**Guidance on assessing the likelihood of a Court making orders restricting access of a court document to a person that is now seeking a copy of the document**

*This guidance has been developed to assist agencies with their risk assessment and provide guidance on when contact with the relevant court may be required*

**30 October 2024**

**Context**

On 19 August 2024, the High Court issued its decision in *H and Anor* v *Attorney-General[[1]](#footnote-2)*. The decision addressed the question of how specific documents commissioned for court proceedings involving children and young people (including social work and psychological reports) should be assessed by agencies who have copies of these documents on their files for release under the Privacy Act 2020.

The Court accepted there are clear reasons for courts engaged in proceedings involving children to “maintain control of the distribution of documents regarding those children”. However, it noted that when the children are adults, that reason alone, “does not constitute a limit on their right to access their own personal information held by the Agencies”.

The decision also stated that: “The access and disclosure provisions in the welfare legislation do not impose a prohibition or restriction or regulate the manner in which information is to be made available, in relation to the personal information of the child or young person *once they are an adult.*”

Accordingly, an agency holding this information must provide the information to the person concerned unless a court has ordered that specific personal information not be provided to the person concerned[[2]](#footnote-3) or another exception in the Privacy Act applies.

While the only way to confidently know whether there is an order prohibiting release of the personal information to the person concerned is to make contact with the relevant court,[[3]](#footnote-4) a more timely and pragmatic solution is to undertake a risk analysis that considers the likelihood of an order having been made. Aspects that might inform this consideration may include the content of the document (for example, the level of sensitivity in the information it contains) and the legislative provision it was prepared under.

Where the agency believes that an order may exist it will be necessary to confirm with the relevant court.

This document has been developed to assist agencies with their risk assessment and provide guidance on when contact with the relevant court may be required.

The following legislation was considered when developing the risk assessment:

* Under the Oranga Tamariki Act 1989 and the Guardianship Act 1968 prior to 13 January 1981[[4]](#footnote-5), the Court is not required to consider making access restrictions. Our understanding is that it is rare for a Court to do so, but they are enabled to do so:
* Oranga Tamariki Act 1989 - the Court may make orders restricting access of various reports to any person where the court is satisfied disclosure may be detrimental to the physical, mental or emotional well-being of the child, young person or other person to whom the report relates.
* Under the Guardianship Act 1968 prior to 13 January 1981, the Court is empowered to order the report not be given or shown to “the person for whom counsel is acting”. A threshold or reasons for doing so are not provided for in the legislation. However, we consider it likely a court would have considered similar welfare reasons as noted in the Oranga Tamariki Act.
* Under the Care of Children Act 2004 (COCA), lawyer for child is expressly prohibited from giving or showing a section 132 or section 133 report to the child unless the court has ordered so. This is likewise the case with respect to s 41 of the Children and Young Person’s Act 1974 and s 29 of the Guardianship Act 1968 post 13 January 1981. Based on these provisions, if an order exists, it will be an order allowing the report to be given or shown to the child or young person, not an order restricting their access. In *H v Attorney-General*, the court found the purpose of the reverse onus under COCA rests on protecting the age-appropriate capacity of the child, and that policy is not fulfilled by restricting release of information to the person concerned when they are an adult. It is reasonable to interpret this as meaning that once the person concerned is an adult, the reverse presumption against disclosure no longer applies.

**Risk analysis questions to consider for each court document**

1. Is the document of a type that is captured by the *H v A-G* proceedings?
* See attached Appendix A.
1. How old is the person concerned?
	1. If the person concerned is under 18 years of age, the document will be withheld pursuant to s 24(1)(b) of the Privacy Act.
	2. If the person concerned is 18 years of age or older, go to question 3.

(note – if the document relates to multiple persons and at least one of them is still under 18 years of age, please seek guidance from your legal team)

1. Was the document prepared for the court pursuant to ss 132 or 133 of the Care of Children Act, or s 41 of the Children and Young Person’s Act 1974 or section 29 of the Guardianship Act 1968 on or after 13 January 1981?
	1. If yes, assess the request pursuant to the Privacy Act and release the documents accordingly. Things to consider:
		1. If the requester is the person concerned (or a person acting on their behalf) specific attention should be paid to s 49 of the Privacy Act.
		2. If the requestor is somebody other than the “person concerned” (or a person acting on their behalf), specific attention should be paid to third party privacy considerations. It may be that a heavily redacted version of the document is released, or the document is withheld on the basis it contains no personal information relevant to the requestor.

