



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

## **Access to Documents on Federal Court Website**

**CANADIAN BAR ASSOCIATION  
FEDERAL COURTS BENCH AND BAR LIAISON COMMITTEE, ADMINISTRATIVE LAW, ENERGY, ENVIRONMENT AND NATURAL  
RESOURCES, ENTERTAINMENT, MEDIA AND COMMUNICATIONS, IMMIGRATION LAW, INTELLECTUAL PROPERTY, PRIVACY  
AND ACCESS LAW SECTIONS**

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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Federal Courts Bench and Bar Liaison Committee and the CBA Administrative Law, Energy, Environment and Natural Resources, Entertainment, Media and Communications, Immigration Law, Intellectual Property, and Privacy and Access Law Sections with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Administrative Law, Energy, Environment and Natural Resources, Entertainment, Media and Communications, Immigration Law, Intellectual Property, and Privacy and Access Law Sections.

# TABLE OF CONTENTS

## Access to Documents on Federal Court Website

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>II.</b>	<b>DISCUSSION .....</b>	<b>1</b>
<b>III.</b>	<b>AUSTRALIAN MODEL .....</b>	<b>2</b>
<b>IV.</b>	<b>RECOMMENDATIONS .....</b>	<b>4</b>
	1. Require Creation of Online Account and Fees .....	4
	2. Open Online Access Subject to Limited Exceptions .....	5
	3. Protecting Sensitive Personal Information: Responsibilities of Counsel and the Court .....	5
	4. Special Considerations in the Immigration Context .....	6
	5. Special Considerations for Minors .....	9
	6. Data Security .....	9
	7. Searchability .....	10
	8. Pilot Project.....	10
<b>V.</b>	<b>CONCLUSION .....</b>	<b>10</b>
<b>VI.</b>	<b>SUMMARY OF RECOMMENDATIONS .....</b>	<b>10</b>



# Access to Documents on Federal Court Website

## I. INTRODUCTION

The Federal Court of Canada has requested input from the Canadian Bar Association on a proposal to make court files – including most material filed by parties and generated by the Court – available on its website. The proposal’s aim is to increase transparency of the judicial process in accordance with the open court principle recognized under s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

Open courts are essential to a proper functioning democracy and judiciary and must be safeguarded. The open court principle must be balanced against the protection of vulnerable parties accessing the justice system, the privacy rights of individuals and the legitimate interests of businesses to keep certain information confidential. We recognize and are guided by the Supreme Court of Canada’s test in *Sierra Club*<sup>1</sup> to ensure that any incursion on the open court principle is exercised in accordance with *Charter* principles.

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

The CBA struck a working group of members from the Federal Courts Bench and Bar Liaison Committee and the Administrative Law, Energy, Environment and Natural Resources, Entertainment, Media and Communications, Immigration Law, Intellectual Property, and Privacy and Access Law Sections (CBA Sections) to review the proposal and make recommendations.

## II. DISCUSSION

Open courts are vital to our democracy. However, this core principle is not limitless.<sup>2</sup> We must ensure that increasing the transparency of the judicial system with online access to court-filed information does not create unintended consequences that could undermine access to justice, the administration of justice, or the rights and interests of participants. Individuals may be deterred

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1 *Sierra Club v Canada (Minister of Finance)*, [2002] 2 SCR 522 at 553.

2 For example, Rule 151 of the Federal Courts Rules is available to restrict public access to certain, specified information adduced in a proceeding before the Federal Courts. See *Sierra Club v Canada (Minister of Finance)*, [2002] 2 SCR 522 on the Rule 151 test to seal confidential, proprietary and commercially sensitive information from public disclosure.

from accessing justice if it creates a risk that their private and confidential information will be freely and widely accessible. Legal costs are already high and will increase if additional procedural steps (*e.g.*, motions for confidentiality and protective orders, or redacting documents) are required to mitigate this increased risk.

