contemporary values and expectations in relation to freedom to seek, receive and impart information, open justice, access to official information, protection of privacy interests, and the orderly and fair administration of justice.

14. How these values apply to a request to access the court file will depend upon what stage the proceeding is at. For example, the principle of open justice – that is the principle that justice should be seen to be done – may have substantial weight when the proceeding is being heard in court as the documents will be made public then, but may have less weight before the hearing when the documents have not yet been admitted into evidence. Similarly the protection of privacy interests may have greater weight prior to the proceeding when the case may still settle and documents containing the information may not be admitted into evidence, than at the hearing stage when the documents have been presented in court. Because the importance of these considerations varies depending on what stage the proceeding is at, requests for accessing court documents are treated differently depending on whether the request is made before, during or after the substantive hearing stage.

(ii)(a) Before or after the substantive hearing stage

15. Requests made before or after the substantive hearing stage must be made to the court. The application must set out the nature of, and the reason for, the request¹⁴ and the applicant must give notice of the application to any person adversely affected by the application.¹⁵ This provides an opportunity for these persons to file submissions in relation to whether or not permission to access the documents should be granted. The judge, or if a judge directs a registrar, may also direct that the person seeking access file an interlocutory application or originating application with an affidavit in support of the application.¹⁶

¹⁰ *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [18].

¹¹ HCR, rr 3.7(3) and 3.8(3); DCR, rr 3.3 and 3.4(3); and CA(Access)R, rr 5(2) and 6(3).

¹² *Mafart v Television New Zealand Ltd*, above n 10, at [24]; *R v Mahanga* [2001] 1 NZLR 641 (CA) at [29] and [31].

¹³ *Mafart v Television New Zealand Ltd*, above n 10, at [7] (citations omitted).

¹⁴ HCR, r 3.13(2); DCR, r 3.9(2); and CA(Access)R, r 12(2).

¹⁵ HCR, r 3.13(5); DCR, r 3.9(5); and CA(Access)R, r 13(1). However, the Judge or Registrar may dispense with giving notice if it is impracticable.

¹⁶ HCR, r 3.13(4); DCR, r 3.9(4); and CA(Access)R, r 12(3).

16. In determining whether to grant permission to access the documents, the judge or registrar considers the nature of, and reasons for, the application or request and, in light of this, takes into account any of the following matters:¹⁷
 - a. the orderly and fair administration of justice;
 - b. the protection of confidentiality, privacy interests, and any privilege held by, or available to, any person;
 - c. the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions;
 - d. the freedom to seek, receive and impart information; and
 - e. whether a requested document is subject to restrictions imposed either by the rules or by a judge or registrar.

These five matters are non-exhaustive. The judge or registrar may also consider any other matter that he or she thinks just.¹⁸

17. In taking into account the relevant matters, the court exercises a “broad judicial discretion” in weighing the “competing interests presented by any particular application.”¹⁹ The matters are ascribed weight based on the context of the request and the nature of, and the reasons for, the request.²⁰ This means that each decision will turn on the specific nature of the request, the nature of the proceedings, when the request is made and what documents are requested.

(ii)(b) During the substantive hearing stage

18. Requests made during the substantive hearing stage differ from applications for access before or after this stage in that there is an expedited mechanism for granting access to the documents.
19. During the substantive hearing stage, which lasts from the beginning of the hearing or trial until 20 working days after the final judgment, any person may request the pleadings and applications filed in court, along with affidavits, depositions, other written evidence, and documents admitted into evidence, and a transcript of any oral evidence.²¹
20. An application for such documents is made by giving the registrar a request in writing that identifies the requested document and provides reasons for the request.²² The registrar then promptly gives the parties a copy of the request. A party that wishes to object to access being granted must do so within a certain time period being the first working day after the request has been made, if the request is made during the substantive hearing, or three working days, if the request is made after the hearing but before the final judgment.²³ If the party does not object, the registrar must grant access to the requested documents.²⁴ If a party objects, the request is referred to a judge, or registrar if a judge has made such a direction. The judge or registrar determines the request as if the request was made before or after the substantive hearing stage with the judge or registrar deciding whether to grant

¹⁷ HCR, r 3.16; DCR, r 3.12; and CA(Access)R, r 17. In the Court of Appeal, a further factor is if the trial is yet to take place, the right of the defendant to a fair hearing: CA(Access)R, r 17(a).

¹⁸ HCR, r 3.16(f); DCR, r 3.12(f); and CA(Access)R, r 17(g).

¹⁹ *R v Mahanga*, above n 12, at [32].

²⁰ *Schenker AG v Commerce Commission*, above n 2, at [37].

²¹ HCR, r 3.9(2); DCR, r 3.5(2); and CA(Access)R, r 7(2).

²² HCR, r 3.9(4); DCR, r 3.5(4); and CA(Access)R, r 7(4).

²³ HCR, r 3.10; DCR, r 3.6; and CA(Access)R, r 8.

²⁴ HCR, r 3.9(5); DCR, r 3.5(5); and CA(Access)R, r 7(5).

access by considering the relevant matters in light of the nature of, and reasons for, the request.²⁵

Criminal Proceedings

21. In criminal proceedings, access to court documents is governed by Part 6 of the Criminal Procedure Rules 2012. Part 6 is modelled on the civil access to court documents rules. Under Part 6, the public has a general right to access the permanent court record,²⁶ the prosecutor and defendant have a right to access the court file and documents,²⁷ and other persons may apply for permission to access the court file in a similar manner to the civil access rules.²⁸

22. While Part 6 of the Criminal Procedure Rules 2012 is modelled on the civil access rules, there are four main differences between the access to court documents regime under the civil access rules and under the Criminal Procedure Rules 2012.

(i) Two stages rather than three stages

23. The first difference relates to the different stages a proceeding is divided into. In the High Court Rules, a proceeding is divided into three stages: before, during and after the substantive hearing stage. In the Criminal Procedure Rules 2012, a proceeding is only divided into two stages: during and after the proceeding. During the proceeding stage, which begins from when the proceeding was commenced by way of the filing of a charging document and continues until all applicable appeal periods for that period have expired,²⁹ any person may request access to the court file. Unless a party objects, the court has made a direction restricting access to the court file or a restriction under r 6.9 applies, a registrar must promptly give the requested document(s) to the applicant.³⁰

24. After the proceeding has concluded following the appeal periods having expired, an application to access court documents is made in the same way as an application under the civil rules relating to a period before or after the hearing. The court will determine the application in the same manner as in the civil context, by applying the relevant matters that have to be considered.³¹

(ii) Oral requests by prosecution and defence

25. The second difference is that the Criminal Procedure Rules 2012 allows the prosecution or defence to make a request orally to the registrar.³² This is a procedural difference driven by practical considerations. During a hearing, prosecution or defence may need to check details on the court file. Requiring the request to always be made in writing would hinder this. However, in some cases, the registrar can require the prosecution or defence to make the request in writing.³³

(iii) Additional consideration: the right to a fair trial

26. The third difference is that in addition to the matters the judge or registrar must take account of when considering whether to grant or refuse a request, the Criminal Procedure Rules

²⁵ HCR, rr 3.9(6) and 3.16; DCR, rr 3.5(6) and 3.12; and CA(Access)R, r 17.