*If the document was prepared for the court pursuant to the Oranga Tamariki Act or the Guardianship Act prior to 13 January 1981*

1. Is there any indication in the file to suggest that the court has made an order restricting access to the requestor?

For example:

1. A stamp or written note on the court document restricting access
2. Reference in a court minute or court decision to a Judge making an order restricting access
3. A file note recording directions made at a court hearing or case management conference that an order had been made restricting access
* If there is a clear indication on file that a Court order has been made restricting access to the requestor then the document may be withheld pursuant to 24(1)(b) of the Privacy Act 2020 (subject to consideration of the discretion discussed below).
* If there is an indication on file to suggest that an order *may* have been made, but it is unclear, then contact the relevant court to confirm whether any orders/restrictions are in place.
* If there is no evidence of an order on file, move to question 5.
1. Is there any indication in the file suggesting that social workers or lawyers discussed that they may need to seek directions that a court document be withheld from the requestor?
* Yes – contact the court to confirm whether any orders/restrictions are in place and what they are.
* No – move to question 6
1. Is there any indication in the file that could suggest that there were enough risks present that a court might have considered making an order restricting access to the requestor?

For example:

1. Information that may be detrimental to the physical, mental or emotional well-being of the child or young person. For example:
	1. Sensitive information about a whanau member that the child or young person may not have been aware of;
	2. Threats of harm towards the child or young person.
2. Any particular vulnerabilities about a child or young person that may have meant the Court would likely have considered making an order restricting access after

having regard to the content of the report and the possible impact this may have had on them if they had read the content. For example:

* 1. The child or young person is suicidal or has mental health concerns that makes them more vulnerable to being impacted by the content of the report.
* Yes – contact the relevant court to confirm whether any orders/restrictions are in place and what they are.
* No – move to question 7.
1. If the above questions do not suggest there is a likelihood that the Court made an order restricting access to the requestor, then the document can be released subject to any other withholding reasons in the Privacy Act 2020.

**Next Steps**

If following completion of the above steps, an agency believes that an order may exist it will be necessary to confirm this with the relevant court.

While confirmation is being obtained from the Court around any potential orders on specific documents, the remainder of the information can be assessed and released to the requester (partial release) informing them that the court documents will be assessed when confirmation has been received from the Court.

When confirmation is received from the Court that:

* The order is confirmed - the documents may be withheld under section 24(1)(b) of the Privacy Act 2020. Requestors are advised that they may request these documents from the Court.
* The order is not confirmed - the document/s can be released as appropriate subject to any other withholding grounds contained in the Privacy Act 2020.

Section 53(f) contempt of court

When considering withholding a document pursuant to section 24(1)(b) of the Privacy Act 2020 on the basis that a court order is in place restricting access to the requestor, consideration should be given to section 53(f) of the Privacy Act 2020. This provision permits an agency to refuse access to information if it would constitute contempt of court.

Seeking Legal Advice

If you are in any doubt about the application of this guidance or about whether information should be released please seek guidance from your legal team.

**Appendix A - Documents defined as a ‘court document’ for the purposes of this guidance**

Guardianship Act 1968

* Section 29 - Reports from the Superintendent of Child Welfare (or their representative)

Children and Young Person’s Act 1974

* Section 41 – Report from a social worker where a court finds that a charge or complaint against a child or young person is proved

Oranga Tamariki Act 1989 (formerly known as Children, Young Persons and their Families Act 1989)

* Section 128 – Plan
* Section 135 – Review of plan
* Section 178 – Medical, psychiatric and psychological reports
* Section 186 – Report by a social worker
* Section 187 – Cultural or community reports
* Section 296M – Report on review of intensive supervision order
* Section 308C – Progress report on young person’s compliance with conditions composed
* Section 314 – Report where the Court is considering early release from custody before expiry of supervision with residence order
* Section 319A – Review of plan of particular orders
* Section 320 - Report on effectiveness of certain orders
* Section 333 – Medical, psychiatric and psychological reports
* Section 334 – Report by social worker before making an order under section 283
* Section 335 – Plan to accompany section 334 social worker report
* Section 336 – Cultural or community report

Care of Children Act 2004

* Section 131A – Advice from Chief Executive or social worker
* Section 132 – Reports from Chief Executive or social worker
* Section 133 – Reports from other persons
1. [2024] NZHC 2317 [↑](#footnote-ref-2)
2. For the purpose of this guidance, “the person concerned” is defined as the child or young person who was the subject of the proceedings (in the Family Court), or the respondent to the proceedings (in the Youth Court). [↑](#footnote-ref-3)
3. ‘relevant court’ refers to the regional Family or Youth Court for which the document was prepared. [↑](#footnote-ref-4)
4. The Guardianship Amendment Act 1980 came into force on 13 January 1981. This Act amended section 29 of the Guardianship Act 1968 and provided that a report shall be given or shown to the child for whom the barrister or solicitor was acting only if the Court ordered. Prior to this date, reports under section 29 were able to be provided unless the Court made an order restricting access. [↑](#footnote-ref-5)