Federal Court materials are available to the public in paper-based format at Registry Offices across Canada unless designated as confidential pursuant to R. 151, or otherwise protected by a protective order. The “practical obscurity” of paper-based records offers a form of privacy protection that will not exist with online access. Online access creates a risk of nefarious uses such as fraud, data mining, identity theft, stalking, harassment, discrimination, persecution and other abuses. While the Court should explore technological means to prevent these abuses, the risk cannot be eliminated entirely.

In our view, the same rules should apply whether records are available in paper or electronically and the current access requirements for paper records must be bolstered. We reviewed systems for online access to court records in other jurisdictions. Some elements of the Federal Court of Australia’s approach are helpful to balance transparency and privacy rights.

### **III. AUSTRALIAN MODEL**

Australia offers online access to its federal court files. The Australian system does not distinguish between electronic and paper-based records. Access depends on how the document is classified: non-restricted, restricted or confidential.

There are two online interfaces: 1) Federal Law Search and 2) Commonwealth Courts Portal.

The *Federal Law Search* closely parallels the “docket” already accessible online by the Federal Court in Canada. It gives the following information:

- name of participants;
- file number;
- date case was commenced;
- type of application (*e.g.*, migration, trade practices);
- type of each document filed and date it was filed;
- past and future hearing dates;
- current status of the case;
- link to the judgment; and
- texts of Orders (where applicable).

Non-parties can access the *Federal Law Search*. They can register and use it to track particular cases.

The *Commonwealth Courts Portal* contains documents that are classified as non-restricted, restricted or confidential. This portal permits parties and non-parties to create an online account, customize access and receive email updates on a file. However, only parties can view documents online.<sup>3</sup>

If a non-party wants access to a document (non-restricted and restricted), it must use the request form (see form in Appendix A). Non-parties must also pay a fee for access. If a document can be released to the non-party, the registrar emails the file to the requestor.

Non-restricted documents include:<sup>4</sup>

- originating application or cross claim;
- notice of address for service;
- pleading or particulars of a pleading or similar document;
- statement of agreed facts or an agreed statement of facts;
- interlocutory application;
- judgment or an order of the Court;
- notice of appeal or cross appeal;
- notice of discontinuance;
- notice of change of lawyer;
- notice of ceasing to act;
- reasons for judgment; and
- a transcript of a hearing heard in open court.

While non-parties can access non restricted documents, they need to apply using the request form and cannot access documents through the online interface. No rationale is required in the request form. A processing fee is charged.

Restricted documents include:<sup>5</sup>

- documents not classified as non-restricted, including affidavits, exhibits, unsworn statements of evidence and subpoena material; and
- documents a court has designated as "confidential" or prohibited from disclosure to the type of requester in question.

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3 See Federal Court of Australia Website, When can a Non-party Access Court Documents?

4 See Rule 2.32(2) of Federal Court Rules 2011 (Australia).

5 See Rule 2.32(3) of Federal Court Rules 2011 (Australia).

Non-parties must use the request form (see Appendix A) and are given access to restricted documents only with leave from the Court.

Confidential documents are those designated to be confidential by the Court, following an application by a party. We understand this may capture documents that were otherwise non-restricted or restricted.

## **IV. RECOMMENDATIONS**

### **1. Require Creation of Online Account and Fees**

We recommend creating online user accounts, protected by username and password. We also recommend requiring users to give their full name and address when creating an account. Uploading valid identification should be mandatory to create an account. We recommend that non-parties pay a fee for access to documents.

Registration promotes accountability and enhances security. A processing fee can offset the time spent by registry officers and may dissuade frivolous requests. Fees should be set on a cost-recovery basis, so as not to impede public access.

Since technology infrastructure in remote parts of the country makes it difficult to download large files, we recommend that the Court consider alternative formats for delivering records.

The Model Policy for Access to Court Records in Canada<sup>6</sup> addressed the possibility of creating different categories of users with different access rights. The Court should further consider the value and practicality of different categories. For instance, there could be fewer restrictions on access for representatives of Canadian media outlets, since the media is the most effective vehicle for disseminating information to the public. There could also be more permissive access rules for non-party lawyers licensed by Canadian law societies.<sup>7</sup>

Online accounts should be subject to terms and conditions for authorized use, including nature and scope of reproduction. Usage must be regularly monitored and accounts that violate the terms and conditions should be immediately disabled.

