

Practice Direction 29

Recovery of Evidence in Court Proceedings

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SUMMARY

Recovery by the Reporter

- Formal steps to recover should only be taken where informal steps are unsuccessful or unavailable.
- The reporter should seek (whether informally or formally) to obtain documents, medical records or other material required in relation to court proceedings only where:
 - (A) the material is relevant,
 - (B) the material is necessary for the proper conduct of the case, and
 - (C) the request for the material is appropriately specific in its terms.
- The formal method the reporter is to use to recover evidence is that set out within the Administration of Justice (Scotland) Act 1972 . Appendix 1 to this Practice Direction sets out the procedure to be followed.
- The reporter should canvass opposition to the motion and specification in advance of any hearing on the motion.

Recovery by Other Parties

- Other parties seeking formally to recover evidence may use either the Administration of Justice Act 1972 or common law commission and diligence. Appendix 4 provides information about common law commission and diligence.
- The reporter is to oppose any motion by another party to recover any material where (i) the material is not relevant to the matters in issue between the parties, (ii) formal recovery is not necessary as the material can be recovered by other means, or (iii) the specification is too wide in its terms (“fishing” or “speculative” diligence”).

Recovery in Other Proceedings

- Where intimation of a motion and specification is received in any proceedings to which we are not a party, the decision as to what material to produce is delegated to the Practice Manager. When such intimation is received the Practice Team should be contacted immediately.

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1. Introduction

- 1.1 The reporter will often require to obtain documents or other material before any hearing on evidence in order to consider whether that material will require to be used as evidence. It is essential that the reporter identifies the need to obtain such material - and takes appropriate action - at the earliest possible point in the proceedings.
- 1.2 The reporter will normally be able to obtain such material using informal means. In most situations, a request to the person the reporter believes has possession of what is required – normally a local authority, the police, or a hospital or GP practice - will result in the necessary material being made available. Such methods should be used wherever possible.
- 1.3 However where informal methods are not effective, or where the reporter requires to respond to formal steps taken by other parties to recover evidence, this Practice Direction summarises the approach the reporter is to take.
- 1.4 There is a significant body of relevant case law, particularly on opposition to recovery and this Practice Direction does not cover all aspects of this. An outline of issues relevant to opposition is provided in Appendix 3. If further information or resources are required, the reporter should consult their senior practitioner or the Practice Team who will be able to provide support and access to relevant legal texts.¹
- 1.5 Note that reference throughout this PD to the things that are being sought is to “material” rather than “documents” or “productions”. This is because:
 - (i) While the things being sought will almost always be documents of one type or another, recovery can be of non-documentary material.
 - (ii) Further, there will be occasions when some or all of the material recovered is not used as evidence in proceedings.²

2. General Principles related to recovery by Reporter

2.1 Seek recovery of evidence only where relevant

Parties are only entitled to seek recovery of material which is relevant to the matters before the court.³ Any party taking formal steps must be able to demonstrate the relevance of that material before the court will grant an order for its recovery. The assessment of what is relevant is based on what is at issue in the proceedings i.e. the substance of the statement of grounds in a proof application or, in an appeal, the substance of the appeal and answers.⁴

¹ Of particular relevance is Chapter 15 of Macphail on “Sheriff Court Practice” which can be accessed by Senior Practitioners and Practice Reporters through Westlaw.

² The PD is named “Recovery of Evidence....” for the sake of brevity.

³ This principle applies equally to informal recovery of evidence.

⁴ Note that it is likely to be the reporter’s position in most appeals that evidence is not required.

The reporter is not to engage in any attempt to recover material solely because he/she suspects there may be something of relevance contained therein. Such an attempt – where the range of documents sought is deliberately wide – is often referred to as “fishing diligence”. The reporter is to oppose any attempt by another party to engage in fishing diligence.

2.2 Seek recovery of evidence only where necessary

Just because material is, or may be, relevant does not mean that the reporter should seek to recover it. The reporter’s investigation must have regard to the rights of children and others to respect for privacy. Therefore the reporter should not be seeking to obtain sensitive material unless he/she is clear that such access is necessary from an evidential point of view. It may be possible to prove a case just as effectively without accessing certain sensitive material.

The obvious example relates to medical records for a child. Where the reporter has sufficient medical information in relation to a child through a GP’s report or a report from a hospital then it is unlikely to be appropriate to seek full medical or hospital records.

