



IN THE SUPREME COURT OF BERMUDA

PRACTICE DIRECTION

ISSUED BY THE REGISTRAR

Ref. A/50

Monday 7 November 2016

CIRCULAR No. # of 2016

ACCESS TO COURT RECORDS

The purpose of this Circular is to expand upon and to provide further guidance on *Amended Practice Direction No 23 of 2015* for the benefit of persons seeking access to court files at the Registry of the Supreme Court. This Circular applies to files in the Court's **civil**, **criminal**, and **divorce** jurisdictions.

CONSULTATION

Consultation with the members of the Bermuda Bar Association, the Solicitor General, the Director of Public Prosecutions and interested members of the public began with the distribution of a draft copy of this Practice Direction. A copy was also published on the Supreme Court website.

The consultation period ran from 3 October 2016 to 28 October 2016.

Responses obtained through the consultation process were not treated confidentially and were made available at the discretion of the Registrar for further dissemination and wider discussion.

All input received was considered and reviewed carefully prior to the issuance of this Circular.

ACCESS TO COURT RECORDS IN CIVIL FILES

Absolute Right of Access to the Parties to Proceedings

1. Whether a case is inactive or pending, any party to the proceedings, either in person or through Counsel, will be given access to the court records for that matter upon payment of the fee requirements specified in paragraphs 32-33 below.

Restricted Rights of Access to Non-Parties to the Proceedings

2. The level of access available to persons who are *not* party to the proceedings will largely depend on whether the case itself is *pending* or *inactive*. Where a case is

considered by the Registrar to be inactive, the access rights become akin to the rights of a party to the proceedings subject to the exceptions set out in 3(2) of the *Supreme Court (Records) Act 1955*.

3. The distinction between a pending case and an inactive case is thus an important determining factor for the access to be granted to non-parties.

Definition of 'Pending'

4. As stated in the decision of the learned Chief Justice, Ian Kawaley, in *Bermuda Press Holdings Ltd v Registrar of the Supreme Court [2015] SC (Bda) 49 Civ (24 July 2015)*, the meaning of 'pending' or 'active' simply means active or open in the sense of awaiting a final decision or final judgment. In the context of section 3(2)(a) of the 1955 Act the following definition of pending was accepted:

"A legal proceeding is 'pending' as soon as it is commenced...and until it is concluded; ie so long as the court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein" (Stroud's Judicial Dictionary of Words and Phrases, Seventh Ed. 2006)

Definition of "Inactive"

5. It follows that the term *inactive* is to be construed as the opposite of *pending*.
6. In some cases where final judgment has not been entered, a matter will be considered inactive notwithstanding the absence of a filed notice of discontinuance. In circumstances such as these, where there has been no activity on the file for three consecutive years preceding the request, the Registrar will not consider the matter pending but rather inactive.

Restricted Rights of Access to **Non-Parties** in **Pending** Civil Cases:

7. Generally, where a non-party requests access to records in a pending matter, only the documents comprising the originating process together with any judgments and orders on the file will be made available. This applies exclusively to cases where the originating process was filed on or after 1 December 2015. (See *Amended Practice Direction No 23 of 2015*)

Documents which comprise the Originating Process:

8. Once properly filed, the following documents will be considered as documents comprising the originating process¹:
 - (i) Writ;
 - (ii) Summons;
 - (iii) Originating Motion; and
 - (iv) Petition
9. In judicial review cases, leave applications (Form 86A and verifying affidavit) will not be treated as the originating process and any orders or judgments thereto are equally excluded from the originating process category.

¹ See Order 5 Rule 1 of the Rules of the Supreme Court 1985 for reference to documents which begin civil proceedings in Court.

10. Where leave is granted in a judicial review application for leave and a notice of originating motion is filed, the said originating motion will stand as the originating process.
11. In other cases where Counsel file urgent interim applications in new matters (eg. ex parte summons and supporting affidavits for injunctive relief), Counsel must be sure to simultaneously file the originating process.
12. Where it is impracticable for Counsel to simultaneously file the originating process with urgent ex parte interim application, Counsel should file the originating process within 3 days thereafter, unless the judge hearing the interim application otherwise orders.