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6 Canadian Judicial Council, Model Policy for Access to Court Records in Canada, (Judges Technology Advisory Committee (September 2005)

7 References to lawyers include notaries who are members in good standing of the Chambre des notaires du Québec.

## **2. Open Online Access Subject to Limited Exceptions**

In accordance with the open court principle, all court records should be accessible online unless they are designated as confidential or subject to the limited exceptions outlined in recommendations 4 and 5. We recommend adopting Australia’s categorization and handling of “restricted” documents for immigration matters and cases involving minors, given heightened sensitivity in these areas. We are not recommending any changes to the Court’s current practices governing confidentiality.

## **3. Protecting Sensitive Personal Information: Responsibilities of Counsel and the Court**

Individuals may fear seeking justice if their private and confidential information is more likely to become freely and widely accessible. Counsel have a role to play in alleviating this risk, by carefully considering the impact of online access on materials filed with the Court and taking steps to protect their client’s privacy and confidentiality. Counsel should limit, where possible, private and confidential information included in filings to the Court and take steps to protect that information. For example, counsel should consider using the simplified process for requesting anonymity in immigration and citizenship files<sup>8</sup> and motions for confidentiality.

The Court should also be mindful of limiting personal information, security and law enforcement related information when preparing judgments and case file materials. Prescribed court forms should be revisited with privacy in mind.

Tax Court of Canada Practice Note 6<sup>9</sup> reminds parties of their responsibility to limit disclosure of “personal and confidential information to what is necessary for the disposition of the case.” For example, the Practice Note encourages parties to refrain from including the following information from all pleadings and documents filed with the Court (unless otherwise directed):

- Social Insurance Number and employee identification number;
- Business number, GST/HST account number;
- Sensitive medical information;
- Dates of birth. If a date of birth is provided, only the year should appear;
- Names of minor children. If a minor child is identified, only the minor child’s initials should appear; and
- Bank and financial account numbers. If a financial account number is provided, only the last four digits of the number should appear.

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8 Following the Federal Court’s Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings, 5 November 2018.

9 Tax Court of Canada, Note No. 16 Notice regarding privacy and public access to court files.

We recommend adding the following information to this list:

- Identity documents, including birth certificates, passports, and national identity cards;
- Financial and tax statements and other banking information;
- All other personal information that enables the identification of individuals (except for names unless subject to publication ban or similar restrictions) including without limitation birth date, addresses, phone numbers and other contact information, photographs and other media featuring individuals;
- Health and biometric information (fingerprints), and
- Documentation from non-consenting or not involved third parties, including employers, family members and minors. This material may include personal identification documents, financial statements, medical records, etc.

Public access to this information would create risks to personal security, such as identity theft, stalking and harassment. The foreseeable uses of this information are likely not connected to the purposes for which court records are made public.

Litigants should be informed of the consequences of court records being accessible online, the inherent risks, and steps that can be taken to protect sensitive information.

Special consideration should be given to the needs of self-represented litigants, who may not understand the implications of online access to their information. We recommend that the Federal Court examine this issue and would be pleased to participate in further discussions.

#### **4. Special Considerations in the Immigration Context**

Immigration files contain highly sensitive information, and there are heightened risks of abusive uses of information from overseas. To reduce the risk, we recommend adopting Australia's classification system: non restricted, restricted and confidential in the immigration context.

Non-parties would be allowed to view a list of documents in the Court file and access non-restricted documents on request. However, non-parties should not have access to restricted documents unless they obtain permission from the Court.

We recommend that the following documents be considered non restricted:

- originating application (other than requests for mandamus or applications containing extensions of time);
- notice of address for service;
- certificate of service and notice of appearance;

- judgment, order, and direction of the Court;
- notice of discontinuance;
- notice of change of lawyer;
- notice of ceasing to act; and
- reasons for judgment.

Restricted documents in the immigration context would include pleadings, affidavits, exhibits and Certified Tribunal Records (CTRs).