²⁶ Criminal Procedure Rules 2012, r 6.4. The equivalent of the "formal court record" in civil access to court rules.

²⁷ Criminal Procedure Rules 2012, r 6.5.

²⁸ Criminal Procedure Rules 2012, rr 6.6 and 6.8.

²⁹ Criminal Procedure Rules 2012, rr 6.6(1).

³⁰ Criminal Procedure Rules 2012, rr 6.6(5).

³¹ Criminal Procedure Rules 2012, rr 6.8.

³² Criminal Procedure Rules 2012, rr 6.5(3).

³³ Criminal Procedure Rules 2012, rr 6.5(3).

2012 requires the judge or registrar to consider the right of the defendant to a fair hearing.³⁴ Section 25(a) of the New Zealand Bill of Rights Act 1990 provides that a person who is charged with an offence has “the right to a fair and public hearing by an independent and impartial court.” Releasing documents may prejudice a trial, especially if the documents are not eventually admitted into evidence. It is also important to prevent a trial by media, especially in relation to high profile cases.³⁵

(iv) The role of the registrar

27. The final difference is that in criminal proceedings registrars may not be delegated the responsibility to determine whether to grant access to the court file. In the civil context, a judge may direct that a registrar should determine whether to grant permission to access the court file. In the criminal context, a registrar may only grant access during the proceeding stage where no objection is received. If an objection is received or if the application is made after the substantive hearing stage, a judge must determine whether to grant permission to access the court file.³⁶

Issues identified with the existing rules

Issue 1: Structure and ease of understanding relationship between rules

28. The first issue identified by the Rules Committee in its review of the access to court document rules is the complicated scheme of the rules and repetition in the rules. As the criminal access rules adopt the same scheme as the civil access rules, the same issues apply to the criminal access rules as well.
29. Within the access to court documents rules there is significant cross-referencing and various provisions that would flow together are separated by several rules. For example, in the High Court Rules, r 3.11 provides that where rr 3.7 to 3.9 do not apply, a person may make a request under r 3.13. Rule 3.12 then sets out general restrictions on access that apply generally, not just to requests under r 3.11. Rule 3.13 provides the mechanism for applying where the person falls under r 3.11, but also for where a judge has restricted access and so a party cannot access the court documents as of right. Rule 3.14 states that a judge or registrar may refuse an application or grant it in whole or part. But it is only at r 3.16 that the matters to be considered in deciding whether to grant or refuse an application are set out.
30. Many people who apply to access the court file are non-lawyers and this complicated scheme can be difficult to follow. The rules should be simple and easy to follow to assist applicants and parties to know the process and what is required, along with the likelihood of obtaining documents.
31. There is also repetition within the rules. The rules relating to who can apply to access court documents – rr 3.7, 3.8 and 3.9 of the High Court Rules – each contain a subclause providing that a judge may direct that the court file or any document may not be accessed without the permission of the court where r 3.12 already provides this. Such repetition in the other rules simply adds to the density of the rules.
32. The Rules Committee has formed the view that the rules can be simplified to provide a more streamlined structure that is easier to understand and apply.

³⁴ Criminal Procedure Rules 2012, r 6.10(2)(a). This additional factor is similar to the additional factor in r 17(a) of the CA(Access)R which provides that the court must consider “the right of the defendant to a fair hearing” “if the appeal relates to a defendant whose trial is yet to take place or who may be retried”.

³⁵ *APN New Zealand Ltd v Banks* [2014] NZHC 915, [2014] NZAR 514 at [18].

³⁶ Criminal Procedure Rules 2012, r 6.8.

Question: Is the existing scheme in both the civil and criminal access to court documents rules easy to understand and apply? What improvements to structure would you suggest?

Issue 2: The automatic release mechanism in the substantive hearing stage

33. If a person makes a request during the substantive hearing stage in a civil proceeding, or during proceeding prior to the expiry of appeal rights in a criminal proceeding, the rules set out a fast track mechanism for the request. The registrar must promptly give the parties a copy of the request and the parties have one day to raise an objection in writing if the request is made during the hearing or trial, or three working days if the request is made outside this period but during the substantive hearing stage. If no party objects during this specified period then the registrar *must* release the documents unless the documents are restricted either by an enactment or court order.
34. In such a situation, a significant onus is placed on the parties to determine whether the documents should be released. The rationale behind the onus on the parties is that during the substantive hearing stage the principle of open justice takes on great importance. While the privacy interests of the parties continue to apply, it is for the parties not the court to determine whether or not there are privacy interests which should be protected. This recognises the parties' autonomy.
35. In practice this onus on the parties and their lawyers is not well placed. During the proceeding, the parties and their lawyers are generally extremely busy and may overlook providing the court with a written objection to a request, especially when the deadlines for making such an objection are so short. There are many instances where the court documents impact on third parties and their privacy interests. In such situations, placing the onus on the parties may not protect these parties' interests, although a court may direct that these parties also be served with the request.
36. If no objection is received, the rules do not provide any discretion to the registrar or judge to decline an application. If the judge has not restricted the court file in general, then the registrar must release the documents. This fast track mechanism bypasses applying the normal considerations for determining whether access should be granted. Unless objected to, the nature of, and reasons for, the request are not considered. This mechanism automatically gives a prima facie supremacy to the principle of open justice at the substantive hearing stage at the expense of other matters that may be relevant as well.
37. For these reasons, the Rules Committee considers that this automatic release mechanism should be removed. All requests to access court documents should be determined by a judge with reference to the matters including the principle of open justice but also the fair and open administration of justice and the protection of privacy and confidentiality. The fact that a party has not objected is relevant to, but not determinative of, whether access should be granted.

Question: During the substantive hearing stage, should requested documents be automatically released unless a party objects to the request or unless there is an existing order restricting access?

Issue 3: The different ways to apply for permission to access court documents

38. As outlined above, applications for permission to access court documents can arise at three different times: if a judge has restricted access to the documents, at the substantive hearing stage following an objection, or before or after the substantive hearing stage.
39. While the application that is made is the same regardless of when the application is made, in that it must specify the nature of, and reasons for, the request, the process by which the application is dealt with varies. Where the parties themselves have applied for permission following the documents being restricted, the matter goes to a judge and the judge decides whether to grant permission by reference to the matters that must be considered. Where a person makes a request during the substantive hearing stage, the request is given to the parties. If one of the parties objects, the request will be heard by a judge. Finally, if the request is made before or after the substantive hearing stage, notice is given to the parties and regardless of whether there is an objection the judge or registrar considers whether to grant permission.
40. These three mechanisms are substantially the same. Rather than provide separate application pathways, the Rules Committee considers that it would be preferable to have one process to request permission to access court documents, regardless of what stage the proceeding is at. This would only apply to requests where permission is required. Any person would still have the right to access the formal court record, and parties would still be able to request the court file at any time (subject to restrictions by the judge). However, where permission is required to access the court file the Rules Committee proposes a single process to request access to the documents. This would simplify the structure of the rules and also make the rules easier to understand.