The likelihood that another party will want access to records is not a reason for the reporter to seek recovery. Even where to do this may expedite the progress of a case, the reporter is not to do so. If the reporter does not consider the material to be necessary to prove the case there is no justification to seek recovery. What another party may wish to recover is entirely a matter for them.

2.3 Be Specific

When seeking recovery of evidence the reporter needs to be specific regarding what is being sought. If the request is not specific it will give the appearance that the reporter is being speculative – hoping to recover something helpful without a clear sense of what that might be - and might result in the court refusing the reporter’s attempt to recover.

Separately, where the reporter is not specific in what he/she is seeking then he/she may inadvertently access a range of material unnecessarily, contrary to Principle B above. Unintended consequences may involve an unjustified interference with a person’s right to respect for privacy and/or the need to disclose the recovered material to other parties.

3. Methods of Recovery

3.1 In Scots Law there are 2 possible methods to recover evidence in civil proceedings:

- **Statutory procedure** - Administration of Justice (Scotland) Act 1972
- **Common law procedure** - commission and diligence for the recovery of documents

Both methods are competent in Children's Hearings related court proceedings, both proofs and appeals.

- 3.2 The reporter is to use the 1972 Act procedure for the sake of consistency and because this process is wider in its application and fairer to 3rd party havens. However, if another party uses the common law procedure, the reporter is not to oppose its use.

The 1972 Act differs from the common law procedure in 3 major respects:

- It can be used before the commencement of legal proceedings.
- It can be used to recover real evidence as well as documentary evidence.
- Before recovery is allowed, those persons who are said to be in possession of material the recovery of which is being sought (called "3rd party havens") must be given the opportunity to be heard.

Details of the process to be followed are set out in Appendix 1. Style forms for use in the statutory process are set out in Appendix 2.

- 3.3 It should be noted that the terminology in this area is potentially confusing. The 1972 Act procedure involves the court making an order which *grants* a "commission and diligence" for the recovery of documents or other property. As a result, the phrase "commission and diligence" is used in both the 1972 Act procedure AND the common law procedure.

4. Recovery by other parties

- 4.1 The reporter must not attempt to recover documents informally because another party to the proceedings wishes to have sight of them. There have been occasions where sheriffs have considered imposing upon the reporter an obligation to obtain documents that are being sought by another party. This approach is to be resisted by the reporter. An outline submission in support of this position is set out in Appendix 3.
- 4.2 The reporter must consider any specification lodged by another party to the proceedings to determine whether opposition is appropriate, (in whole or in part). Broadly, the most significant considerations reflect the principles set out in section 2 of this Practice Direction:
- A. Is recovery by specification necessary?
 - B. Is the material referred to in the specification relevant?
 - C. Is the specification too wide in its terms and therefore effectively a speculative or "fishing" exercise?

For more detailed consideration of the relevant issues, refer to the Note on Reasons for Objecting in Appendix 4

- 4.3 If opposing the recovery (in whole or in part) the reporter is to intimate that opposition to the court and other parties as soon as possible. A style for intimating opposition to the court is set out in appendix 2.5.

5. Recovery by Party in Other Proceedings

- 5.1 Where a party to other court proceedings (i.e. proceedings to which the reporter is not a party⁵) seeks to recover material from SCRA and serves upon a reporter a motion and specification of documents, authority to take decisions on how to respond is reserved to the Practice Manager under the Casework Practice Scheme of Delegation. On receiving notification of such an action the reporter must inform their LRM or senior practitioner and the Practice Team.

⁵ For example a natural parent or adoptive parent in adoption proceedings or an accused in criminal proceedings

A Recovery under the Administration of Justice (Scotland Act 1972)

Summary of Process where the Reporter is seeking to Recover Evidence

1. *Draft the specification and motion (see Appendices 2.1 and 2.2) and lodge with sheriff clerk, requesting date to be assigned for hearing*
2. *Notify parties of hearing date and give copy specification and motion.*
3. *Notify any third party haver and give copy specification and motion.*
4. *Where appropriate, notify person whose records are being sought and give copy specification and motion.*
5. *Canvas opposition to the motion.*
6. *At hearing, make submissions in support of specification, indicating the appointment of commissioner is not necessary at this time*
7. *Seek recovery in line with any order made by serving the order and specification on the haver(s) along with a Form of Notice (Appendix 2.3).*
8. *Haver lodges material with sheriff clerk within 7 days.*
9. *If material lodged by haver in a sealed envelope marked "Confidential", consider seeking court's permission to open and, if appropriate, lodge motion (Appendix 2.4)*
10. *Uplift material within 7 days of it being lodged (or following court order to open envelope).*
11. *Decide what to lodge as productions within 7 days where practicable and returns other material to sheriff clerk.*
12. *Sheriff clerk returns (non-production) material to havers once all parties have had opportunity to look at it.*
13. *If haver does not comply with order by sheriff, reporter to consider seeking appointment of a commissioner. If approved by locality reporter manager, lodge motion requesting appointment of commissioner.*