We recommend that the requester must give a rationale for accessing restricted documents but no rationale be required to access non-restricted documents. As in Australia, we support an approach where the court's permission must be sought to access restricted documents. The policy for granting access to restricted documents could consider different types of users and facilitate greater access by Canadian media and non-party lawyers licensed with law societies as discussed in recommendation 1. We do not recommend any changes to current practices governing confidentiality.

A restricted category of documents in the immigration context would safeguard against unlawful access, including data mining and illicit uses of personal and confidential information.

The United Kingdom, like Australia, requires a justification for non-party access to documents. The non-party must demonstrate a legitimate interest in the document, and the Court must balance the purpose of the open justice principle against "any risk of harm which disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."<sup>10</sup>

We support a similar approach in Canada for immigration matters. Requiring the court's permission to access these items would protect against the potential unlawful use of this information overseas (e.g. foreign governments, agents of persecution in a refugee context, fraudsters with financial and identity documents). The leave requirement under the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* is unique as it mandates that applicants place their best-foot forward – including all pertinent facts – in written pleadings and exhibits. There is no opportunity for oral arguments to supplement the written record, so even careful counsel cannot avoid relying on private and confidential information.

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10 This was recently discussed by the United Kingdom Supreme Court in *Cape Intermediate Holdings Ltd v Dring* (for and on behalf of Asbestos Victims Support Groups Forum UK), [2019] UKSC 38

Even in non-refugee applications, financial and medical records are often relevant to the grounds of refusal. For example, a new immigrant to Canada may have good reason not to want others to know he has HIV, a student permit applicant may not want others to know she has medical condition, or a visitor visa applicant may not want individuals in his home country to obtain his identity documents, financial statements, address, and know that he will be absent from the country. This type of information and evidence is in the CTR and likely to be part of an Application Record given its relevance to the arguments and decision.

Making immigration records available online would also increase the burden on applicants because of government policies. Immigration, Refugees and Citizenship Canada (IRCC) and Public Safety Canada take the position that applicants are deemed to be aware of documents available online and should proactively address these documents in their submissions. This has been extended to include not only country conditions documentation, but also LinkedIn and Facebook profiles. If pleadings and exhibits are online and accessible (non-restricted), this increases the burden on applicants to ascertain what type of information IRCC or the Canada Border Services Agency have before them.

With more permissive access to restricted documents for representatives of Canadian media and non-party lawyers licensed with law societies, we anticipate that requests by other non-parties will be limited and not place a heavy burden on the Court.

In determining when the Court should grant access to restricted documents, two considerations may be relevant: identity of the non-party; and whether the rationale and declared use of the information is consistent with section 2(b) of the *Charter*.

Regardless of whether a restricted and non-restricted classification is implemented, we recommend the following:

- Immigration files, including materials from interlocutory proceedings, should not be available online unless leave has been granted. This will ensure only meritorious applications receive public scrutiny. Applications where leave has been granted will, in most cases, benefit from a judgment or decision. This can prevent the misuse and misinterpretation of information, as the Court will have evaluated the materials and the judgment or decision can temper private interpretation.
- Exempt 1) applications from refugee claimants, which have already benefited from prior in camera proceedings (including from the Refugee Protection Division, Refugee Appeal Division, Immigration Division, and Immigration Appeal Division where previously in camera), and 2) Pre-Removal Risk Assessments and overseas visa office applications for

members of the Convention refugee abroad class or the humanitarian protected persons abroad designated class. The risks to these applicants (and their overseas family members and associates) is significant. It is important to prevent the misuse of information filed by these applicants, who are particularly vulnerable and will not benefit from Canada's protection overseas.

- CTRs should never be posted online. CTRs contain highly sensitive and private documents, including identity documents, financial statements, medical reports, etc. Redactions by tribunals would be onerous (time consuming and costly), and it is not clear that the parties would agree on the redactions. Further, Optional Character Recognition (OCR) formatting would not permit redactions of most handwritten materials, meaning time-consuming review and the likelihood of private information being missed from redaction. Finally, this information may be of assistance to the Court and redactions may inhibit the proceeding (particularly where parties edit their materials to protect privacy; the CTR then becomes the only method of placing the documents before the Court).