Question: Should the three separate request mechanisms be retained or should there be a single way to request permission?

Issue 4: The role of the registrar in deciding whether to grant access

41. Under the present rules, registrars can grant access if no party objects to a request during the substantive hearing stage or during the criminal proceeding, or, under the civil rules, if a judge has delegated the decision to the registrar.
42. The Rules Committee questions whether registrars should be responsible for determining applications to access court documents. The Rules Committee has already highlighted concerns with the automatic release mechanism whereby registrars provided access if no objection was received. The Rules Committee also considers that a judge is in the best place to determine whether to grant permission to access court documents. Determining such a request involves knowing what is on the court file and the issues raised in the proceeding. Judges are familiar with the file, have a general knowledge about proceedings and issues that may arise in the proceeding, and are used to dealing with requests to access the court file.
43. While the existing civil rules provide that a judge generally determines an application, and a registrar will only determine an application if a judge directs, experience has shown that even where such a direction is made registrars tend to seek judicial involvement to determine the application. Therefore the Rules Committee considers that all requests for permission to access the court file should be determined by a judge.

Question: Should registrars be able to determine applications for permission to access the court file or should this decision be the sole preserve of judges?

Issue 5: Lack of guidance for balancing of the matters to be taken into account

44. The matters that must be considered in determining whether to grant permission are:
- a. the orderly and fair administration of justice;
 - b. the protection of confidentiality, privacy interests, and any privilege held by, or available to, any person;
 - c. the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions;
 - d. the freedom to seek, receive and impart information; and
 - e. whether a requested document is subject to restrictions imposed either by the rules or by a judge or registrar.

The criminal access rules also provide that the defendant's right to a fair trial should be a matter taken into consideration.

45. Neither the civil or criminal access to court document rules provide any guidance about how much weight should be ascribed to the various matters that must be taken into account when determining whether to grant permission to access the court file. None of the matters are paramount and the court is required to undertake a balancing exercise.³⁷ The relevance and weight ascribed to each of the factors will depend on the context of the request and the nature of and the reasons for the request.³⁸ In considering the request, the court must weigh each factor in a balancing test.³⁹
46. The Rules Committee has formed the view that while this approach to the balancing exercise should be maintained, and the weight given to each factor will depend on the nature of the request and the reasons for it, some guidance should be given as to what weighting may be applied to each factor at different stages of the proceeding. This is not intended to circumscribe the judge's discretion but rather provide an indication to applicants of the likelihood of permission being granted depending on the stage of the proceeding and what types of documents are requested.
47. Prior to the trial or hearing, courts tend to place significant emphasis on protecting the parties' privacy and confidentiality interests and the orderly and fair administration of justice. During this period, it may not be clear whether the proceeding will go to trial and whether the documents will be made public. Preserving privacy and confidentiality may facilitate the settling of the claim without the need for a trial. There may also be documents that affect the privacy or confidentiality interests of third parties, such as witness statements. Even if the proceeding goes ahead to trial, some documents may not be relied upon at trial or may be discredited.⁴⁰
48. In addition to privacy considerations, the principle of the orderly and fair administration of justice is also relevant. This principle focuses on protecting the trial process and takes into

³⁷ *Schenker AG v Commerce Commission*, above n 2, at [37].

³⁸ At [37].

³⁹ At [21] approving the approach in *Commerce Commission v Air New Zealand Ltd* [2012] NZHC 271 at [26]–[27].

⁴⁰ *APN New Zealand Ltd v Banks*, above n 35, at [23].

account the effect of disclosure on the proceedings as a whole or on other proceedings.⁴¹ In *Commerce Commission v Air New Zealand Ltd* the parties had disclosed information to each other in creating the statement of facts and this assisted the Court in defining the issues.⁴² This encouraged the parties to use the most speedy and cost-effective procedures to resolve the dispute. Asher J considered that allowing access may discourage the parties from cooperating in later stages of the proceedings as well as any future proceedings.⁴³ Such considerations are also relevant in determining whether to grant access. When combined with privacy interests, the factors may favour refusing permission to access court documents prior to the hearing.

49. During the hearing many of these considerations diminish in importance. Evidence is given in open court and so privacy and confidentiality interests may be reduced while the principle of open justice becomes of particular importance. Open justice requires that hearings and decisions are subject to public scrutiny.⁴⁴ This is to ensure that “[j]ustice should not only be done, but should manifestly and undoubtedly be seen to be done.”⁴⁵
50. To ensure that justice is done and seen to be done “[i]n general the public, including the media, have full access to court proceedings as and when they take place. ... The degree of access usually fulfils the values of open justice and the right to freedom of expression....”⁴⁶ As well as having full access to attend court proceedings, the public and media generally will be able to have access to documents admitted into evidence that may impact on the decision so long as these documents are not confidential or contain information that may adversely affect the interests of third parties. Therefore during the substantive hearing stage, the principle of open justice has significant weight and would tend to favour granting access to documents admitted into evidence.
51. Following a trial, the principle of open justice continues to be of importance in relation to documents admitted into evidence and potentially documents not admitted into evidence.⁴⁷ However, the privacy and confidentiality interests of a party may assume greater significance with the passage of time.⁴⁸ Often court documents that may have been relied upon in the trial contain personal information that may not be relevant to the decision. With the passage of time it may be considered that it is not in the public interest to be release such information.

Question: Should the rules include guidance regarding the weighting of the matters to be considered in granting permission at the different stages of a proceeding?

⁴¹ In *Duff v Commicado Ltd* [1996] 2 NZLR 89 (HC) at [45] the Court stated that there is a “constitutional right to have the case determined by the Court” and if comments on the case impacted on this it could amount to contempt of court.

⁴² *Commerce Commission v Air New Zealand Ltd* above n 39.

⁴³ At [39]. Affirmed in *Schenker AG v Commerce Commission*, above n 2, at [39].

⁴⁴ *Television New Zealand v Rogers* [2007] 1 NZLR 156 (CA) at [88].

⁴⁵ *R v Sussex JJ Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart.

⁴⁶ *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [121].

⁴⁷ In *Rogers v Television New Zealand Ltd*, above n 46, at [124] McGrath J considered that the public has “a legitimate interest in being fully informed of the nature of excluded evidence in order to make their own assessments of the Court’s reasons for exclusion.”

⁴⁸ *Re Whittingham* [2013] NZHC 1726 at [10]; and *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC) at 733. In *Rogers v Television New Zealand Ltd*, above n 46, at [48] Elias CJ considered that in the criminal context there was a public as well as a private interest in the re-integration of offenders. The Chief Justice cited Lord Bingham in *R v Chief Constable of North Wales Police ex parte AB* [1999] QB 396 (CA) at 414 where Lord Bingham considered that it was unacceptable that persons who had completed their sentences could be “harried from parish to parish like paupers under the old Poor law.”

