



NUNAVUT COURT OF JUSTICE

ACCESS TO COURT RECORDS POLICY

“Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the very spur to exertion and the surest of all guards against improbity.”

Jeremy Bentham

This policy is the Court’s guide to accessing court records, files, documents and exhibits. The policy is available in the Court Registry, Court Library, and on the Court’s website to enhance the public’s access to the Court. This policy is periodically reviewed and updated, subject to the discretion of the judiciary.

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1. DEFINITIONS

The Definitions assist in interpreting (understanding) this policy. The defined terms in this section are found Capitalized throughout the policy for ease of reference.

1.1 “Access,” in relation to a court record, includes a search for a record, viewing a record, making a copy of all or part of a record, and/or publishing a record. Subject to this policy, the Court may limit the type of access to be provided in a particular case or impose conditions upon the use of a record.

1.2 “Case File” refers to the filed Documents used in connection with a single judicial proceeding that may be referenced by a judicial officer to decide an issue in dispute, or that reflects the result of a judicial decision made in a particular case. The case file includes all pleadings, indictments, informations, court process documents, Exhibits, transcripts, judgments and orders.

The case file does not ordinarily include information protected by statute or court policy, such as:

- a) Correspondence between parties; or
- b) Information connected to pre-trial conferences, case-management meetings, focusing conferences, or court-based settlement conferences.

Case files are presumptively accessible by the public. All documents, transcripts, or exhibits found in the case file are accessible, with the exception of Protected Case File Documents that have been ordered segregated in a Protected Document Folder.

1.3 “Court” means the Nunavut Court of Justice, Nunavut Youth Court of Justice, and Nunavut Justice of the Peace Court.

1.4 “Court Record” refers to any information that is filed in a court action, stored, maintained, or archived by the Court in connection with its judicial proceedings. This includes, but is not limited to:

- a) Case Files,
- b) dockets,
- c) minute books;
- d) calendars of hearings,
- e) case indexes,
- f) registers of actions,

- g) records of the proceedings contained in any forms; and,
- h) transcripts and audio recordings of the proceedings.

The Court Record does not include:

- a) a coroner's inquest (see *Coroner's Act* regulations established pursuant to section 64 of the *Coroner's Act*, R.S.N.W.T. 1988, c. C-20, as duplicated for Nunavut by s.29 of the *Nunavut Act*, S.C. 1993, c.28.);
- b) Court and judicial administration records such as judicial training programs, judge and trial schedules, or statistics of judicial activity; and,
- c) personal notes, correspondence, memoranda, drafts, or similar documents prepared and used by judges, court officials, or other court personnel.

1.5 "Court Records Officer" is the officer of the Court responsible for:

- a) Vetting all requests for redaction to a Court Record that are not made directly to the Court in the course of a court proceeding;
- b) Assisting the Court Registry in responding to requests for access; and,
- c) Responding to any other media request for information not directly covered by this policy.

In the absence of any person specifically designated to perform this function, the Legal Officer, or his/her designate, shall be the Court Records Officer.

1.6 "Court Registry" means both the Civil and Criminal Registries of the Court and also refers to the Court Staff working in the Court Registry.

1.7 "Document(s)" means any record of information, whether recorded and stored physically or electronically, that can be read or understood by a person or by a computer system and includes any copy, reproduction, or duplicate of a document or part thereof.

1.8 "Exhibit" includes Documents and other objects in the custody of the Court or under the Court's control that have been offered as evidence in a Court proceeding.

1.9 "Judiciary" means a judge of the Nunavut Court of Justice.

1.10 "Justice System Participant" means Court staff, counsel, parties to a proceeding (such as the accused), witnesses, alleged victims of an offence, jurors, and any other individual taking part in a court proceeding.

1.11 “Parties” are the litigants in a proceeding, including their counsel and their authorized agents.

1.12 “Personal Data Identifiers” means personal information that, when combined with the name of the individual, enables direct identification so as to pose a serious threat to an individual’s personal security. This information includes, but is not limited to:

- a) unique numbers, such as phone, social insurance FPS (fingerprint section) number, driver’s license, financial accounts, or health care numbers;
- b) biometrical information, such as finger prints, facial image, or DNA profile;
- c) personal information, such as day and month of birth and place of employment;
- d) civic and postal email and IP addresses of the person’s home, business, or place of employment (other than community and or province/territory); and,
- e) personal possession identifiers (e.g. licence or serial numbers, property or land identification, corporate or business name).

