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Seth Barrett Tillman



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BUSINESS LAW

EDITED BY KIERON WOOD, Barrister-at-Law

Open democracy requires free media access to court documents

The Constitution requires that justice should be administered in public, but that requirement does not seem to apply to certain court documents

Kieron Wood

The Constitution of Ireland requires that justice be done in public. Article 34.1 says "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

You would imagine that imperative should also apply to the availability of court documents in Ireland – but it doesn't. In the 2000 case of Minister for Justice v The Information Commissioner, the former president of the High Court, Mr Justice Joseph Finnegan, said that, as the courts were entitled to regulate the conduct of their own business, any practice not originating in the Rules of the Superior Courts – such as "the practice of confining access to Central Office files to parties and their representatives" – amounted to a prohibition.

In an interview with *The Sunday Business Post*, the former president said: "The open administration of justice is, of course, a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even-handed administration of justice. Any system of secret court hearings could pave the way for judicial arrogance, overbearing judicial conduct and abuse."

"In these circumstances, the public are entitled to have access to documents which were accordingly opened without restriction in open court, simply and not parcelled out in the open administration of justice which the Constitution – subject to exceptions – enjoin."

Media solicitor Darryl Broderick, in the current edition of *Ronan Daily Jermyn's media law bulletin*, says that Mr Hogan judgment "should make it easier for members of the public and the media to gain access to important documents which the public previously would have been denied access in formal channels."

"What is not clear from the decision, however, is how this will operate in practice or whether the public's entitlement to obtain the records from the court itself or from parties to the proceedings. Whichever the case, it does not seem that the public's entitlement to documents can be denied once they have been read into the record of the court."

Yet access to those "public documents" is currently restricted – not just to the public, but for journalists and even for other lawyers, unless they are involved in the case.

The point was taken up by McGarr Solicitors of Dublin, in an article on the firm's website. It said: "Before you can publish a 'fair and accurate report', you must access the material."

"There is no right of access, un-

der the Freedom of Information Acts, to Irish court records. In the High Court, the records are under the control of the president of the High Court and, in the Circuit Court, under the control of the president of the Circuit Court.

"Currently, in the High Court, civil pleadings are no longer filed in the court. They are simply exchanged between the litigants and, later, a booklet of pleadings is delivered to the court to facilitate the hearing of the action."

"All of this is in considerable contrast to US courts. There, the general public has access to the court records. Indeed, they are often published on the internet by the court authorities. This is essential, for instance, in relation to a class action. There, the general public must be able to understand the issues to know whether to subscribe to the proceedings as an injured claimant."

"When will Ireland catch up with the UK, not to speak of the US?" The Courts Service website confirms that obtaining information under the Freedom of Information Act is "subject to certain limitations", with "particular procedures and time limits". But section 46 (1) of the act makes clear that it "does not apply to a record held by the courts."

The Courts website adds: "Court records are under the control of the courts, and not the Courts Service. In general, you would have to apply to the court (not the Courts Service) to get information about a court record."

"This is in line with section 66 of the Court Officers Act, 1926. This states that 'all proofs and all other documents and papers lodged in or handed in to any court in relation to the course of the hearing of any suit or matter shall be held by, or at the order and disposal of, the judge or the senior of the judges, or before whom such suit is heard'."

Amendments to the Rules of the Superior Courts last April say that the public's entitlement to documents can be denied once they have been read into the record of the court."

sending themselves – or other individuals – with the consent of the acting solicitor – may inspect their own files on production of photographic ID. Law reports for or reports such as the Irish Reports or the Irish Law Reports Monthly can also inspect the files in concluded cases."

The Courts Service says this "settled practice" of "exclusionary access" is to protect "sensitive personal information".

Despite this newspaper being refused a Central Office file in a concluded case "by order of the president of the High Court", the Courts Service spokesman said that the order came from his chief executive, not from the judiciary.

One of the problems appears to be data protection. Susan Whiteford, head of corporate communications for the Scottish courts, said: "We are currently reviewing how we provide information, and the challenge for us is balancing our requirement to support for open justice and our statutory compliance with data protection."

However, Ireland's Data Protection Commissioner has apparently not banned access to court files. Ciara O'Sullivan, spokeswoman for the commissioner, said: "Organisations which process personal data – about identifiable living individuals – have responsibilities under the Data Protection Acts 1988 and 2003 in relation to how they use, disclose, and store that personal data."

"Where access to personal data is being sought, it is a matter for that organisation to assess in the first instance whether it has a legal basis under the Data Protection Acts to grant access to or disclose that personal data. The Data Protection Commissioner has not been requested to provide a general assessment on this particular topic, but we would expect that consideration would be given to the application of the acts in relation to such access, insofar as the files concerned contain personal data."

Other common law jurisdictions, such as England and Wales, Australia, New Zealand, India, Canada and the United States, generally allow media access to court files. In England, the Civil Procedure Rules give the courts power to order the release of documents to non-parties and, according to lawyers for the Guardian newspaper in 2010, "the general tenor of the authorities is in favour of disclosure to the public of material which, in proceedings in open court, entered the public domain".