Issue 6: Freedom of expression as an explicit

52. The freedom to seek, receive and impart information was considered by the Supreme Court in *Mafart v Television New Zealand* to be one of the “contemporary values and expectations” in which applications to access court documents needed to be considered.⁴⁹ Both the civil and criminal access to court documents rules recognise this and the freedom to seek, receive and impart information is one of the matters that a court must consider in determining whether to grant access to court documents.
53. It is not necessarily clear how this freedom to seek, receive and impart information applies in determining whether to grant access to court documents. This freedom is not an end in itself but one tied to autonomy, self-determination and self-expression.⁵⁰ It exists alongside the right of freedom of thought, conscience and religion.⁵¹ At its foundation, freedom of expression is oriented towards self-determination and self-fulfilment as it promotes a person’s ability to shape his or her identity by imbibing a variety of information or expressing those thoughts either individually or in community, in private or in public.⁵² As the Supreme Court of Canada explained:⁵³

The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one’s circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one’s life and perhaps the wider social, political, and economic environment.

54. Conceived of in this light, as fostering the “marketplace of ideas”,⁵⁴ it is not immediately clear how the freedom to seek, receive and impart information applies to the release of court documents. As discussed above at paragraph 10, documents are provided to a court by two or more parties to resolve a dispute. This is often private information about the parties and these documents do not become public simply by virtue of being held by the court.⁵⁵ The freedom to seek, receive and impart information does not naturally apply to a desire to obtain non-public information or private facts because this type of private information does not go to shaping one’s identity, self-fulfilment, and participation in social and political decision making. For this reason, in a contractual dispute between a vendor and supplier, a person could not approach a party and demand to see the contract and other information relying on the freedom to seek, receive and impart information.⁵⁶

⁴⁹ *Mafart v Television New Zealand*, above n 10, at [7]. The freedom to seek, receive and impart information is set out in s 14 of the New Zealand Bill of Rights Act 1990.

⁵⁰ Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 311 disagree and consider that “the freedom of expression is an end as well as a means”.

⁵¹ Under Art 19 of the International Covenant on Civil and Political Rights the two rights are coupled under the same right.

⁵² As the Supreme Court of Canada explained in *Ching RWDSU, Local SSB v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at [32]: “The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one’s circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one’s life and perhaps the wider social, political, and economic environment.”

⁵³ *Ching RWDSU, Local SSB v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at [32] cited in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [114].

⁵⁴ *Abrams v United States* (1919) 250 US 616 at 630.

⁵⁵ *Mafart v Television New Zealand Ltd*, above n 10, at [24]; and *R v Mahanga*, above 12, at [29]. In *R v Wharewaka* (2005) 21 CRNZ 1008 (HC) at [39] Baragwaneth J stated that the playing of video in the court did not constitute “such publication as would warrant concluding that the information has already entered the public domain.” However caution must be exercised as in *Rogers v Television New Zealand Ltd*, above n 46, at [104] McGrath J considered that there was no reasonable expectation of privacy in a video that was recorded to be shown at trial where the public could attend.

⁵⁶ The rights set out in the New Zealand Bill of Rights Act 1990, including freedom of expression (s 14) only apply in relation to acts done by the legislature, executive or judicial branches of Government, or by a person or body performing a public function (s 3).

55. Just because the court possesses the documents does not automatically mean that the freedom to seek, receive or impart information requires the court to grant access. In *R v Mahanga* the Court of Appeal stated that this freedom “does not confer any right to acquire information”.⁵⁷ It is important to remember that the only reason that the court possesses the documents is because the parties have provided the documents to the court in order to have the parties’ legal rights and interests determined by the court. The information may still be private information to which the principle of freedom of expression does not properly apply, or only applies to a limited degree.
56. While the Rules Committee recognises that in some situations the freedom to seek, receive and impart information may not apply strongly, the decision to grant or refuse access to the documents is a judicial act. Therefore the New Zealand Bill of Rights Act 1990 applies to this decision and the court has to consider the freedom to seek, receive and impart information to the extent that it applies.⁵⁸ The Rules Committee is mindful that there can be issues of public interest where the freedom may apply to a greater degree than in many situations. In *Rogers v Television New Zealand Ltd* McGrath J considered that freedom of expression is aimed at fostering “legitimate public interest, debate and further scrutiny.”⁵⁹ Proceedings may involve legal matters of public importance or there may be revelations that the public has a legitimate interest to discover or learn about and this merits further discussion or scrutiny. In such circumstances the provision of the information is in the public interest and the freedom to seek, receive and impart information may have considerable weight.
57. The Rules Committee has formed a preliminary view that the freedom to seek, receive and impart information is a matter that should continue to be considered in relation to applications for permission to access the court file. However, the Rules Committee is seeking comment on this matter.

Question: Should the freedom to seek, receive and impart information continue to be a matter that is considered when determining applications for permission to access court documents? Are there any other matters that should generally be considered?

Issue 7: The application and content of the principle of open justice

58. Although, as stated, the principle of open justice is often as the starting point for an application to access court documents, there is no consensus as to what the principle actually entails. The media often uses the term to signify a right to know, however, the Rules Committee considers that, when used in relation to Court proceedings, the principle has a more limited meaning.
59. Courts have found that open justice is a principle and not a right.⁶⁰ It is different from freedom of expression, and cannot be expressed in fixed and immutable terms.⁶¹
60. The purposes behind the concept include the importance of the public being able to understand court processes, and how and why a particular decision is reached.⁶² Such

⁵⁷ *R v Mahanga*, above n 12, at [29].

⁵⁸ New Zealand Bill of Rights Act 1990, ss 3(a) and 14.

⁵⁹ *Rogers v Television New Zealand Ltd*, above n 46, at [116].

⁶⁰ *Commerce Commission v Air New Zealand*, above n 39, at [29], endorsed by *Schenker AG v Commerce Commission*, above n 2, at [32]. See also *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [29].

⁶¹ *Police v O'Connor* [1992] 1 NZLR 87 (CA) at 95 and 97; *Rogers v Television New Zealand Ltd*, above n 46, at [117] per McGrath J; and *John Fairfax Publications Pty Ltd v Ryde Local Court*, above n 60, at [60].

⁶² *Regina (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] EWCA Civ 420, [2013] QB 618 at 650; *Rogers v Television New Zealand Ltd*, above n 46, at [34], [35], 74] and [119]; and *Broadcasting Corp of New Zealand v Attorney General* [1982] 2 NZLR 120 (CA) at 123.

information and understanding ensures there is transparency of decision-making and judicial accountability, and assists in maintaining public confidence in the judicial system.

61. Although, as discussed, the principle of open justice may require different things and carry more or less weight at different stages of proceedings, and depending upon the competing interests at stake, the Rules Committee feels that it could be useful to try to give the concept some meaning in the rules rather than just referring to the concept generally.

Question: Should the principle of open justice continue to be a matter to be taken into account when determining applications for permission to access court documents? Should the rules try to define the content of the principle, and, if so, how should this be defined?

