



How to Apply for Copies of Exhibits (Non-Parties) – Supreme Court of Western Australia

The Court has the power in both its civil and criminal jurisdictions to allow third parties, including the media, access to court records. This policy relates to the power to allow the Court to release copies of documents, audio visual recordings or images tendered in evidence in civil and criminal cases (exhibits).

In criminal cases, the power is contained in the *Criminal Procedures Rules 2005 (CPR)* r 51. The *Criminal Investigation Act 2006* s 121 makes it an offence to broadcast all or part of a recording of an interview between a suspect and a police officer. Section 122 permits the Court to give directions as to the supply and broadcast of an audiovisual recording of an interview. This policy applies to applications for such directions, where the interview has become an exhibit.

In civil and Court of Appeal cases, the power is contained in the *Rules of the Supreme Court 1971 (RSC)* O 67B.

In each case, the power may be exercised by a Judge or Registrar and, in certain cases, by the Court's Media Manager.

Part A – Criminal Jurisdiction (First Instance)

The Court will determine each application on a case-by-case basis. Issues which will be considered in determining if it is appropriate to release an exhibit include the victim's interests and privacy, such as whether publication of the exhibit has the potential to embarrass or humiliate a victim (or a witness); whether the exhibit is of a graphic nature; whether the exhibit identifies a child, police undercover operative or protected witness; and whether proceedings or other related investigations are finalised.

Applications in the Criminal Jurisdiction

1. An application for an exhibit is to be made in writing, including by email.
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 exhibit sought to be released, for example, exhibit number;
 - the grounds on which the application is made;
 - whether the application is being made on the basis that any exhibit released will be pooled with any other media outlets and, if so, the name of those outlets; and

- any relevant publication deadlines.

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

Type of Application	Addressee	Email
Criminal – Current trial or sentencing	Associate to presiding Judge	Associate to Judge - see website
Criminal - Other	Principal Registrar	Associate.Principal.Registrar@justice.wa.gov.au cc: central.office@justice.wa.gov.au

4. Applications should have a reference line as follows:

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

For example:

Release of exhibits – INS 1234 of 2010 – Jones - Trial before Justice Smith

5. The judicial officer dealing with the application may require the applicant to notify interested persons of the application (see CPR r 51(4) (b)).

6. If a judge or registrar grants an application, the person making the application must pay the cost of the Court supplying the copy of the exhibit (CPR r 51(5B)). A registrar may determine the costs associated with the Court supplying the copy (CPR r 51(6)).

Other considerations

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 its deliberation processes. There is also the obvious risk of media reporting of the trial referring to the released material in a way which may impact on the jury’s deliberation.

2. Where the application is made in the course of a trial, up to and including any sentencing, the request is to be made to the associate to the trial Judge. Contact details for associates are provided on the Court’s [website](#).

3. If the application is made after trial, including any sentencing, it should be addressed to the Principal Registrar.

4. Media organisations are encouraged to send their request to the Court as soon as they identify an exhibit to which they would like access. The Court will endeavour to deal with the request so that if release is appropriate, it can be arranged as soon as possible, usually either immediately after the verdict has been handed down or after sentencing. **Note:** where an accused has been convicted after trial, the Court's preference is to release copies of exhibits immediately following the conclusion of the sentencing hearing, allowing time to copy the exhibits in between the end of the trial and the sentencing.

5. 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.

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 their associate that a request has been made so as to determine whether the prosecution or the defence have any objections to the exhibit being released.

This approach will also apply to an application made to the Principal Registrar.

6. 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.

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 the 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 pixelated video footage using a copy exhibit.

7. Where one media organisation has been granted leave to inspect or obtain a copy of an exhibit, the Court's Media Manager may grant an oral application for access to the same material (CPR r 51 (2), (3A)).

8. Pursuant to CPR r 51(5), a judge or registrar may only grant an application subject to any other orders made under s 171 of the *Criminal Procedure Act 2004* (such as orders that prohibit publication of all or any parts of the proceedings, or publication of any matter likely to lead members of the public to identify a victim of an offence); and s 22 of the *Sentencing Act 1995* (which includes orders related to pre-sentence reports); and any other law that may restrict access to exhibits.

Part B – General Division (general jurisdiction) and Court of Appeal

Access to an exhibit list: As to proceedings in the General Division (general jurisdiction) and in the Court of Appeal commenced from 1 March 2018, unless access to the document is restricted, a person is entitled to have access to a list of exhibits under O 67B r 6(4)(a) or O 67B r 6(4)(b), as applicable. However, access to a document (such as a list of exhibits) may be restricted by legislation or an order made by a court in Australia. (See O 67B r 6(1).)

As to proceedings in the General Division (general jurisdiction) and in the Court of Appeal commenced prior to 1 March 2018, access to a list of exhibits will (unless restricted) be determined under O 67B r 16(1)(e). That is, a person is not entitled to access to the document as of right, but only with the leave of the Court or a registrar. Again, access to a document (such as a list of exhibits) may be restricted if the document contains information that the person is presented by an Act from possessing (O67B r 16(3)).