Exceptions when Access to the Originating Documents may be Refused

13. Access may be refused in the following categories of pending cases:
 - (i) pending cases where the originating process was filed with the Court prior to 1 December 2015;
 - (ii) any case where by Order of the Court public access to such documents has been restricted;
 - (iii) divorce proceedings and any other proceedings related to children;
 - (iv) applications in relation to arbitration proceedings;
 - (v) applications for directions in relation to trusts;
 - (vi) cases relating to the administration of the estates of deceased persons;
 - (vii) winding up proceedings (to which the Companies (Winding Up) Rules 1982 apply); and
 - (viii) any other category of case where the Court has ordered that documents be sealed or any other category which may be identified from time to time by way of Circular by the Registrar.
14. Following 13 (viii) above, the following category of cases are hereby added to the list of exceptions:
 - (ix) bankruptcy proceedings filed under the Bankruptcy Act 1989;
 - (x) mortgage actions filed under RSC Order 88 where residential property is the subject of the action;
 - (xi) actions filed under the Mental Health Act 1968; and
 - (xii) actions brought under the Criminal Justice (International Cooperation) (Bermuda) Act 1994
 - (xiii) proceedings under the Tax Information Exchange Agreements) Act 2005
15. It is important to note that the Registrar may decline to identify the specific category of exception applicable when a refusal is made. This may occur in circumstances where the revealing of the category of exception will betray the very information which is sought to be protected.

Rights of Access to Non-Parties in Inactive Cases:

16. With regard to the relevant exceptions taken from section 3(2) of the *Supreme Court (Records) Act 1955*, when a civil case is no longer pending or active, the Registrar will allow court record access to any person in the same measure as access would be made available to the parties to the proceedings.
17. The relevant section 3(2) exceptions to access which continue to apply to inactive cases include a prohibition against:
 - (i) any discretion statement or report of a medical examiner in a matrimonial cause and
 - (ii) any documents relating to any part of a trial from which all or any portion of the public has, in pursuance of section 9(4) of the Act of Parliament of the United Kingdom entitled the Official Secrets Act 1920, been excluded.
18. The Section 3(2)(b) reference to proceedings under the Indictable Offences Act 1929 is of no assistance as the 1929 Act was repealed by Schedule 3 of the Criminal Jurisdiction and Procedure Act 2015.

Refusing or Restricting Access to Non-Parties in Inactive Cases:

19. Rarely will access be denied to members of the public when a matter is considered inactive. However, the following provisions give rise to possible exceptions:
 - (i) Matrimonial Matters: Rule 130 of the Matrimonial Causes Rules 1974 provides:

“130(1) A party to any matrimonial proceedings or his attorney or the Attorney-General may have a search made for, and may inspect and bespeak a copy of, any document filed or lodged in the registry in those proceedings.

(2) Except as provided by rules 48(3) and 95(3) and paragraph (1) of this rule, no document filed or lodged in the registry other than a decree or order made in open court, shall be open to inspection by any person without leave of the registrar, and no copy of any such document, or of an extract from any such document, shall be taken by, or issued to, any person without such leave.”
 - (ii) Bankruptcy Matters: Rule 329 of the Bankruptcy Rules 1990 provides:

“329(1) The registers kept by the Registrar shall, on payment of the prescribed fee, be open to the public for inspection except that the Registrar may refuse to allow a person to search the registers if he is not satisfied as to the propriety of the object for which the search is required.”
 - (iii) Civil Recovery Investigations: In respect of the confidentiality of court documents, Order 115B Part II 11(1) of RSC provides: “11(1) When an application is issued, the Court file will be sealed and, unless a judge grants permission, the Court records relating to the application (including the summons, documents filed in support, and any order or warrant that is made) will not be made available by the Court for any person to inspect or copy, either before or after the hearing of the application. (2) An application for permission under paragraph (1) shall be made on notice to every other party in accordance with Order 32 (applications and proceedings in chambers) and shall be made to a judge in chambers. (Order 32(3) provides that unless the Court otherwise orders or any of these rules otherwise provides, a summons shall be served on every other party not less than two clear days before the day specified in the summons for the hearing.)”; and
 - (iv) Other Cases: Any case, where by virtue of any provision of law or Court Order, public access to the relevant documents has been restricted.

Where access requires the leave of the Registrar, written reasons for the request should be entered on the back page of the applicable Search Praecipe Form.