1.13 “Protected Case File Documents” are documents from a Case File that are restricted from public access under law or this policy.

Protected case file documents are segregated in a Protected Document Folder to prevent access by unauthorised persons. Protected Case File Documents are not accessible by a member of the public except with leave of the Court. Any documents contained in a protected document folder are ordinarily accessible by the Parties.

1.14 “Protected Document Folder” is a closed folder or envelope within a Case File where any Protected Case File Documents are stored. The Protected Document Folder must be clearly labelled and is not available to the public. The folder or envelope must be removed before providing the file to a member of the public for inspection.

1.15 “Publication” or **“Publish”** mean to print or reproduce in any document, or to broadcast or transmit in any way. This includes, but is not limited to, traditional print and broadcast media, as well as internet-based media, blogs, Twitter, and other instant public communications.

1.16 “Record Suspension” refers to an order made by the National Parole Board that an applicant’s record in respect of an offence be suspended.

1.17 “Restricted Case File” refers to a Case File that is required by statute (law) or this policy to remain confidential. As a result, access to the Case File is restricted to the parties or their authorized representatives. Restricted Case Files must be clearly labelled and are not available to the public. These files include, but are not limited to:

- a) criminal case files for which a record suspension has been obtained;
- b) child protection files;
- c) adoption files; and,
- d) contingency fee agreements (required to be filed with the Court pursuant to Rule 659 of the *Rules of Court*).

1.18 “User” means any member of the public who accesses a court record. A user does not include judicial officers, court staff, corrections officers, peace officers or other public officers who must access court records for the purpose of, and in the course of, their employment. Nor does it include officers of the court (lawyers) who are authorized to review a Court Record on behalf of a party to a proceeding.

1.19 “Young Person” is a person older than 12 years, but younger than 18 years.

2. GUIDING PRINCIPLES

This policy shall be interpreted liberally and applied in accordance with the following principles.

2.1 The “Open Court Principle” and the Presumption of Open Access

Members of the public have a presumptive right of Access to all Court Records with the exception of Protected Case File Documents and Restricted Case Files. Even where a Case File is sealed, members of the public have a right to know that a Case File exists. Public Access is an important element of judicial accountability and can only be curtailed where there is a need to balance or protect other important values or constitutional rights.

2.2. The Test for Restriction

Restrictions upon Access to a Court Record may only be imposed:

- a) Where no reasonable alternative exists to otherwise safeguard the right or interest needing protection as identified in section 2.3; and,

- b) Where the detrimental effect associated with full Access and/or Publication exceeds the anticipated benefits of the open court principle.

2.3. Interests to be Protected

Restrictions upon the public's right to Access Court Records may only be justified:

- a) To prevent improper interference with the court's processes and the administration of justice;
- b) To protect legitimate privacy interests of a Justice System Participant;
- c) To safeguard a Justice System Participant from a serious and credible threat to their personal security;
- d) To prevent compromise of important protections provided by law or by court order; and,
- e) To protect a Justice System Participant's right to a fair trial.

2.4. Criteria to be Considered

In balancing the open court principle with the competing interests outlined in section 2.3 above, the Court must consider:

- a) The connection between the purposes for which Access is sought and the rationale for the constitutional right to an open court.
- b) The potential detrimental impact on the rights of individuals and on the proper administration of justice, if a request for restricted Access is not granted.
- c) The adequacy of existing legal norms, and remedies for their breach, if improper use is made of information contained in the Court Records; and,
- d) The availability of reasonable alternatives, other than restricting Access, which will prevent the detrimental effects.

2.5. The Onus for Demonstrating the Need for Restrictions

With the exception of Personal Data Identifiers, the onus of establishing a basis for limiting or restricting Access lies upon those who seek to limit the open court principle in relation to a particular case.

2.6. The Principle of Restraint

Where a restriction to Access is required, such a restriction must not exceed that which is minimally necessary to adequately safeguard the right or interest sought to be protected.

3. SCOPE OF THIS POLICY

3.1 Proceedings Covered

This policy applies to the Court Records of the Nunavut Court of Justice, the Youth Justice Court of Nunavut, and the Justice of the Peace Court. It applies to both civil and criminal proceedings, unless otherwise indicated.

It does not apply to requests for information on the administration of the Court. Access to this type of information is at the discretion of the Department of Justice ATIPP Coordinator and is governed by the provisions of the *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20.