Issue 8: The protection of private information and commercially sensitive information

62. Many legal disputes involve private facts or commercially sensitive information. In order to resolve these legal disputes, these facts or information must necessarily be disclosed. This is considered to be the price that is paid for having the court determine matters. However, disclosing these facts or information to the general public can discourage persons from bringing or defending proceedings.
63. The Rules Committee recognises that it is an important principle of justice to keep the courts open to all persons seeking to resolve disputes so that such disputes are resolved fairly, according to the law. While at the time of the dispute, the disclosure of such facts or information may be necessary, prior to the proceeding there is no need to allow people to access such information as the proceedings may be settled prior to the hearing. After the hearing, there is little need to allow the general public to trawl through court documents and discover private facts that are not directly related to the proceedings or commercially sensitive information disclosed in the course of the proceeding but not directly at issue.
64. The Rules Committee considers that private facts about individuals or commercially sensitive information that are not directly relevant to a proceeding should not unnecessarily be disclosed before or after a proceeding. This is not an absolute principle and must be balanced against the other factors, including open justice and freedom of expression. However, the Rules Committee considers it appropriate to include this additional factor to make it clear that the effects of the disclosure of the type of information on the general court system should be borne in mind.

Question: Should the protection of private facts and commercially sensitive information be an additional principle?

Issue 9: The right to a fair trial as an additional consideration in the criminal context

65. While the criminal access to court document rules are largely the same as the civil access to court document rules, there are some differences as outlined above.⁶³ One of these differences is that the criminal rules require the court to consider the “right of the defendant to a fair hearing” in addition to the other considerations that are also in the civil rules.⁶⁴
66. Like the “freedom to seek, receive and impart information”, the “right of the defendant to a fair hearing” is drawn from the New Zealand Bill of Rights Act 1990. Section 25(a) of the Act

⁶³ At [21] to [27].

⁶⁴ Criminal Procedure Rules 2012, r 6.10(2)(a).

provides that a defendant has “the right to a fair and public hearing by an independent and impartial court.” Coexisting with this right as a matter to be considered when deciding whether to grant access is the principle of the orderly and fair administration of justice. Whether it is proper to draw a distinction between the right to a fair hearing and the orderly and fair administration of justice is not necessarily certain. The right to a public hearing provided for in s 25(a) is encompassed by the principle of open justice.⁶⁵ Likewise it could be argued that the right to a fair hearing provided in s 25(a) is encompassed by principle of the orderly and fair administration of justice. If the hearing is not fair then there could not be any fair administration of justice in that hearing.

67. The courts have drawn a distinction between fair trial rights, which relate to the fairness of the procedure, and the open and fair administration of justice, which is concerned more generally with the operation of the proceeding, with court proceedings generally and the maintaining the functioning of the justice system. In *APN New Zealand Ltd v Banks Wylie J* declined a request for access to court documents in part because of the risk of a trial by media.⁶⁶ While Wylie J considered that granting access would not deprive the defendant of the right to a fair trial, His Honour was of the view that it could lead to a trial by media, which may use documents that might not be presented in court.⁶⁷ Conducting a trial in the media is inimical to the proper operation of the justice system and the determination of legal rights by the courts and this weighed heavily against granting access.⁶⁸
68. While in civil proceedings the principle of orderly and fair administration of justice may encompass rights to a fair trial, this case illustrates that in the criminal rules there is a distinction between the right to a fair trial and the orderly and fair administration of justice. Consequently, the Rules Committee is of the view that the right to a fair trial should continue to be a separate matter to be considered in requests to access criminal documents. However, the Committee is seeking comment on this matter.

Question: Should the right to a fair trial continue to be a matter that is considered when determining applications for permission to access criminal court documents? Are there any other matters that should generally be considered?

Issue 10: The existing list of enactments

69. The High Court Rules and the District Courts Rules both set out a non-exhaustive list of enactments where access to court documents is restricted and non-parties must seek permission to access the documents.⁶⁹ These are:
- (a) Adoption Act 1955;
 - (b) Alcoholism and Drug Addiction Act 1966;
 - (c) Arbitration Act 1996;
 - (d) Care of Children Act 2004;
 - (e) Child Support Act 1991 (In the District Courts Act);
 - (f) Civil Union Act 2004;
 - (g) Domestic Violence Act 1995 (in the District Courts);
 - (h) Family Proceedings Act 1980;

⁶⁵ *Television New Zealand v R*, above n 44, at [17].

⁶⁶ *APN New Zealand Ltd v Banks*, above n 35.

⁶⁷ At [18].

⁶⁸ At [19] and [20].

⁶⁹ HCR, r 3.12 and DCR, r 3.8.

- (i) Family Protection Act 1955;
- (j) Harassment Act 1997 (in the District Courts);
- (k) Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003;
- (l) Marriage Act 1955;
- (m) Mental Health (Compulsory Assessment and Treatment) Act 1992;
- (n) Property (Relationships) Act 1976;
- (o) Protection of Personal and Property Rights Act 1988;
- (p) Status of Children Act 1969 (in the High Court).

70. The Court of Appeal (Access to Court Documents) Rules 2009 and the Criminal Procedure Rules 2012 contain no such list of enactments.⁷⁰ Where these enactments do apply, there is a presumption of refusing access.
71. The Rules Committee is seeking comment on whether the list of enactments is comprehensive or whether other enactments should be added to this list.

Question: Is the list of enactments in the District Court Rules and the High Court Rules restricting access comprehensive or should other enactments be included?

Issue 11: Transferring to Archives New Zealand and regulating requests

72. After a proceeding has concluded, the court retains the court file for 10 years.⁷¹ After 10 years many of the documents are transferred to Archives New Zealand.⁷² Once transferred to Archives New Zealand, access to the documents is governed by the Public Records Act 2005.
73. Under the Public Records Act 2005, before the documents are transferred to Archives New Zealand the administrative head of the court possessing the documents⁷³ classifies the records as either open access records or restricted access records.⁷⁴ Under the current classification most court records are classified as restricted access records and have access restrictions imposed lasting for 100 years for criminal records and 60 years for civil records, although some (such as adoption records or other suppressed documents) have an indefinite restriction.⁷⁵
74. If a person wishes to access these records they must apply to the court which held the documents prior to transferral to Archives New Zealand.⁷⁶ The court then has to determine whether to grant access to these records. At first glance, the civil and criminal rules do not

⁷⁰ CA(Access)R, r 12 and Criminal Procedure Rules 2012, r 6.9.

⁷¹ Archives New Zealand "Retention Schedule for Courts Records" (DA564).

⁷² All documents in the Supreme Court, Court of Appeal and High Court are transferred to Archives New Zealand. Documents held in the District Court relating to civil proceedings are generally not of archival value (except significant cases) while certain documents from criminal proceedings are to be retained where the Police incident and offence schedule recommends retention or it is a significant case.