Obtaining records of Court hearings

20. Whether a matter is active or inactive, judges' notes of the evidence will not automatically be made available for access to non-parties or persons who are not entitled to access by other provisions of law (see section 3(2) of the Supreme Court (Records) Act 1955). However, Order 63 Rule 9 vests a discretion in the Court to provide access to any documents.
21. Where there is an entitlement to access, a judge's notes may be made available for transcription. See Schedule to Order 62 (Rule 32) Part 1 for fees payable to registry which includes payment at \$7.50 per foolscap page for the transcription of judge's notes.
22. Additionally, where a request is made for a record of court proceedings open to the general public, the audio recording of those proceedings may be made available upon payment of the requisite fee.²

Audio records of open court hearings will be made available to any person, whether party to the proceedings or not.

23. Additionally, witness statements which stand as evidence in chief may be made available for inspection under Order 38/2A (12)-(17) of the RSC:

“(12) Subject to paragraph (13), the judge shall, if any person so requests during the course of the trial, direct the associate to certify as open to inspection any witness statement which was ordered to stand as evidence in chief under paragraph (7)(a).

A request under this paragraph may be made orally or in writing.

(13) The judge may refuse to give a direction under paragraph (12) in relation to a witness statement, or may exclude from such a direction any words or passages in a statement, if he considers that inspection should not be available-

(a) in the interests of justice or national security,

(b) because of the nature of any expert medical evidence in the statement, or

(c) for any other sufficient reason.

(14) Where the associate is directed under paragraph (12) to certify a witness statement as open to inspection he shall-

(a) prepare a certificate which shall be attached to a copy (“the certified copy”) of that witness statement; and

(b) make the certified copy available for inspection.

(15) subject to any conditions which the Court may by special or general direction impose, any person may inspect and (subject to payment of the prescribed fee) take a copy of the certified copy of the witness statement from the time when the certificate is given until the end of seven days after the conclusion of the trial.

(16) In this rule-

(a) any reference in paragraphs (12)-(15) to a witness statement shall in relation to a witness statement of which only part has been ordered to stand as evidence in chief under paragraph (7)(a), be construed as a reference to that part;

(b) any reference to inspecting or copying the certified copy of a witness statement shall be construed as including a reference to inspecting or copying a copy of that certified copy.

(17) The Court shall have power to vary or override any of the provisions of this rule (except paragraphs (1), (8) and (12) to (16) and to give such alternative directions as it thinks fit.”

² The cost for the purchase of a Court Smart audio recording is \$50.00 per CD

ACCESS TO COURT RECORDS IN CRIMINAL FILES

24. The duties of disclosure between an Accused person and the Crown are governed by the Disclosure and Criminal Reform Act 2015 (DCR) and the Criminal Jurisdiction and Procedure Act 2015 (CJP).

25. Section 12 of the DCR provides:

“Confidentiality: 12 Any unused material disclosed to the accused person under this Act may not be used or disclosed for any purpose other than that of the proceedings in relation to which it is disclosed, save that it may be used or disclosed-

(a) For the purpose of any appeal or advice on appeal against a decision of the court or jury in those proceedings;

(b) To the extent that it has been displayed or communicated in open court to the public other than in proceedings for contempt of court under section 13; and

(c) With leave of the court, for the purpose and to the extent specified by the court.”

26. Following section 12(b) DCR, where the Court is engaged to assist with access to criminal records, the following documents when communicated in open court to the public may be made available upon payment of the prescribed fee:

- (i) Information/ Indictment of charges;
- (ii) Summary of Evidence;
- (iii) Certificate of Conviction / Sentence; and
- (iv) Judgments and Rulings

27. Additionally, members of the public are entitled to access copies of audio recordings of open court hearings upon payment of the requisite fee. Where transcripts of open court hearings are available, copies (or extracts) may also be obtained upon payment of the prescribed fee (See paragraphs 32-33 below on prescribed fees).

RULES APPLICABLE TO PARTIES AND NON-PARTIES

Available Methods of Access:

28. Access, when granted, may be exercised in any of the following ways:

- (i) inspection and examination of the records; and
- (ii) provision of (certified) copies of the records of the Supreme Court;

Upon payment of the requisite fee for a file search, access will now be permitted by the use of photography with hand held devices.

Procedure for Requesting Access- Search Praeipice and Court Fees:

Search Praeipice Forms

29. All requests for access to court records shall be filed in the form of a Search Praeipice (see the attached Forms).

New Counsel of Record:

30. Where Counsel has been retained by a party to the proceedings (whether formerly unrepresented or represented by other Counsel) and the new Counsel seeks to access the Court file, the search request should be comprised of the following:
- (a) Completed Search Praecept Form; and
 - (b) Notice of Change of Attorney (see RSC Order 67/1) or Notice of Appointment of Attorney (see RSC Order 67/3)

Litigants in Person / Members of the Public:

31. Where a litigant in person (whether formerly represented by Counsel or not) or a member of the Public (whether through Counsel or not) seeks to access the Court file, only a completed Search Praecept form need be filed with payment of the requisite court fee.