This policy is not intended to cover other media requests for information. The Court Records Officer is the contact person for the Nunavut Court of Justice regarding media requests for information that are not outlined in this policy, such as requests for information on Court scheduling, Court sittings, and Court proceedings. Court staff will not respond to these types of queries from the media.

3.2. Persons covered

This policy governs the public's Access to Court Records. It applies to Users, which includes both the general public and members of the media. It is not intended to control Access to Court Records by judicial officers, court staff, officers of the Court, corrections officers, peace officers or other officers who are accessing Court Records in the course of their employment.

3.3. Restrictions on Access or Publication by law or court order

The Access provided for in this policy is subject to any applicable:

- a) statutory and regulatory provisions,
- b) common law, or
- c) court order

that limits or restrict Access to or publication of Court Records.

3.3.1 Statutory Restrictions

There are many statutory and regulatory provisions (laws) that limit or restrict access to certain types of records and court proceedings. For example, one such statutory restriction is the prohibition on identifying a Young Person involved in proceedings under the *Youth Criminal Justice Act*.

3.3.2 Court Ordered Restrictions

There are two circumstances under which a Court may restrict Access or Publication of a Court Record.

- i. The court will make such an order when a law says the judge or justice “shall” (must) make an order upon the application of a party to a proceeding.
- ii. The court may make a discretionary order only in circumstances where the judge or justice is satisfied that the test set out above in subsection 2.2 has been met by the applicant.

Orders that restrict access include: sealing orders, confidentiality orders, and orders for in camera (closed or private) hearings. The public has no right to access any part of a sealed file. The public does have a right to know a sealed file exists.

Orders that restrict Publication include: a ban on identifying someone or on publishing information until the end of the trial. This is not a complete list; other types of orders are possible. Orders that restrict Publication (non-publication orders) do not limit public Access to a Court Record.

Where a court order restricting Access or Publication is made, a cautionary note must be highlighted in red on the cover of the Case File or directly on the information to ensure that anyone examining the file is aware of the nature and extent of the order.

See Appendix A for additional information on non-publication orders.

4. POLICY DISSEMINATION AND COMPLIANCE

The Court and Court Registry must take reasonable steps to ensure that the public is aware of this policy and of any court order that restricts Access or Publication.

The User has a legal responsibility to ensure that requests for information and documents are accessed and used in accordance with all applicable regulatory and statutory requirements and court orders.

Any User who willfully violates a court order or condition of Access commits an offence and may, in the discretion of the Court, be cited for contempt.

5. DISCRETION OF THE COURT

Nothing in this policy overrides a presiding judge's discretionary control over the Court File and Exhibits for individual proceedings.

6. PROCEDURE FOR REQUESTING ACCESS OR REDACTION

The Court Registry is responsible for receiving, filing, and providing a response to:

- i. Requests for Access a Court Record [Form A],
- ii. Requests for redaction [Forms B, C, D], and,
- iii. Requests for an appeal of decisions made under this policy [Form E].

The Court Registry must maintain a log to clearly identify the date, time and identity of all persons other than Court staff who have made a request for Access or redaction.

No person shall be permitted Access without first identifying themselves to the satisfaction of the Court Registry.

The Court Registry must ensure all Users filing a request are aware of this policy.

6.1 Requests for Access

The Court has a duty to ensure that its records are protected from alteration, theft or harm by those persons accessing the records. Where the circumstances warrant it, the Court Records Officer may instruct the Manager of Court Operations, or his or her designate, to be present at all times when a User is viewing an original Court Record or an Exhibit.

All Users requesting Access to a Court Record shall complete and file with the Court Records Officer a *Request to Access a Court Record* [Form A]. No User shall be permitted Access without completing this Form.

The Court Registry is responsible for providing Access to information that is available at all times, as set out in section 7.1 of this policy. Before granting Access to a User, the Court Registry must review the Court Record and ensure that only publically accessible documents are provided to the User.

The Court Records Officer is responsible for responding to all other requests for Access to ensure the request complies with the law and this policy.

Where the Court Registry receives a request for Access to information not set out in section 7 or where there is any question from the Court Registry about whether a request for access is permitted under this policy, the Court Registry shall, without delay, consult the Court Records Officer who will make a preliminary ruling.

The Court Records Officer will notify the Court Registry and User of that ruling. Where a request for Access or redaction is declined, or where the Court Records Officer imposes restrictions upon a right of access written reasons must be provided to the User.