1. Procedural Rules

- 1.1 There are no dedicated rules detailing how recovery procedures should be used in Children's Hearing court proceedings. The procedure set out below has regard to the procedure used in Ordinary civil court actions but only insofar as this process is compatible with the purpose of proceedings under the 2011 Act. For reference, these rules are set out in Chapter 28 of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993.
- 1.2 Note that while this Practice Direction proposes a similar process to that set out in Chapter 28 of the OCR, the reporter is **not** to adopt the detailed aspects of these Rules. Specifically, although some agents will sometimes use the other procedural aspects of the Ordinary Cause Rules in relation to the intimation of motions (such as specific forms), the reporter should not seek to apply them and should seek to avoid their rigid application by others.

- 1.3 This Practice Direction proceeds upon the basis that most formal recovery proceedings will relate to recovery of documents⁶ located in Scotland. Should a situation arise that is out with this “norm” – for example recovery of documents from England, or where one of the other options available under the 1972 Act seems appropriate⁷ – then advice and support should be sought from the Practice Team.

2. The Specification

- 2.1 If the reporter, having had regard to the principles set out in Part 2 of the Practice Direction, considers that formal measures for the recovery of evidence are required, then the procedure set out below is to be initiated as quickly as possible
- 2.2 The reporter is to give careful consideration to the detail of the documents or other evidence that he/she is seeking to recover. Having decided what is to be sought the reporter should draft a specification of documents (or of other evidence) conform to that set out in Appendix 2.1. In drafting the specification the reporter should be as clear as possible regarding (i) the nature of the evidence that is being sought and (ii) in whose possession the evidence is.
- 2.4 Where more than one item or set of records are being recovered then the reporter is to draft a separate numbered paragraph for each of them even where more than one item or set is being recovered from the same person or organisation. Note that the examples in Appendix 2 are illustrative only; the precise wording of the specification depends on what it is that the reporter wishes to recover.
- 2.5 Objection may be taken to the specification if it is not sufficiently specific or relevant.

3. Initial Procedure

- 3.1 Having drafted a specification the reporter must draft a separate document - called a “motion” - in the form set out in Appendix 2.2. The motion formally asks the court to grant an order in relation to the documents being sought.
- 3.2 At this stage the reporter will require to identify who should receive intimation of the motion and specification. This will always include the other parties and any person or body who is in possession of any documents being sought, the “haver” (see paragraph 3.5 below). In addition, where the specification seeks to recover documents that relate to an individual who is neither a party to the proceedings nor a haver (e.g. the medical records of neither the child nor a relevant person) then the reporter should take steps

⁶ The term “document” covers more than the obvious type-written document and includes photographs, electronically stored material, x-rays, scans, tape and video records, and so on.

⁷ Under Section 1 of the 1972 Act the court can order (i) recovery of non-documentary, or real, evidence, (ii) order the inspection or photographing of documents and other material, or even the experimenting on material, (iii) order someone to reveal the identity of potential witnesses.

to have the court order intimation on that person.⁸ In addition intimation on the Lord Advocate may be required (see paragraph 3.6 below).