## **5. Special Considerations for Minors**

Information related to children also requires special protections. For example, even with anonymized pleadings, the Notice of Application in a judicial review involving a child seeking services can reveal considerable personal and identifying information, particularly in small communities. In these cases, restricted documents could include pleadings, affidavits, exhibits and other documents containing sensitive information.

## **6. Data Security**

We recommend rigorous security measures and storage of documentation on Canadian servers.

Data mining is a significant problem and represents an ongoing threat. Data mining, unlike access to court records by the media, involves the mass collection of information (including information that would be considered confidential or private). Information is one of the most important commodities in today's market. Protecting information in documents published on the Court's website is imperative.

Data security of court records and other privacy rights should be equivalent to standards in privacy legislation. For example, there should be an updated privacy policy on the Court's website, retention limits, mandatory breach recording and reporting procedures, and appropriate technological safeguards to prevent unauthorized access or circumvention of technological barriers.

We recommend that the Court consult with the Office of the Privacy Commissioner on best practices for data security for online records.

## **7. Searchability**

Documentation should not be accessible, except from the Federal Court's website. It should not be possible to access court files (or even to confirm the existence or non-existence of these files) from internet search engines or similar software designed for 'bulk' online searching.

The search functionality of the documentation filed with the Court, even on the website, should be limited as it is presently. This tool allows users to search electronic records of Court files by:

- Last name of person;
- Name of corporation;
- Name of ship;
- Court file number;
- Intellectual property name/number, and
- Name of counsel on record.

There should be no ability to search for details, words or phrases in the documentation (e.g., key terms such as HIV, Baha'i, ISIS).

## **8. Pilot Project**

We recommend conducting a pilot project before fully implementing online access, to evaluate the feasibility, effectiveness and cost of the initiative. A pilot project would allow the Court to determine the extent and type of non-party requests for immigration documents. A pilot project can be evaluated by stakeholders in future consultations.

## **V. CONCLUSION**

The CBA Sections appreciate the opportunity to comment on the proposal to make court files available on the Federal Court's website. We trust that our recommendations are helpful and welcome the opportunity to discuss them in more detail if necessary.

## **VI. SUMMARY OF RECOMMENDATIONS**

- **Create online user accounts (protected by username and password);**
- **Require a fee on a cost-recovery basis for non-parties to access documents;**

- **Establish one set of rules for both online and paper-based records;**
- **Allow online access to all court records unless they are designated confidential or subject to limited exceptions for immigration matters and cases involving minors;**
- **Access to court records on immigration matters and files involving minors should depend on whether the document is classified as non-restricted or restricted;**
- **Establish rigorous security and storage measures to protect against data-mining and other misuses of information. Adopt data security and other privacy policies and procedures including training for court staff to avoid unnecessary inclusion of personal information;**
- **Ensure documentation is only accessible from the Federal Court's website;**
- **Limit the search functionality of the documentation filed with the Court as it is presently with no ability to search for details, words or phrases;**
- **Examine the impact of online access on self-represented litigants; and**
- **Conduct a pilot project before fully implementing online access.**

**APPENIDIX A**  
**REQUEST BY NON-PARY TO ACCES TO COURT DOCUMENTS**  
**AUSTRALIA FEDERAL COURTS**



**Federal Court of Australia/Federal Circuit Court of Australia**  
**(General Federal Law)**

**Request by non-party for access to Court Documents**

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**1. Details of the person making the request**

(a) Name:

(b) Organisation (solicitor's  
firm, media organisation,  
etc.):

(c) Postal address:

(d) Telephone number:

(e) Email address:

**2. Details of the proceeding**

(a) Title of proceeding:

(b) Proceeding number (if  
known):

(c) Judge

### 3. Details of the unrestricted documents required

I wish to inspect and photocopy the following unrestricted\* documents on the court file:

#### Decision in relation to request for access to unrestricted documents

- ◆ I approve the request to inspect and photocopy the unrestricted documents mentioned in section 3.