Access to an exhibit: In both the General Division (general jurisdiction) and in the Court of Appeal, a person is not entitled to access to an exhibit as of right. That is the case whether the proceeding was commenced prior to or from 1 March 2018.

As to proceedings commenced from 1 March 2018, access to the exhibit may only be granted with the permission of the Court given under O 67B r 9 on an application to the Court under r 11; or with the permission of the Media Manager given under r 10 on an application made to

the Media Manager under r 11. Again, access to a document (such as an exhibit) may be restricted by legislation or an order made by a court in Australia (O 67B r 6(1)).

As to proceedings commenced prior to 1 March 2018, an application for access to an exhibit will (unless restricted) will be determined under O 67B r 16(1)(e). The Rules provide that a person is not entitled to access to the document as of right, but only with the leave of the Court or a registrar. Again, access to a document (such as an exhibit) may be restricted if the document contains information that the person is presented by an Act from possessing (O 67B r 16(3)).

Determining an application

As to proceedings commenced from 1 March 2018, when considering the application for access to an exhibit, the Court must give permission if it is satisfied of the matters set out at O 67B r 9(3).

When considering the application for access to an exhibit, the Media Manager must give permission if the Media Manager is satisfied of the matters set out at O 67B r 10(3).

The Court's powers as to applications for permission are set out at O 67B r 12 (which is reproduced below), and how applications are determined is set out at O 67B r 13.

As to proceedings commenced prior to 1 March 2018, the Rules do not prescribe matters to be considered by the Court or a Registrar. Each application will be determined on a case-by-case basis. Issues which will be considered in determining if it is appropriate to release an exhibit include whether and if so to what extent the document has been referred to in open court; the stage reached in the proceeding; the contents of the document (to assess the nature and seriousness of any allegations made and whether any information on any subject matter which has the potential to damage the private or commercial interests of a party); whether access to the document is necessary or desirable to facilitate an understanding of the proceedings and thus the judicial process; and the purpose for which access is required.

In determining the application, the Court may enquire as to whether the parties to the proceedings have any objection to access being granted.

The Court may make a costs order under O 66 of the RSC with respect to applications for access to exhibits.

How an application is to be made

As to proceedings commenced from 1 March 2018, oral applications may be made to the Court and to the Media Manager if the criteria in O 67B r 11(8) or (9) are satisfied.

An application for access is taken to be an interlocutory application in the proceeding in respect of which the exhibit is held by the Court, whether or not the applicant is a party to that proceeding (O67B r 11(4)).

If the application is made to the Court (and not the Media Manager), it may be made by letter addressed to the Principal Registrar. However, the Principal Registrar may require the applicant to file a motion or summons (O67B r 11(6) and (7)).

Applications addressed to the Principal Registrar should be emailed to the associate: Associate.Principal.Registrar@justice.wa.gov.au with a 'cc' to the Supreme Court Registry: central.office@justice.wa.gov.au.

Every written application must be accompanied by the prescribed fee (if any).

Written applications must comply with O 67B r 11(11) and (12):

11. Applying for access

...

(11) Every application must —

(a) describe clearly —

- (i) the information, record or other thing to which access is wanted; and
- (ii) the proceeding in respect of which the information, record or other thing is held by the Court;

and

(b) if the applicant is a media representative, must state —

- (i) that fact; and
- (ii) whether the applicant or the applicant's employer is a party to the proceeding in respect of which the information, record or other thing is held by the Court;

and

(c) if it is for access to information or a record, state the format (such as paper or digital) in which the applicant, if allowed access, would prefer to be given the information or record.

...

12. Court's powers as to applications for permission

(1) This rule applies if a written application is made to the Court under rule 11 for permission to have access.

(2) The Court —

- (a) may order the applicant to provide additional information in the form of an affidavit;
- (b) may order the applicant to serve on a person specified in the order —
 - (i) the application; and
 - (ii) a notice giving the person an opportunity to give the Court submissions about the application;
- (c) may request any person to give it submissions about the application;
- (d) may decide the application on the basis of the documents filed without requiring the applicant to attend a hearing.

(3) The Court is not required to determine an application until after the applicant complies with an order made under subrule (2).

The applicant need not serve the application on, or give notice of it to, any person unless the Court orders otherwise under O 67B r 12.

As to proceedings commenced prior to 1 March 2018, if the application is made to the Court or a Registrar, it may be made by letter addressed to the Principal Registrar. However, the Principal Registrar may require the applicant to file a motion or summons. The Principal Registrar determine the application or may refer the application to another registrar or a Judge.

Record of the application for access

Written applications and a record of any decision by the Court or the Media Manager to grant access will be a filed document. A party to the proceedings or any third party who inspects the file (via the EDS or otherwise) will be able to inspect any access request where a decision is made, unless orders restricting access are obtained.

How access is given

Details on how access may be given is set out at O 67B r 14.