See section 7.4 which sets out information on Users rights to obtain copies of documents in a Court Record

6.2 Requests for Redaction

Whenever possible, redaction requests should be addressed to the presiding judge or justice during the course of court proceedings. Where a request for redaction is made after a court proceeding or trial has ended, the request for redaction must be filed with the Court Registry.

The Court Registry will forward the request for redaction to the Court Records Officer. The Court Records Officer must, without delay, make a preliminary ruling and complete a Certificate of Redaction [Form F]. The Certificate will be placed in the Court File. A copy of the Certificate will be attached to the redacted copy and placed in the Court File, and a copy will be provided to the party requesting redaction.

The Court or the Court Records Officer will not identify and redact sensitive information without a formal request that complies with the terms of this policy.

6.2.1 Personal Data Identifiers

The Court will exercise its discretion to redact documents found in a Case File to prevent disclosure of Personal Data Identifiers that have inadvertently found their way into a Case File.

Where Personal Data Identifiers are redacted, the Court Records Officer must ensure that the original non-redacted document is placed in the Protected Documents Folder and that a redacted copy remains accessible to the public in the Case File.

See Appendix C for additional information on redaction of Personal Data Identifiers.

6.2.2 Onus on the party seeking redaction

The onus is on the party seeking redaction to lay out the evidentiary grounds for its necessity. Where this onus is not met, the requested redaction will be declined and full Access to the Document or Exhibit in question will be permitted.

It is incumbent upon the party seeking redaction of any transcript, filed Document or Exhibit to identify the information to be redacted and provide well-grounded written argument in support of the redaction request, as outlined in subsection 6.2.2.

6.2.3 Redaction requests for filed Documents, Exhibits, and Transcripts

If redaction is required for filed Documents, the Document to be filed in Court should be accompanied by a Redaction Request [Form B] attached to the Document to be filed. The redaction request must identify with reasonable particularity those portions of the Document or subjects described in the Document where redaction is requested.

If a party wants to redact information contained in an Exhibit to be tendered in Court, a Redaction Request [Form C] should be submitted along with the Exhibit when it is tendered. The redaction request must outline with reasonable particularity the nature of the sensitive material to be redacted.

A party or their counsel may submit a Redaction Request [Form D] within two clear business days of the conclusion of any hearing or trial with respect to any oral evidence given in Court that may subsequently find its way into a transcript of the proceedings and that the party believes is subject to redaction.

6.3 Request for an Appeal from a Decision Made Under This Policy

If a User is dissatisfied with the decision made under this policy, the User has a right to summarily appeal the decision to a judge of the Nunavut Court of Justice by filing a Request for Appeal [Form E] within 3 clear business days of receiving the access or redaction decision.

The Court will act expeditiously to hear the appeal. No portion of a Court Record may be released until any appeals have been resolved.

6.4 Duty of the Court Records Officer

The Court Records Officer will review and consider any requests received to ensure the request meets the guidelines and standards set out in this policy before granting or limiting Access to a Court Record.

6.5 Timing

Timeliness is an important part of Access. Court staff will endeavour to respond to requests no later than 5 days after the request is received. The amount of time required will depend on factors such as the complexity of the request and the location of the records. The User making the request will be contacted once a decision has been made or the records are available for viewing.

6.6 Fees

Users must pay any required fees prior to conducting a search of Court Records, inspecting a Case File or obtaining copies of a Court Record. The Court Registry has the discretion to waive fees if they create a barrier to the right of Access for a specific User.

7. INFORMATION AVAILABLE AT ALL TIMES

Subject to a non-publication order or a court order to the contrary, the following information may be provided to a User, either in person or by telephone, by the Court Registry.

7.1 Adult Criminal Cases (only after 1st appearance/arraignment):

- confirmation of the name(s) of the accused,
- age of the accused in years,
- date of the alleged offense,
- charges laid (referring to the section number and general description of the offense),
- disposition (sentence, adjournment, withdrawn, etc.),

- plea or election,
- name of the presiding judge,
- name of the Crown and defence counsel; and,
- information as to the existence and contents of any court orders limiting or restricting access or publication.

7.2 Youth Criminal Cases (only after 1st appearance/arraignment):

- confirmation that the matter is governed by the provisions of the *Youth Criminal Justice Act*,
- date of the alleged offence,
- charges laid (referring to the section number and general description of the offense),
- disposition (sentence, adjournment, withdrawn, etc.),
- plea,
- name of the presiding judge,
- name of the Crown and defence counsel; and
- information as to the existence and contents of any court orders limiting or restricting access or publication.