Signed: ..... Date: .....

**Authorised Registry Officer**

### 4. Details of the restricted documents required

I wish to inspect and photocopy the following restricted\*\* documents on the court file:

**If there is insufficient space, please attach a separate page identifying the documents sought.**

#### NOTES

1. \* **Unrestricted documents** are those mentioned in Rule 2.32 (2) of the Federal Court Rules 2011 (see page 3).
2. \*\* Restricted documents are those not mentioned in Rule 2.32 (2) of the Federal Court Rules 2011, including affidavits, exhibits, unsworn statements of evidence and subpoena material, and those mentioned in Rule 2.32 (3). Permission of the Court is required to inspect these documents.
3. In the Federal Court and the Federal Circuit Court, fees are payable. Photocopy charges also apply. The current fee is published on the Federal Court website at [www.fedcourt.gov.au/forms-and-fees/court-fees/fees](http://www.fedcourt.gov.au/forms-and-fees/court-fees/fees) - refer to item 123. [These fees are fixed by the Commonwealth Government to which the Court is required to remit the revenue collected.]

**5. Reasons in support of request for access to restricted documents**

If you wish to give reasons why you want access to any restricted documents please do so below. This is not a requirement but may assist the Judge in deciding whether access should be granted.

Signed: ..... Date: .....

**6. Decision in relation to request for access to restricted documents (delete where appropriate)**

- ◆ I approve the request to inspect and photocopy the restricted documents mentioned in section 4.
- ◆ I do not approve the request to inspect and photocopy the restricted documents mentioned in section 4.
- ◆ I approve the request to inspect and photocopy the restricted documents mentioned in section 4, subject to the following conditions:

.....  
 .....  
 .....

Signed: ..... Date: .....

**Judge/Registrar**

**Fees paid**

**Amount \$** \_\_\_\_\_

**Receipt:** \_\_\_\_\_

### Federal Court Rules 2011

#### 2.32 Inspection of documents

(1) A party may inspect any document in the proceeding except:

- (a) a document for which a claim of privilege has been made:
  - (i) but not decided by the Court; or
  - (ii) that the Court has decided is privileged; or
- (b) a document that the Court has ordered be confidential.

(2) A person who is not a party may inspect the following documents in a proceeding in the proper Registry:

- (a) an originating application or cross-claim;
- (b) a notice of address for service;
- (c) a pleading or particulars of a pleading or similar document;
- (d) a statement of agreed facts or an agreed statement of facts;
- (e) an interlocutory application;
- (f) a judgment or an order of the Court;
- (g) a notice of appeal or cross-appeal;
- (h) a notice of discontinuance;
- (i) a notice of change of lawyer;
- (j) a notice of ceasing to act;
- (k) in a proceeding to which Division 34.7 applies:
  - (i) an affidavit accompanying an application, or an amended application, under section 61 of the *Native Title Act 1993*; or
  - (ii) an extract from the Register of Native Title Claims received by the Court from the Native Title Registrar;
- (l) reasons for judgment;
- (m) A transcript of a hearing heard in open Court.

*Note Native Title Registrar and Register of Native Title Claims* are defined in the Dictionary.

(3) However, a person who is not a party is not entitled to inspect a document that the Court has ordered:

- (a) be confidential; or
- (b) is forbidden from, or restricted from publication to, the person or a class of persons of which the person is a member.

*Note* For the prohibition of publication of evidence or of the name of a party or witness, see sections 37AF and 37AI of the Act.

(4) A person may apply to the Court for leave to inspect a document that the person is not otherwise entitled to inspect.

(5) A person may be given a copy of a document, except a copy of the transcript in the proceeding, if the person:

- (a) is entitled to inspect the document; and
- (b) has paid the prescribed fee.

*Note 1* For the prescribed fee, see the *Federal Court of Australia Regulations 2004*.

*Note 2* If there is no order that a transcript is confidential, a person may, on payment of the applicable charge, obtain a copy of the transcript of a proceeding from the Court's transcript provider.

*Note 3* For proceedings under the Trans-Tasman Proceedings Act, see also rule 34.70.