- 3.3 Both the motion and the specification of documents should then be lodged with the Sheriff Clerk. At the same time the reporter should identify those parties or others on whom intimation should be made. There is no set procedure for dealing with motions of this type. The reporter should ask the sheriff clerk to deal with the motion and specification in a manner broadly similar to how it would be dealt with in ordinary civil actions. If the Sheriff Clerk agrees he/she should assign a date for a hearing in respect of the motion and return the motion and specification to the reporter with an interlocutor specifying the date of this hearing and ordering intimation on the parties, havers or others. If the case is calling at court for other reasons within a convenient timeframe, reporters are to ask that the motion be set down for a hearing at the same time thus avoiding the need for all parties to attend court on two separate occasions.
- 3.4 On receipt of the interlocutor the reporter must notify parties, havers or others by sending them copies of the motion and specification and by advising them of the date and time of the hearing.⁹
- 3.5 As highlighted above the reporter must notify any person (or organisation or public body) who is referred to in the specification as being in possession of a document or other piece of evidence. Such a person is referred to as a “third party haver” (or sometimes “a non-party haver”) and must be afforded the opportunity to attend the hearing to make representation on whether the court should order them to disclose the material referred to in the specification. The requirement to notify any third party haver should be made clear in the interlocutor but it may not be. In either event it is essential that such notification is made as to fail to do so is likely to result in the hearing being continued for such notification to take place. Where social work or education or other local government department records are being sought then intimation should be made on the Chief Executive of the local authority rather than on an individual within the named department. In addition the reporter is to inform the legal services department within a local authority that intimation has been made on the Chief Executive.
- 3.6 In certain circumstances notification must be sent to the Lord Advocate. The Lord Advocate is seen as having a legal interest, almost a supervisory role, in relation to the recovery of material belonging to, or in the possession of, the Crown. This covers any central government organisation or institution or department, for example, immigration or social security.

⁸ Such instances are likely to be rare. However if such a situation arises, the reporter must immediately contact the Practice Team for further advice and guidance as there is no clear authority for intimation on such individuals. It is submitted, however, that such intimation is appropriate having regard to that individual’s Article 8 rights to respect for their private and family life.

⁹ If a less formal method is used by the sheriff clerk (eg the sheriff clerk just confirms the motion and specification will be put before the sheriff for the next calling), the reporter should inform the other parties by informing them of this and giving a copy of the motion and specification.

The Lord Advocate should be notified at the following address:

**The Rt Hon The Lord Advocate,
Crown Office
25 Chambers Street
EDINBURGH
EH1 1LA**

- 3.7 Notification on parties or others is to be effected as quickly as possible to give them sufficient time to consider the motion. There is no provision which dictates the amount of notice required, but the reporter is to give other parties at least 2 days clear notice of the hearing.

4. The Hearing on the Motion

- 4.1 The reporter will have given significant consideration to the relevance to his/her case of the material sought, with particular regard to the supporting facts within the statement of grounds. Therefore, the case to be made in support of an order being granted in the terms of the specification should be clear.
- 4.2 Opposition to the granting of the order may be made for a number of reasons. Reference is made to Appendix 4 which looks in more detail at what these reasons may be. It will not always be clear whether opposition will be made in advance of the hearing as there is no obligation to inform the reporter of this opposition. The reporter is to contact all parties and others in advance of the hearing to ascertain if any opposition is to be made and if so, what the basis of this opposition is. While no-one is under an obligation to advise the reporter of their position, the fact that the approach has been made may be relevant to any motion by the reporter to continue the hearing to allow proper consideration of any opposition made.
- 4.3 If opposition is encountered to the terms of a specification for any reason, this opposition is to be addressed fully by the reporter. If the reporter was advised of the nature of any opposition in advance, or anticipated this opposition, then the opportunity to prepare to counter this opposition will have been available. In cases where opposition is made but was not anticipated then the reporter should consider making the motion that the Sheriff continue the hearing to allow the opposition to be properly considered.
- 4.4 At the hearing on the specification any party (including the reporter when faced with an objection to his/her own specification) can propose amendments to the terms of the specification. Normally such proposals will relate to a restriction of the scope of the specification, for example a restriction of the range of dates, or of the type of document to which the specification relates.
- 4.5 Having heard parties on the motion, the Sheriff will grant an order under Section 1 of the 1972 Act in terms of the specification (in whole or in part) or will refuse the motion. In granting an order the Sheriff may give effect to

amendments proposed by any party or may amend of his or her own accord (*ex proprio motu*)¹⁰. Examples of such amendment might include restricting records to the date of commencement of proceedings, or to medical records relative to conditions or injuries referred to in the supporting facts.

- 4.6 In granting a 1972 Act order, the Sheriff is granting a commission and diligence for the production of a document or other property. At the point of granting this order the court can appoint a commissioner. Commissioners are appointed to oversee the process of recovering documents and other evidence. Their role is discussed in more detail in section 5 below. The reporters should state to the court that they are not seeking such an appointment meantime.