⁷³ The term in s 43 of the Public Records Act 2005 is "administrative head of the controlling public office". "Public office" is defined in s 2 as including the judiciary. "Controlling public office" is defined as the public office that controls the public record.

⁷⁴ Public Records Act 2005, s 43. In classifying the documents, the administrative head must consider whether there are good reasons to restrict public access to the documents, having regard to any relevant standard or advice issued by the Chief Archivist, or whether another enactment requires the public record to be withheld from public access. If neither ground applies, then a public record must be classified as an open access record.

⁷⁵ Archives New Zealand "Retention Schedule for Courts Records" (DA564) sets out the classifications. However most of the registers and probate documents are open access.

⁷⁶ Access Authority 866 provides that access will be decided by "a judge of each relevant court" and requests should be addressed "dependent on court transferring records".

apply to such a determination for documents transferred to Archives New Zealand. Both the criminal and civil access rules provide that the rules apply "... to documents while they are in the custody or control of the court and until they are transferred to Archives New Zealand."⁷⁷ However, in practice the rules do. Under s 24 of the Public Records Act 2005, Archives New Zealand transfers the documents back to the court making the determination. This results in the documents being "in the custody or control of the court" and so the access rules apply to determining whether the documents should be released.

75. The Rules Committee considers that the rules should be made clearer as to their application to requests made to Archives New Zealand. Prior to the 2009 reforms the rules did not exclude their application to requests made to Archives New Zealand but applied for 60 years.⁷⁸ Because both the civil and criminal access rules apply to determining requests made for accessing court documents held by Archives New Zealand, then it is inaccurate for the rules to state that they apply "until [the documents] are transferred to Archives New Zealand." The various rules should be amended to state that the access rules apply to "documents while they are in the custody or control of the court." Control would include determining whether to grant access even where the Court does not have physical custody over the documents because of the restricted status on the documents that means that only the court can decide to release the documents.

Question: Should the rules apply to requests made to access documents held by Archives New Zealand? Should the rules be amended to make this clearer?

The proposed rules

General scheme of the rules

76. The Rules Committee proposes introducing a single set of rules covering access to documents in both civil and criminal proceedings. Draft High Court (Access to Court Documents) Rules are **attached** as an appendix to this consultation document.
77. The Rules Committee has adopted a simple structure for both sets of rules as follows.
- (1) Interpretation;
 - (2) Application of the rules;
 - (3) General right of public to access the formal court record and the right of parties to access documents on the court file;
 - (4) Process for all other requests, including where parties require permission;
 - (5) Restrictions on access;
 - (6) How requests should be considered by a judge;
 - (7) Additional provision empowering judge to manage request.
78. This scheme is simpler than the existing rules and follows a more streamlined approach. While some rules are larger as a consequence of consolidating what has been separate rules, for example, the rule on how requests should be considered by a judge, and also in incorporating criminal specific provisions, this improves the comprehensibility of the rules.
79. The content of the rules is outlined below including the substantive changes:

⁷⁷ HCR, r 3.6(1); DCR, r 3.2(1); CA(Access)R, r 4(1); Criminal Procedure Rules 2012, r 6.2(1).

⁷⁸ High Court Rules 1985, r 66(12) and the Criminal Proceedings (Search of Court Records) Rules 1974, r 2(8).

(1) *Interpretation*

The interpretation sets out the definitions for the access rules and is largely unchanged.

(2) *Application*

This rule sets out what documents the rules apply to. The rules apply to documents while they are in the custody or control of the court. The phrase, “until they are transferred to Archives New Zealand”, has been deleted as it is incorrect.

(3) *General right of public and parties to access certain court documents*

This rule sets out who has a general right to access documents and what these documents are. The rule combines what was two separate rules. Under this rule, anyone has the general right to access the formal/permanent court record. Parties and their lawyers have the right to access all documents on the court file. However, as before, this rule is subject to statutory restrictions and judicial orders.

(4) *Any person may request access to other court documents*

This rule provides a single mechanism whereby a person may request access. The applicant must provide his or her address, identify the requested documents and give sufficient reasons for the request. The addition of “sufficient” is to ensure that applicants provide a detailed reason to enable the request to be properly considered.

Following this, the registrar gives the application to the parties or their counsel. The parties or counsel have either one working day, if the request is made during a hearing, or three working days, if the request is made at any other time, to object to access being granted. An objection is important, in particular to determining the privacy and confidentiality interests of a party. However, regardless of whether an objection is received, a judge will consider the application.

(5) *Restrictions on access*

This rule sets out a simplified restriction provision and provides that any right or permission to access a court document is subject to any enactment, court order, or direction limiting or prohibiting access or publication and also the payment of any prescribed fees for access. The list of enactments where access is restricted has been moved to the following rule.

(6) *Consideration of application*

This rule sets out how a request is determined by a judge. The judge must consider the nature of, and reasons for, the application and then take into account certain matters, including the orderly and fair administration of justice and the principle of open justice.

Subclause (2) sets out some guidance as to the weighting of the matters that a judge may consider. This is described in non-directive terms as a judge should only “have particular regard” to the matters and the matters are themselves discretionary. Prior to the substantive hearing, the protection of confidentiality and privacy interests as well as the orderly and fair administration of justice may require that access is restricted. During the substantive hearing, open justice has greater weight, in particular in relation to documents admitted into evidence. After the substantive hearing, the principle of open justice continues to apply to documents admitted into evidence but the protection of privacy may have a greater application. This guidance is intended to assist applicants in understanding what weighting may be given to the different factors at different stages of the proceeding and the likelihood of obtaining documents.

Subclause (2) also makes it clear that the courts receive documents for the purpose of resolving disputes and that any disclosure of information should be consistent with this purpose.

Subclause (3) then sets out the enactments where access is restricted. If the proceeding is brought under one of those enactments, unless the judge is satisfied there is good reason for permitting access, a person may not access documents.

(7) *Procedure to be adopted by Judge in dealing with requests and objections*

Finally, this rule makes it clear that judges have the discretion to determine any application in any manner considered just and may request interlocutory or originating applications to be filed, notice to be given to persons other than the parties and their lawyers, or to dispense with the required notice.

A single set of rules - differences between civil and criminal rules

80. The Rules Committee has formed the view that there should be a single set of rules regulating access to documents in both civil and criminal proceedings. The single set of rules would be located in the civil procedure rules of each court, such as the High Court Rules for documents held by the High Court. Providing for one set of rules to regulate accessing documents in a particular court, recognises that the decision to grant access to court documents, in both civil and criminal proceedings, is a civil determination.⁷⁹
81. Having a single set of rules would also assist lay persons and the media who would only have to be familiar with one set of rules regulating access to court documents. This would also enable the case law on the interpretation of the rules to grow and for decisions about access to civil and criminal documents to inform each other. While this happens to some extent presently, combining the rules would enable this to occur more fluidly.
82. At the same time, the Committee recognises that having a single set of rules may result in lengthier rules due to some of the differences between the civil and criminal access regime.⁸⁰ Further, s 404A of the Criminal Procedure Act 2011, providing that request to access court documents prior to the Act coming into force are dealt with under Part 6 of the Criminal Procedure Rules, would need to be repealed or amended to refer to the High Court Rules.