7.3 Civil Cases

- confirmation of the names of the parties,
- date and location of the court hearing,
- disposition (adjournment, judgment reserved, etc.),
- name of the presiding judge,
- name of counsel for the parties; and,
- information as to the existence and contents of court orders limiting or restricting access or publication.

7.4 Right to Obtain a Copy

Generally, the right to Access a Court Record includes an unrestricted right to obtain a copy, unless a judge orders otherwise.

Where restrictions upon Publication are necessary, the Court may order that:

- i. The Court Record may not be further Published, copied or disseminated in electronic or paper form to any other person, organization or body corporate for the purpose of further Publication;
- ii. The copy of the record may not be posted electronically on the internet or on any internet based social medium without leave of the Court; or,
- iii. The copy must be destroyed when the information is no longer required for the purpose for which it was disclosed.

Where restrictions upon Publication of a Court Record or Exhibit are imposed by the Court or the Court Records Officer, before obtaining a copy the person seeking Access may be required to first sign a written undertaking to comply with all conditions of Access. Any conditions imposed by the Court or the Court Records Officer with respect to the prohibited use of copies shall be deemed for all purposes to be ordered by the Court.

If a User obtains a copy of a Court Record in the course of their employment on behalf of a media or any other corporate organization, the parent organization is bound by the conditions attached to the provision of the copy to their agent or employee.

8. LIMITS ON PUBLIC ACCESS

This section contains a non-exhaustive list of exceptions to the open access principle which are required by law or because there is a compelling public interest.

8.1 Criminal Case Files for Offences Eligible for a Record Suspension

Once a person who has been convicted of an offence becomes eligible for a Record Suspension, the related Case File is only accessible upon application to a Judge.

See Appendix B for additional information on determining Record Suspension eligibility.

8.2 Youth Records in Relation to Criminal Allegations

Youth records are subject to strict statutory protections that severely restrict Access.

8.3 Access During Ongoing Proceedings

The Court reserves the right to temporarily limit Access to any part of a Case File if the file relates to a matter that is in Court during a hearing or trial. Granting unrestricted Access to a Case File under these circumstances may be disruptive and potentially interfere with the Court's conduct of the proceedings.

Judicial leave is required to Access any part of a Case File under these circumstances.

8.4 Completed Civil and Family Case Files

Access to civil and family Case Files that have been closed for 15 or more years is subject to approval by a Judge.

8.5 Pre-trial and Settlement Conferences and Mediations

Filed Documents and Exhibits or other evidence given in a pre-trial conference, mini-trial, settlement conference, or mediation are not accessible to the public unless ordered by a judge to become part of the Case File.

8.6 Correspondence

Any correspondence between:

- a) the court and a party,
- b) court staff,
- c) the judiciary and court staff, or
- d) court staff and counsel for the litigants

regarding a Case File will not be accessible to the public and will not form any part of the Case File unless it has been entered as an Exhibit in a Court proceeding.

8.7 Protected Document Folder

Access to the Protected Document Folder is restricted to the parties to the proceeding, unless a judge orders a Protected Case File Document to become part of the Case File.

8.8 Private Proceedings

Access to Court Records from proceedings or portions of proceedings that are closed, or *in camera*, are only available at the discretion of the presiding judge.

8.9 Exhibits

The Court or the Court Records Officer may exercise discretion and restrict or impose conditions upon Access to physical exhibits if contact with the Exhibit presents a potential biological or physical hazard to the safety of either the User or Justice System Participant.

9. MAINTENANCE AND DEVELOPMENT

The Court reserves the right to change this policy as necessary to ensure compliance with both statute and common law related to public Access to the Court and its records.

The Court must create a Court Records Committee to assist with the maintenance and further development of this policy. This committee shall consist of the following representatives:

- a) one member of the Judiciary (Chair),
- b) the Court Records Officer or Legal Officer,
- c) the Court's Registrars,
- d) the Sheriff,
- e) one representative of the media,
- f) one representative of the Law Society of Nunavut; and,
- g) the Director of Court Services.

The Court Records Committee shall be responsible for this policy's implementation and shall advise the Judiciary on all matters pertaining to:

- a) policy implementation,
- b) policy dissemination,
- c) policy evaluation and review; and,
- d) recommendations for further policy modifications to the Judiciary.