5. Implementation of an order in terms of Section 1 of the 1972 Act

- 5.1 Having been granted an order for commission and diligence but without the appointment of a commissioner meantime, reporters are to seek to recover the relevant material in line with the procedure set out in Rule 28.3. This is known as the “optional procedure” and is designed to enable recovery of material mentioned in the order granted in a streamlined manner, without the need for the involvement of a commissioner.
- 5.2 The reporter must serve the order and specification on the haver along with a Form of Notice in the form set out in Appendix 2.3. This Form includes a certificate that the haver has to complete and deliver to the Sheriff Clerk along with any relevant documents.
- 5.3 The haver has 7 days from the date of service of the application to comply with the order. Such compliance will consist of:
- Completion of the certificate sent to them with the order. Within this certificate the haver must indicate:
 - (i) either that they have produced all documents in their possession falling within the specification OR
 - (ii) that they have no such documents.

In addition the haver must indicate whether they are aware of the existence of any other document falling within the specification BUT which is not in their possession

- Where the haver has relevant documents they must lodge them with the Sheriff Clerk along with an inventory which lists and numbers all items produced.
- 5.4 A haver who wishes to claim that documents sought under the specification are confidential (perhaps renewing a claim already made at

¹⁰ The Latin phrase *ex proprio motu* is used in a number of contexts in legal proceedings and is used when a sheriff or other judge does something of his or her own accord, not because they were asked to do it by another party.

the hearing on the original motion) can lodge these documents with the Sheriff Clerk in a sealed packet (Rule 28.8). Thereafter it is for the reporter to lodge a fresh motion to have the sealed packet opened. If the reporter does not do so then another party can lodge such a motion. The Sheriff Clerk will fix a hearing on this motion. The haver may attend to oppose the motion to open the packet.

- 5.5 The Sheriff clerk must notify the reporter (and any other party) of the lodging of the certificate and any documents within a day of their receipt.
- 5.6. The reporter has 7 days from notification by the Sheriff Clerk to uplift the documents produced. If the reporter has not done so then other parties are entitled to uplift the documents. For obvious reasons, it is anticipated that reporters will always uplift any document lodged.
- 5.7 The reporter has to consider the documents and decide whether they wish to lodge any of them as productions. Any documents which the reporter does not lodge are to be returned to the Sheriff Clerk. If returning to the Sheriff Clerk any document which is in a category of material covered by the obligation to disclose¹¹, the reporter must advise all other parties of the existence of this document and of the fact that it has been returned to the Sheriff Clerk.
- 5.8 The Sheriff Clerk requires to advise other parties of the documents' return so that they have the opportunity to look at them. If they are not uplifted by another party within 14 days then they will be returned to the haver.
- 5.9 If the reporter considers that the haver has not fully complied with the order, or that the reason given for failure to comply is inadequate, then the reporter is to consider applying to the court for appointment of a commissioner. Such appointments carry with them a liability to pay expenses so a reporter is not to seek such appointment without the approval of their Locality Reporter Manager.
- 5.10 If the Locality Reporter Manager agrees to seek appointment of a commissioner, the reporter will have to lodge a fresh motion requesting that a commissioner now be appointed. Thereafter, the procedure to be followed in the event that the appointment of a commissioner is made is set out in Rule 28.4. The reporter is to consult with their Senior Practitioner or with the Practice Team about the procedure.

¹¹ Practice Direction 34 - Disclosure of Evidence by Reporters in Children's Hearing Proof Proceedings

APPENDIX 2 - Style Documents

2.1 Style Specification

SHERIFFDOM OF [INSERT NAME OF SHERIFFDOM]

SPECIFICATION OF DOCUMENTS (or SPECIFICATION OF PROPERTY)

For the recovery of
which an order under
Section 1 of the Administration
of Justice (Scotland) Act 1972

is sought by

**(NAME, TITLE
AND ADDRESS OF
LOCALITY REPORTER MANAGER)**

in an application
under S.93 / S.94* of the Children's
Hearings (Scotland) Act 2011

(or in an appeal under S.154 of the
Children's Hearings (Scotland) Act 2011)

in the case of

David McManus (01.01.2010),
24 Hill Street, Anytown

1. The whole medical records of the Royal Hospital, High Street, Anytown, in the possession of NHS Midshire and the Chief Medical Officer, Royal Hospital, High Street, Anytown relating to David McManus (01.01.2010), 24 Hill Street, Anytown from 1 January 2010 to 31 December 2012.
2. All records, notes, memoranda, reports and other documents relating to David McManus (01.01.2010), 24 Hill Street, Anytown, held by or on behalf of Anytown City Council Social Work Department, Brown Street, Anytown for the period from 1 January 2010 to 31 December 2012.