Question: Do you agree with the proposal to have a single set of rules in the civil procedure rules of each court covering access to documents in both criminal and civil proceedings?

⁷⁹ *Mafart v Television New Zealand Ltd*, above n 10, at [40].

⁸⁰ As stated above these are:

- (a) Specifying that requests may be made by the prosecutor or defendant orally during the hearing;
- (b) Restrictions on access apply to types of documents rather than stemming from the types of proceedings;
- (c) Differences between the "formal court record" and the "permanent court record" which the proposed set of rules subsume into the formal court record;
- (d) When the substantive hearing runs from;
- (e) Different general rights (and restrictions) of public to access documents depending on criminal or civil proceedings;

Summary of proposed changes

83. In summary, the proposed rules make the following changes to the existing rules:
- (1) Single set of rules covering access to both civil and criminal documents;
 - (2) Simplified structure;
 - (3) Single mechanism for requests for permission;
 - (4) Only judges can give permission to access court documents; and
 - (5) Guidance as to the weighting of particular matters at different stages of the proceeding is provided in the rules.

Summary of questions

84. The Rules Committee invites submissions on the access to court documents rules. In particular, the Rules Committee seeks feedback on the following questions:
- (1) Do you agree with the issues identified in the current access to court document rules?
 - (2) Are there other issues that exist in relation to accessing court documents and the rules that regulate this?
 - (3) Do the proposed rules adequately address these issues?
 - (4) Is the proposed guidance as to the weight attached to the matters to be considered at different stages of a proceeding appropriate?
 - (5) Should the protection of private facts and commercially sensitive information be included as an additional principle?
 - (6) Should the freedom to seek, receive and impart information and the right to a fair trial (for criminal proceedings) continue to be a matter to be considered when determining whether to grant access? Are there other matters that should be considered?
 - (7) Should the principle of open justice continue to be a matter to be taken into account when determining applications for permission to access court documents? Should the rules try to define the content of the principle, and, if so, how should this be defined?
 - (8) Should the access to court document rules regulate access to documents transferred to Archives New Zealand?
 - (9) Should a single set of rules covering access to both civil and criminal documents be adopted?
 - (10) Are there problems with the proposed rules?
 - (11) Should the existing rules be changed and replaced by the proposed rules?

Return of submissions

85. Please return submissions or comments on the proposed changes to Harriet Bush, the Clerk to the Rules Committee, by Friday 19 June 2015 by post to:

Ms Harriet Bush
Clerk to the Rules Committee
Auckland High Court
PO Box 60
Auckland 1010

Or by emailing the submissions to: harriet.bush@courts.govt.nz

86. Submissions that are received may be posted on the Rules Committee website.

The Rules Committee would like to take the opportunity to remind members of the profession that feedback from the profession is a valuable way of ensuring that the rules are working well. If you have any concerns about a particular rule please raise this with the Committee by emailing RulesCommittee@courts.govt.nz

DRAFT FOR CONSULTATION

High Court (Access to Court Documents) Rules 2015

Governor-General

Order in Council

At Wellington this day of 2015

Present:
in Council

Pursuant to section 386(1) of the Criminal Procedure Act 2011 and section 51C of the Judicature Act 1908, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council and with the concurrence of the Right Honourable the Chief Justice and at least 2 other members of the Rules Committee established under section 51B of the Judicature Act 1908 (of whom at least 1 was a Judge of the High Court), makes the following rules.

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Rules

1 Title

These rules are the High Court (Access to Court Documents) Rules 2015.

2 Commencement

These rules come into force on [date].

3 Application

- (1) These rules apply to the High Court.
- (2) These rules apply to documents while they are in the custody or control of the court and until they are transferred to Archives New Zealand.
- (3) These rules do not require any person to prepare a document that is not in existence at the time the document is sought.

4 Interpretation

In these rules, unless the context otherwise requires,—

access means to search, inspect, or copy under the supervision of an officer of the court

court means the High Court

court file means a collection of documents in the custody or control of the court that relate to a proceeding (including any interlocutory application associated with the proceeding)

document,—

- (a) in relation to civil proceedings,—
 - (i) means any written material in the custody or control of the court that relates to a proceeding (including any interlocutory application associated with the proceeding), whether or not kept on a court file; and
 - (ii) includes documentary exhibits, video recordings, records in electronic form, films, photographs, and images in electronic form; but
 - (iii) excludes—
 - (A) notes made by or for a Judge for his or her personal use; and
 - (B) any material that relates to the administration of the court; and
- (b) in relation to criminal proceedings, has the meaning set out in section 5 of the Criminal Procedure Act 2011

formal court record means any of the following kept in a registry of the court:

- (a) a register or an index:
- (b) the permanent court records under Part 7 of the Criminal Procedure Rules 2012:
- (c) any published list that gives notice of a hearing:
- (d) a document that—
 - (i) may be accessed under an enactment other than these rules; or
 - (ii) constitutes notice of its contents to the public:
- (e) a judgment, an order, or a minute of the court, including any record of the reasons given by the Judge:
- (f) the rolls of barristers and solicitors kept under section 56 of the Lawyers and Conveyancers Act 2006 or any former corresponding enactment

Judge means a High Court Judge

substantive hearing means,—

- (a) in relation to criminal proceedings,—
 - (i) from the start of the trial by a judicial officer or by a Judge and jury to the end, whether by acquittal or finding of guilt or conviction or dismissal or withdrawal of the charges; and
 - (ii) if the defendant pleads or is found guilty, the sentence hearing from its beginning to the pronouncement of sentence:
- (b) in relation to civil proceedings, a hearing (other than the hearing of an interlocutory application) at which issues that will decide the ultimate outcome of the proceedings are determined.

5 General right of public and parties to access certain court documents

- (1) Every person has the right to access the formal court record of a civil proceeding that is kept in a registry of the court.
- (2) Every person has the right to access the following court records of a criminal proceeding:
 - (a) the permanent court record under Part 7 of the Criminal Procedure Rules 2012; and
 - (b) any published list providing notice of a hearing; and
 - (c) any judgment, order, or minute of the court given in a criminal proceeding, including any records of the reasons given by a judicial officer; and
 - (d) any judicial officer's sentencing notes.
- (3) Every person has the right to access any document or court file that relates to an application or action for a grant of administration under the Administration Act 1969 or to a proceeding for the recall of any such grant.