Court Fees

32. The requisite court fee payments must be made prior to access. (See the Rules of the Supreme Court 1985 (RSC) for fee requirements)

RSC (Miscellaneous fees) Schedule to Order 62 (Rule 32) Part 1:

- 75. *On any search:* \$5.00
- 76. *On an inspection of a file:* \$10.00
- 77. *For providing a copy of a document* \$0.50 per page
- 80. *Transcribing Judge's notes:* \$7.50 per foolscap page

33. (Notably, reference is made to the Court Fees and Expenses Act 1971 in section 3 of the Supreme Court (Records) Act 1955. However, the 1972 Rules made thereunder do not affix fees applicable to the 1955 Act.)

Timeframe for Access:

34. Requests for record access shall be considered as soon as reasonably practicable. If the request is urgent, a covering letter should provide reasons for the need for expedited access.
35. Any requests for expedited access to records must take into account the pressures faced by the Registry while administering and managing current cases, navigating multiple court locations and the current absence of an electronic register of records.
36. In any event, the Registrar will endeavor to dispose of applications for access within the following timeline:

ESTIMATED TIMELINE FOR ACCESS	
Cause book ³	immediate
originating documents	same day-3 days
judgments and orders	same day-3 days
Indictments (charges)	same day-3 days
Certificates of conviction	same day-3 days
Certificates of sentence	same day-3 days
Summary of Evidence (crim)	1-4 days

³ It is envisaged that access to the Cause Book will be available on line in the near future.

pleadings	1-4 days
Affidavits	1-4 days
Witness statements	1-4 days
Expert reports	1-4 days
Inspection of file	1-4 days

Appeal Process against Refusal of Access

37. Where any person seeks to appeal the Registrar’s decision on access to court records, the appeal shall lie to a judge of the Supreme Court in Chambers and must be issued within five days after the decision was given or made. See Order 58/1(3) of the Rules of the Supreme Court 1985 and Rule 131 of the Matrimonial Causes Rules 1974.
38. The Judge’s decision is subject to the right of appeal to the Court of Appeal for Bermuda, save in bankruptcy matters where the judge’s decision is final (See Rule 329(2)-(3) of the Bankruptcy Rules 1990).

Dated this 7 day of November 2016

REGISTRAR
Shade Subair Williams

DRAFT FOR CONSULTATION

**SUPREME COURT OF BERMUDA
CIVIL JURISDICTION**

**SUPREME COURT (RECORDS) ACT 1955
RULES OF THE SUPREME COURT 1985**



SEARCH PRAECIPE
PRACTICE DIRECTION Circular No. ___ of 2016
(issued by the Registrar 15 August 2016)

No. ___ of 20 ___	<u>Select as applicable:</u>
V	Plaintiff(s)
	Appellant(s)
	Defendant(s)
	Respondent(s)

PARTY REQUESTING ACCESS

SELECT APPLICABLE BOX:

Party to Proceedings	Counsel for Party to Proceedings	Member of Public (Media included)	Counsel for Member of Public
----------------------	----------------------------------	-----------------------------------	------------------------------

PRINT NAME (AND FIRM NAME):

TELEPHONE AND/OR EMAIL CONTACT:

LEVEL OF ACCESS REQUESTED:

SELECT APPLICABLE BOX(ES):

CAUSE BOOK SEARCH	ORIGINATING PROCESS	JUDGMENTS RULINGS ORDERS	JUDGE'S NOTES
PLEADINGS	AFFIDAVITS / EXPERT REPORTS	SUMMONSES / NOTICES	ENTIRE FILE

MODE OF ACCESS REQUESTED

SELECT APPLICABLE BOX(ES):

INSPECTION	PHOTOCOPY	PHOTOGRAPHY
-------------------	------------------	--------------------

DATE : _____ DAY OF _____ 20____ SIGNATURE:

FOR REGISTRY USE ONLY:

ACCESS APPROVED/REFUSED:

REASONS FOR REGISTRAR'S REFUSAL:

REGISTRAR'S SIGNATURE	ASSISTANT REGISTRAR'S SIGNATURE	REGISTRY PERSONEL'S SIGNATURE
-----------------------	---------------------------------	-------------------------------

**ADDITIONAL NOTE SPACE FOR PARTY REQUESTING ACCESS
FOR THE ATTENTION OF THE REGISTRAR**

DRAFT FOR CONSULTATION

SUPREME COURT OF BERMUDA
CRIMINAL JURISDICTION

SUPREME COURT (RECORDS) ACT 1955
 DISCLOSURE AND CRIMINAL REFORM ACT 2015



SEARCH PRAECIPE
 PRACTICE DIRECTION Circular No. ___ of 2016
(issued by the Registrar 15 August 2016)

Select as applicable

No. ___ of 20 ___

THE QUEEN/INFORMANT
Appellant(s)

V

THE QUEEN/INFORMANT
Respondent(s)
Defendant (s)

PARTY REQUESTING ACCESS

SELECT APPLICABLE BOX:

Accused / Defence Counsel / Crown Counsel	Member of Public
---	------------------

PRINT NAME:

TELEPHONE AND/OR EMAIL CONTACT:

LEVEL OF ACCESS REQUESTED:

SELECT APPLICABLE BOX(ES):

INDICTMENT (SUPREME COURT CHARGES)	JUDGMENTS RULINGS ORDERS	JUDGE'S NOTES	SUMMARY OF EVIDENCE
COURT SMART CD RECORDING	CERTIFICATE OF CONVICTION	CERTIFICATE OF SENTENCE	INSPECTION OF FILE

MODE OF ACCESS REQUESTED

SELECT APPLICABLE BOX(ES):

INSPECTION	PHOTOCOPY	PHOTOGRAPHY
------------	-----------	-------------

DATE : _____ DAY OF _____ 20 _____ SIGNATURE:

FOR REGISTRY USE ONLY:

ACCESS APPROVED/REFUSED:

REASONS FOR REGISTRAR'S REFUSAL:

REGISTRAR'S SIGNATURE	ASSISTANT REGISTRAR'S SIGNATURE	REGISTRY PERSONEL'S SIGNATURE
--------------------------	------------------------------------	----------------------------------

**ADDITIONAL NOTE SPACE FOR PARTY REQUESTING ACCESS
FOR THE ATTENTION OF THE REGISTRAR**

DRAFT FOR CONSULTATION

**SUPREME COURT OF BERMUDA
DIVORCE JURISDICTION**

**SUPREME COURT (RECORDS) ACT 1955
RULES OF THE SUPREME COURT 1985
MATRIMONIAL CAUSES RULES 1974**



SEARCH PRAECIPE

PRACTICE DIRECTION Circular No. ___ of 2016
(issued by the Registrar 15 August 2016)

No. ___ of 20 ___ Select as applicable:

V

Petitioner(s)
Appellant(s)
Respondent(s)

PARTY REQUESTING ACCESS

SELECT APPLICABLE BOX:

Petitioner / Respondent / Named Third Party	Counsel for Party to Proceedings	Member of Public (Media included)	Counsel for Member of Public
---	-------------------------------------	--------------------------------------	---------------------------------

PRINT NAME (AND FIRM NAME):

TELEPHONE AND/OR EMAIL CONTACT:

LEVEL OF ACCESS REQUESTED:

SELECT APPLICABLE BOX(ES):

DECREE NISI	DECREE ABSOLUTE	JUDGMENTS RULINGS ORDERS	JUDGE'S NOTES
PLEADINGS	AFFIDAVITS	SUMMONSES/ NOTICES	ENTIRE FILE

MODE OF ACCESS REQUESTED

SELECT APPLICABLE BOX(ES):

INSPECTION	PHOTOCOPY	PHOTOGRAPHY
------------	-----------	-------------

DATE : _____ DAY OF _____ 20____ SIGNATURE:

FOR REGISTRY USE ONLY:

ACCESS APPROVED/REFUSED:

REASONS FOR REGISTRAR'S REFUSAL:

REGISTRAR'S SIGNATURE	ASSISTANT REGISTRAR'S SIGNATURE	REGISTRY PERSONEL'S SIGNATURE
--------------------------	------------------------------------	----------------------------------

**ADDITIONAL NOTE SPACE FOR PARTY REQUESTING ACCESS
FOR THE ATTENTION OF THE REGISTRAR**

DRAFT FOR CONSULTATION

DRAFT FOR CONSULTATION