3. All records, notes, memoranda, reports and other documents relating to Mary McManus (01.01.1990), 24 Hill Street, Anytown, held by or on behalf of Anytown City Council Social Work Department Addiction Services, Green Street, Anytown from 1 January 2009 to 31 December 2012.
4. Failing principals, copies or duplicates of the above.

IN RESPECT WHEREOF

NAME
JOB TITLE
ADDRESS
(OF REPORTER SIGNING THE SPECIFICATION)

2.2 Style Motion to accompany specification

SHERIFFDOM OF [INSERT NAME OF SHERIFFDOM]

MOTION FOR REPORTER

in an application
under S.93 / S.94* of the Children's
Hearings (Scotland) Act 2011

(or in an appeal under S.154 of the
Children's Hearings (Scotland) Act 2011)

in the case of

David McManus (01.01.2010),
24 Hill Street, Anytown

[NAME OF REPORTER] for the Locality Reporter Manager respectfully craves the Court to grant an order in terms of the Administration of Justice (Scotland) Act 1972, section 1 for the recovery of the items specified in the Specification of Documents which accompanies this motion

IN RESPECT WHEREOF

NAME
JOB TITLE
ADDRESS
(OF REPORTER SIGNING THE MOTION)

2.3 Form of Notice in Optional Procedure for Commission and Diligence

Court Ref. No.

Order by the Sheriff Court at (insert address)

In an application
under S.93 / S.94* of the Children's
Hearings (Scotland) Act 2011

(or in an appeal under S.154 of the
Children's Hearings (Scotland) Act 2011)

in the case of

David McManus (01.01.2010),
24 Hill Street, Anytown

To Chief Medical Officer, Royal Hospital, High Street, Anytown

You are given notice that you are required to produce to the sheriff clerk at the above address within seven days of (insert date on which service was executed or the day after the intimation was posted)

(1) this order which must be produced intact;

(2) a certificate signed and completed in terms of the form appended to this notice;
and

(3) all documents in your possession falling within the enclosed specification, with an inventory of such documents signed by you relating to this order and your certificate.

Production may be made by lodging the documents with the sheriff clerk at the above address, by posting them by registered post or the first class recorded delivery service addressed to the sheriff clerk at the above address.

Date (insert date)

NAME
JOB TITLE
ADDRESS
(OF REPORTER SIGNING THE MOTION)

NOTE

If you claim confidentiality for any of the documents produced by you, such documents must nevertheless be produced, but may be placed in a special sealed packet by themselves, marked "confidential".

Claims for necessary outlays within certain specified limits may be paid. Claims should be made in writing to the person who has obtained an order that you produce the documents.

CERTIFICATE

I hereby certify with reference to the order of the Sheriff Court at (insert place of sheriff court) in the cause (insert court ref. no.) and the relative specification of documents, served upon me and marked respectively A and B:

(1) that the documents which are produced and which are numbered in the inventory signed by me and marked C, are the whole documents in my possession falling under the specification

[or that I have no documents in my possession falling within the specification];

(2) that, to the best of my knowledge and belief, there are in existence other documents falling within the specification, but not in my possession, namely

(describe them by reference to one or more of the descriptions of documents in the specification), which were last seen by me on or about (date), at (insert place), in the hands of

(insert name and address of the person)

[or that I know of the existence of no documents in the possession of any person, other than myself, which fall within the specification].

Signed

2.4 Style Motion to have sealed envelope opened

SHERIFFDOM OF [INSERT NAME OF SHERIFFDOM]

MOTION FOR REPORTER

in an application
under S.93 / S.94* of the Children's
Hearings (Scotland) Act 2011

(or in an appeal under S.154 of the
Children's Hearings (Scotland) Act 2011)

in the case of

David McManus (01.01.2010),
24 Hill Street, Anytown

[NAME OF REPORTER] for the Locality Reporter Manager respectfully craves the Court to grant an order granting permission to the applicant to open the sealed envelope lodged with the sheriff clerk by (DETAILS OF HAVER) said envelope containing documents recovered conform to the applicant's specification and motion granted in terms of court's interlocutor of (DATE). Said specification and interlocutor are produced herewith.