-
- (4) The parties to a proceeding, and their lawyers, may (whether during or after the completion of the proceeding), under the supervision of the Registrar or a person appointed by the Registrar,—
- (a) search and inspect the court file or any document relating to the proceeding, without payment of a fee; and
 - (b) copy any part or parts of the court file or any document relating to the proceeding on payment of any prescribed fee.
- (5) However, if the court file or document relates to a criminal proceeding,—
- (a) a Judge may direct that the court file or any document relating to the criminal proceeding not be accessed by the prosecutor and the defendant or the defendant’s lawyer without the permission of the court:
 - (b) if there is more than 1 defendant in the criminal proceeding, a defendant or the defendant’s lawyer may access the court file or document relating to the criminal proceeding only with the permission of the court.
- (6) A request for access under this rule may be made orally to a Registrar, but if the request relates to a document to which rule 7 or 8(3) relates, the Registrar may require that the request be made in writing and identify the requested document and give the reasons for the request.
- (7) If the defendant in a criminal proceeding is a corporation, the right of the defendant under this rule to access the court file or any document may be exercised by a representative of the defendant who has been appointed in accordance with section 12 of the Criminal Procedure Act 2011.

6 Any person may request access to court documents

- (1) This rule applies if a person is not entitled to request a court document under rule 5.
- (2) Any person may request access to any court document by providing the Registrar of the court concerned with a letter, an email, or any other document that—
 - (a) identifies the requester and provides the requester’s address; and
 - (b) identifies the requested document; and
 - (c) gives reasons for the request that set out the purpose for which the access is sought; and
 - (d) sets out any conditions to the right of access (for example, restrictions on the ability of the requester to disclose the documents sought and the ability to view but not copy the documents) that the requester will accept (if the conditions are imposed).
- (3) The Registrar must promptly give the parties or their lawyers a copy of the request.
- (4) A party who receives a copy of a request and wishes to object must, before 3 pm on the third working day after the day on which the copy is received (or, if

the copy is received on a day on which a hearing relating to the document is proceeding, before 3 pm on the first working day after the day on which the copy is received), give written notice of the objection to the Registrar.

- (5) The Judge may refuse an application for access under this rule or grant it in whole or in part without conditions, or subject to any conditions that the Judge thinks appropriate.
- (6) Without limiting the powers conferred by subclause (5), the Judge may refuse an application for permission solely for the reason that the document setting out the request does not comply with subclause (2)(a), (b), (c), or (d).

7 Restrictions on access

Any right or permission conferred or given by these rules to access a document, a court file, or any part of the formal court record is subject to—

- (a) any enactment, court order, or direction limiting or prohibiting access or publication; and
- (b) the payment of any prescribed fees for access.

8 Consideration of application

- (1) In determining an application under rule 6, the Judge must consider the nature of, and the reasons given for, the application and take into account each of the following matters that is relevant to the application or any objection:
 - (a) the right of a defendant in a criminal proceeding to a fair trial:
 - (b) the orderly and fair administration of justice:
 - (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals or matters that are commercially sensitive than is necessary to satisfy the principle of open justice:
 - (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
 - (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
 - (f) the freedom to seek, receive, and impart information:
 - (g) whether a document to which the application or request relates is subject to any restriction under subclause (3):
 - (h) any other matter that the Judge thinks appropriate.
- (2) In applying subclause (1), the Judge must have particular regard to the following:

- (a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to court documents be limited:
 - (b) during the substantive hearing, open justice has—
 - (i) greater weight than at other stages of the proceeding; and
 - (ii) greater weight in relation to documents admitted into evidence than other documents:
 - (c) after the substantive hearing,—
 - (i) open justice has greater weight in relation to documents that have been admitted into evidence than other documents; but
 - (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.
- (3) Unless the Judge is satisfied that there is good reason for permitting access, a person may not access a document, a court file, or any judgment or order that relates to a proceeding brought under the following enactments:
- (a) Adoption Act 1955:
 - (b) Alcoholism and Drug Addiction Act 1966:
 - (c) Arbitration Act 1996:
 - (d) Care of Children Act 2004:
 - (e) Civil Union Act 2004:
 - (f) Family Proceedings Act 1980:
 - (g) Family Protection Act 1955:
 - (h) Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:
 - (i) Law Reform (Testamentary Promises) Act 1949:
 - (j) Marriage Act 1955:
 - (k) Mental Health (Compulsory Assessment and Treatment) Act 1992:
 - (l) Property (Relationships) Act 1976:
 - (m) Protection of Personal and Property Rights Act 1988:
 - (n) Status of Children Act 1969:
 - (o) Wills Act 2007:
 - (p) any former provisions corresponding to provisions of any of the Acts mentioned in paragraphs (a) to (o).
- (4) A Judge may, on his or her own initiative or on request, direct that judgments, orders, documents, or files of any kind may not be accessed without the permission of the court.

9 Procedure to be adopted by Judge in dealing with requests and objections

A Judge may determine a request (and any objection referred to the Judge under rule 6(4)) in any manner the Judge considers just (including on the papers or at an oral hearing) and may—

- (a) require the requester or other person concerned to file an interlocutory application or originating application; or
- (b) require the requester or other person concerned to give notice of the request to any person who is, in the opinion of the Judge, adversely affected by the request; or
- (c) dispense with the giving of notice under paragraph (b), if the Judge thinks appropriate.

Clerk of the Executive Council.

Explanatory note

This note is not part of the rules, but is intended to indicate their general effect.

These rules, which come into force on [date], replace subpart 2 of Part 3 of the High Court Rules. Subpart 2 of Part 3 of the High Court Rules sets out rules about access to court documents in the High Court. There is a concern that the existing rules dealing with access to court documents in both criminal and civil proceedings are unduly complex and offer insufficient guidance as to the approach to be adopted when requests are made to the court for access to court documents. Much of the complexity in the existing rules arises from the separate treatment given to requests that are made during the substantive hearing stage of the proceedings and requests made at other stages of the proceedings. These rules abolish that rigid distinction. The key feature of these rules is the introduction of more specific guidance as to the different weight to be given to different factors when assessing requests by the public for access to court documents at different stages of the proceedings.

A key provision is *new rule 8(1)(c)*, which adds as an additional matter to be considered by a Judge in determining an application for access to documents to which there is no right to obtain access:

“the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals or matters that are commercially sensitive than is necessary to satisfy the principle of open justice”.

Another key provision is *new rule 8(2)*, which provides added guidance on the weight to be placed on different factors before, during, and after the substantive hearing. For example, before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to court documents be limited, but during the substantive hearing, open justice has greater weight than at other stages of the proceeding, and then in relation to documents

admitted into evidence than other documents. After the substantive hearing, open justice has greater weight in relation to documents admitted into evidence than other documents but the protection of privacy interests has greater weight than would be the case during the substantive hearing.

A further change introduced by these rules is that a member of the public must provide reasons when seeking access to a court document which the public is not entitled to access. This will enable the court to properly assess whether the request for access should be granted in accordance with the relevant criteria. A failure to provide reasons or to comply with the other procedural requirements relating to such requests is in itself sufficient reason for refusing the request (*see new rule 6(5) and (6)*). Finally, under these rules all substantive decisions on requests for access to information by members of the public will be made by a Judge rather than by a Registrar.

It is intended that a parallel set of rules will be created for the District Courts, and as a consequence Part 3 of the District Courts Rules 2014 and Part 6 of the Criminal Procedure Rules 2012 will be revoked.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

These rules are administered by the Ministry of Justice.