



Briefing for the Public Petitions Committee

Petition Number: [PE1455](#)

Main Petitioner: James Macfarlane

Subject: Public access to court records

Calls on the Parliament to urge the Scottish Government to consider the need for new legislation to create a free of charge public right of access to information generated in relation to court proceedings, including all documents which have been read in open court, whether aloud or not, and to proactively publish this information online.

Background

Current position

Members of the public and the media are free to attend and report on court cases in most circumstances¹. The situations where this right may be restricted include where there are vulnerable parties or witnesses (eg. children), or where the matters to be discussed are highly sensitive (eg. national security). Nevertheless, the public right to scrutinise the justice process is considered to be an important principle in democratic societies.

While the public can attend court hearings and form an impression of a case as it unfolds, little of the written information produced in court is available to the public. Sentencing statements are produced in more serious criminal cases which explain a judge's sentencing decision. Similarly, written judgments are produced for all civil cases in the Court of Session (Scotland's superior civil court). Written judgments may also be available to the public in some civil sheriff court cases which are considered to be of particular importance. However, in most cases, only the basic elements of the sheriff's decision are recorded.

In addition, the public are able to ask court staff for information about court cases past and present. Where the information is readily available (for example the member of the public is able to identify a specific case) and in the public domain, court staff can provide this. Other material presented to the courts, such as witness statements, expert reports, documentary and physical evidence, is not generally available to the public.

¹ The restraints on journalists' (and individuals') ability to report cases are discussed below.

Journalists

Journalists are granted wider access to court documents in order to aid accurate reporting. This will usually mean that access to official court documents is available on request where they have been referred to in court proceedings. The position of evidence, such as witness statements or expert reports, is less clear. Certainly, these will not be available where they have not been referred to in court proceedings. Because most cases do not go to proof (civil) or trial (criminal), many documents related to a case will not be referred to in open court. Of course, journalists may get information from the parties to a court case as well as from court staff.

In their reporting of events, journalists are restrained by the fact that allegations which are not part of a fair and accurate report of contemporaneous court proceedings could form the basis of an action for defamation. They are also restrained by the law in relation to contempt of court², as well as other legal provisions.

Powers of the judge

It remains open to a judge to order particular information to be released where the circumstances of the case justify it. This is what happened in one of the cases referred to by the petitioner. In [Petition by the BBC for Access to Crown Productions in the case of HMA v Hainey](#) [2012] HCJDV 10, the BBC petitioned the court to have access to photographs produced as part of the Crown case in a murder trial. After balancing the competing interests involved, the judge held that photographs featuring only the victim should be released by the Crown Office and Procurator Fiscal Service. The petitioner argues that the process of raising a court action, as the BBC had to do, is too cumbersome and expensive. Instead, an assumption should exist that documents referred to in court are automatically available to the public.

Other considerations

The petitioner calls for all information referred to in court proceedings to be available free of charge and published online. There are practical considerations which affect this proposal.

The information produced as part of a court case is not the property of any one person or organisation. In most cases (although not all), it will belong to the parties producing it and may remain in their custody. Under the current arrangements, it would not necessarily be possible for one organisation – for example, the Scottish Court Service³ – to be responsible for publishing such information. In addition, the cost of providing free copies of court documents

² Contempt of court law allows journalists to report on court proceedings as they happen and to comment on them in discussions on public affairs. However, anything which impedes or prejudices the administration of justice may be illegal under the Contempt of Court Act 1981 and related common law.

³ The Scottish Court Service is the body responsible for the administration of our courts, including staff, buildings and equipment.

may be a considerable burden for either the Scottish Court Service or the parties to a case to take on.

There are also a number of legal hurdles to overcome. The Data Protection Act 1998 governs the processing (including passing on) of personal and sensitive data. The Human Rights Act 1998 enshrines the right to a fair trial (article 6 of the European Convention on Human Rights), the right to privacy (article 8) and the right to freedom of expression (article 10). Each of these rights may have to be considered and balanced against competing interests when deciding whether information should be released. There are other legal provisions which may be relevant.

There may be additional reasons for protecting the identities of parties to court action. In guidance issued by the Lord President regarding the publication of written judgments⁴ in civil cases, it is noted that opinions covering asylum seekers, adoption orders and some other sensitive circumstances should be anonymised. In relation to criminal cases, it may be thought that the identity of victims should be protected. Where individuals are convicted of criminal charges, arrangements exist to keep a record of convictions and to release information to others (eg. potential employers) in appropriate circumstances, but to otherwise keep the information private (eg. to encourage rehabilitation).

Comparisons

The petitioner highlights a recent decision in the English courts – [R \(on the application of Guardian News and Media Ltd\) v City of Westminster Magistrates' Court \[2012\] EWCA Civ 420](#). Here, it was held that a court had the power to order the release of documents where the principle of open justice (the right of the public to scrutinise what happens in court), when balanced with other considerations, required it. The documents (including evidence) had all been referred to in court proceedings but had not been read out in court.

The judge in the above case referred to the administrative process which exists in England for dealing with such requests. Where anything beyond very basic information is requested, a court order is required before the information can be released. In addition, a fee must be paid for access.

The petitioner also highlights the [PACER](#) (Public Access to Electronic Records) website in the USA. This provides online access to a wide variety of court documents. Small volume users pay nothing, but larger users pay a charge per page downloaded. Identifying information such as date of birth (and address in criminal cases) is removed from the downloadable documents. However, names remain unless the person in question is a child.

⁴ Court of Session Practice Note No. 2 of 2007. "[Anonymising Options published on the Internet](#)".

Scottish Government Action

This is not an area that the Scottish Government is actively considering at the moment.

Scottish Parliament Action

The Justice Committee held an evidence session on the role of the media in criminal trials on [2nd October 2012](#). The [SPICe briefing](#) which informed it contains additional information.

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