IN RESPECT WHEREOF

NAME
JOB TITLE
ADDRESS
(OF REPORTER SIGNING THE MOTION)

2.5 Notice of Objection

To Sheriff Clerk

Dear Sir/Madam

Application in terms of sections 93 and 94

Child: (DETAILS)

Case Ref: (DETAILS)

Specification of Documents

We hereby intimate our opposition to the specification of documents and associated motion lodged by the respondent, (DETAILS), in the above application.

While we note that the motion seeks opposition in Form 9 we consider that the specific requirement to do so does not apply in these proceedings. Please consider this letter to be formal opposition. Further, please acknowledge receipt of this opposition prior to (DATE), last day for lodging same.

***(We note that the specification seeks recovery of documents in the hands of (DETAILS). We think that these individuals should be given the opportunity to be heard on the specification before it is granted. The court may wish to consider making an order for intimation on them of any hearing assigned.)*

Yours faithfully

**** This to be included where the reporter thinks such intimation necessary. See Appendix 1, paragraph 3,2)**

Outline submissions where sheriff asks reporter to obtain papers

- The proper course of action is for [the party seeking the material] to move the court either to grant commission and diligence for the recovery of the documents, or to grant an order under section 1 of The Administration of Justice (Scotland) Act 1972. It is not the proper course of action for the reporter to seek to obtain these documents on another party's behalf.
- In support of this, there are 4 key points to make:
 1. It is not lawful or appropriate for the reporter to request this information in order to pass to another party, and is it not lawful or appropriate for another agency receiving such a request to accede to it.
 2. The duty of disclosure does not apply to information the reporter does not have.
 3. Pragmatically, taking the approach of asking or ordering the reporter to obtain these documents will cause delay – and avoiding unnecessary delay is a key principle in these summary proceedings.
 4. On the other hand, an order granting commission and diligence for the recovery of the documents, or an order under section 1 of The Administration of Justice (Scotland) Act 1972 **is** the appropriate mechanism for a party to obtain this information.
- 1. It is not appropriate for the reporter to obtain these documents/records on behalf of another party. There is no lawful purpose for the reporter to request these, and the haver should quite properly refuse any request made by the reporter to share information for the purpose of passing on this information to another party in the case.
- The reporter's powers to request information relate to information the reporter deems necessary to make a decision as to whether a child should be referred to a hearing (section 66, 2011 Act) and documents etc. which the reporter considers it will be likely for a witness to refer to in the course of giving evidence. Both the reporter and the haver of the documents/records are required to comply with:
 - ECHR principles, in particular Article 8, right to respect for private and family life. Personal information that a party seeks to be disclosed engages the Article 8 rights of the person to whom the information relates. It will only be deemed to be 'necessary in a democratic society', to disclose personal information, if there are relevant, sufficient and proportionate reasons to do so.
 - the Data Protection Act 1998, which promotes lawful and proportionate information sharing, while also protecting the right of the individual to have their personal information fairly processed. It is appropriate for agencies to share proportionate information in order to prevent **risk to a child or young person that may lead to harm**¹², but that is not the case here.

¹² This is taken from the Advice of the Information Commissioner for Scotland issued on 28 March 2013 which states "Where a practitioner believes, in their professional opinion, that there is risk to a child or young person

- Therefore, there is no lawful purpose for the reporter to request these and it is not legitimate, nor proportionate for the agency to release information to the reporter, where the only reason for the requested information is to pass that information to a 3rd party.
2. Whilst the reporter is under no statutory duty of disclosure, and cannot be equated with the Crown, Article 6 is applicable and so the reporter would generally disclose information in line with general principles of the right to fair trial.

However, the duty of disclosure does not apply to information the reporter doesn't have.
 3. The reporter does not have the papers/records/documents and has no intention of obtaining these for the purpose of lodging as a production. In practice, for the reasons I have outlined above, the haver of the documents may simply refuse to provide them to the reporter, ultimately causing delay in these proceedings where expeditiousness is a key principle.
 4. A motion for recovery of evidence is the proper way forward.
 - Kearney at paragraph 30.41 onwards specifically refers to the applicability of the provisions of The Administration of Justice (Scotland) Act 1972 to applications under section 68 of the 1995 Act, and in my submission the provisions are equally relevant to an equivalent application under section 93 or 94 of the 2011 Act. Whilst an order under section 1 is the preferred approach, we would not object to the common law procedure of commission and diligence. As Kearney points out, it would be helpful to borrow the provisions of the ordinary cause rules, so far as applicable to recovery of evidence, subject to such modifications as are reasonable having regard to the exigencies of these summary proceedings.
 - Both of these procedures provide a mechanism by which the haver of the material can resist production of the requested information where appropriate. They also provide an opportunity for the court to balance the Article 6 rights of the party requesting it and Article 8 rights of the persons to whom the information in that material relates.
 - [There are specific provisions which apply to the Crown so that the Crown can apply to the court for various orders to restrict disclosure in terms of the Criminal Justice and Licensing (Scotland) Act 2010. This enables the court to carry out a balancing exercise in relation to the various rights and interests that are engaged. These provisions in the Criminal Justice and Licensing (Scotland) Act 2010 do not apply to reporters, and the only mechanism which can be used to allow the court to carry out the balancing exercise is for the reporter to insist that the recovery of evidence procedure is used.]