The Four Courts: some judges have already taken the first step to counter the 'culture of secrecy'



Mr Justice Gerard Hogan

'The open administration of justice is, of course, a vital safeguard in any free and democratic society'

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As Sir John Donaldson said in the 1990 case of AG v Guardian Newspapers Ltd (No 2), the media are the "eyes and ears of the general public", and their right to know and right to publish is "that of the general public, for whom they are the trustees."

In Australia, in the 1995 case of R v Davis, the judge said: "Whatever the media's motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public."

"This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them."

Rule 36.12 of New South Wales 2005 Uniform Civil Procedure

Rules, which apply to the Supreme Court, District Courts and Local Courts, allow anybody to obtain a copy of a judgment or order from the registrar, unless the court orders otherwise. Registrars may give non-parties with "sufficient interest in the proceedings" – such as the media – copies of any pleading or document filed in the proceedings.

According to the Judicial Commission of New South Wales: "The principle of open justice will guide the courts in determining whether to grant the media access to court records and exhibits."

In the 2001 case of Australian Securities and Investments Commission v Rich, Judge Austin said that, when a court made "significant orders on an *ex parte* application, the basis for the making of the orders must be available so the court is accountable for what it has done" – though he didn't think files should be released for reasons of prudence, where there was a risk of "ambush" or misleading reporting, or where there was an issue of commercial confidentiality.

In the 2000 case of Hogan v Australian Crime Commission, the court ruled that permission should generally be granted to inspect files unless evidence of possible harm or damage had been accepted or there was a non-publication order.

Under Australian rules, the media normally has access to:

- pleadings and judgments in concluded proceedings, except if there's a confidentiality order;
- documents that record what was said or done in open court;
- exhibits admitted into evidence, including DVDs and CD-ROMs;
- information that would have been heard or seen by someone in court.

Material that has been rejected, not used or struck out, or being "scandalous, frivolous, vexatious, irrelevant or otherwise oppressive" may not be made available, even where it has been read in open court.

But media access was granted to an affidavit which had not been read in open court in the 2004 case of Australian Securities and Investments Commission v Michaelis, subject to the names of potential witnesses being omitted, because of the public interest in "the due and orderly conduct of investigations by law enforcement agencies".

And the media was also granted access to affidavits and exhibits in the Rich case, including board papers, minutes of a commercially-

confidential meeting and information about the financial assets of three defendants.

In New Zealand, the Ministry of Justice's media guide says: "The registrar or deputy registrar will provide access to court information where legislation allows. This will usually be done on the authority of the registrar, but some cases may involve referral to a judge."

The practice and procedure manual of the Supreme Court of India says: "The court, on the application of a person who is not a party to the case, appeal or matter, may allow him such search or inspection, on good cause being shown for this purpose."

In Canada, the Courts of Justice Act provides for public access to civil court documents on payment of a fee, unless an act or court order provides otherwise.

The Canadian Attorney General's Court Services Division guide to public access to court files, documents and exhibits

is available by phone. (Imagine that happening in Ireland!)

It says the courts are "based on the fundamental principles of openness and accessibility. In general, most court documents are publicly accessible, unless a statutory provision, common law rule or court order restricts access."

Court staff must "facilitate access to court files and documents as quickly and efficiently as possible", and publicly-accessible information is available by phone. (Imagine that happening in Ireland!)

A spokesman for the Irish Courts Service said: "The courts are heard in public and, in this regard, the issues of access to court documents – one which is being actively considered by the Courts Service at the moment, taking into account issues of privacy, legal, practicality and resource implications."

But Beth Barrett Tillman, an American law lecturer in NUI Maynooth and campaigner for open justice, reckons that, despite the Hogan judgment, the Irish legal system has quite some way to go before it can be described as 'open'.

"In Ireland, judicial orders – as distinct from the judgment – are not public documents. As far as I know, Ireland is the only country in the English-speaking world where this has happened," said Tillman.

"Although Mr Justice Hogan reached the correct result, he did a tremendous disservice to democratic debate. He should have striven to make his decision through legislation, section 6(3) of the court officers Act 1926 – a much simpler mechanism than citing the Constitution."

"The judge expressed the right to access in the most limited terms, such as affidavits opened in court, but public should also have a right to lawyers' briefs. He was either fooling the public or more likely he was fooling himself because these remarks were only obiter dicta [which cannot be cited as a precedent]. In the name of transparency, he even denied them and not to use the partner's name."

"The practice of the Australian federal courts is that all documents in the case are open to the public. Lawyers have to certify in their briefs if there is any potentially confidential information. In the US state of Delaware, where two briefs are filed in high-stakes business cases, one publicly-available and one confidential, the business case for the court. But the moment the case concludes, everyone can see the fully open unredacted version of the brief."

"In New York and Delaware, you can get briefs online. The Supreme court of the US has said everyone has a right to these generally, and you can request them anonymously [barring the American Bar Association website]."

"One of the benefits of giving notice to a party in a case is that they might give you documents you are seeking. But what if they want anonymity?"

"What we see in Ireland is the total refusal of the courts to exercise their rights under the Court Officers Act. There is a culture of secrecy in the Courts Service which is no more than an administrative body. Access to files is not a matter for the Courts Service – it's a matter for judges."

Some Irish judges have already taken the first step to counter that "culture of secrecy". Now it's up to the rest of them.