In conclusion, the proper course of action is for the party to move the court either to grant commission and diligence for the recovery of the documents, or to grant an order under section 1 of The Administration of Justice (Scotland) Act 1972.

that may lead to harm, proportionate sharing of information is unlikely to constitute a breach of the Act in such circumstances.” In many cases, a risk to wellbeing (in terms of the SHANARRI indicators) can be a strong indication that the child or young person could be at risk of harm if the immediate matter is not addressed.

Dealing with other parties' Specifications (including Recovery by Common Law Commission and Diligence)

1. Other parties may choose to seek recovery through the common law process of commission and diligence rather than section 1 of the 1972 Act. The statutory and common law processes are very similar with the procedural rules applying to both being broadly the same. In practice the courts have often seemed to view the two procedures as almost interchangeable. However there are differences (see paragraph 2 below) and the reporter should be clear which process is being used.
2. The common law procedure is different in a number of significant ways:
 - The procedure can only be used to recover documents and cannot be used for real evidence or to preserve evidence or to obtain witness details, or for any of the other options that are available through Section 1.
 - The procedure cannot be used prior to the commencement of proceedings.
 - The procedure does not afford a third party haver the opportunity to make representation to the Sheriff in relation to the granting of the motion.
3. Although the common law process does not afford a 3rd party haver the opportunity to oppose the specification, the reporter should consider contacting the haver (especially where the haver is the local authority) to gauge their views on recovery of the documents being sought. The reporter may consider the comments received in deciding whether to oppose the specification. In addition, at the hearing to consider the motion, the reporter may suggest that the motion is continued and intimation made on the 3rd party haver.
4. When another party lodges a motion and specification (whether under the 1972 Act or not) then the reporter must consider whether there is any basis for objecting to this order being granted. In considering this regard must be had to the matters set out in the Note on Reasons for Objecting (below).
5. If the reporter considers that the motion and specification should be opposed for any reason, then we should write as soon as possible to the Sheriff Clerk stating that we object to the motion and specification. Note that as Ordinary civil procedure does not apply in these cases we should not use the Ordinary civil procedure form for opposing motions. A style letter for intimating opposition is set out in appendix 2.5.
6. If the specification seeks recovery of documents which relate to an individual who is not a party to the proceedings, then, in addition to any other reason for intimating opposition (see notes below) the reporter is to oppose the specification. Such opposition is on the basis that respect for that individual's Article 8 rights requires that intimation be made on them before the specification can be properly considered (see Appendix 1, paragraph 3.2).

NOTE ON REASONS FOR OBJECTING

There are a range of reasons why opposition to the motion may be made. Note that these reasons are relevant to consideration of whether to oppose another party's motion and specification. The reasons likely to be encountered in practice are as follows:

- a) The material is not relevant to the case.
- b) The motion and specification constitute a "fishing diligence"
- c) The material being sought is confidential
- d) The material is covered by public interest privilege
- e) The material has been prepared after the proceedings commenced (or "*post litem motam*")
- f) Disclosure will incriminate the haver

Looking at each of these in turn:

- a) The material is not relevant to the case
In proofs, consideration of the relevance of a specification drafted by the reporter is likely to be more straightforward given that the reporter's case is set out within the Section 67 grounds. It is not so straightforward to assess the relevance of other parties' specifications in the absence of any written case whatsoever. However, where a lack of clarity exists as to the relevance of what is being sought in another parties' specification, the reporter is to be ready to challenge the motion even if only by seeking clarification as to the line of evidence that a party is likely to pursue and the connection with the documents being sought. The reporter should ask the party lodging the specification in advance of the hearing to clarify the relevance of the material thought.
- b) "Fishing" or Speculative Diligence
As has been mentioned before this relates to any attempt to recover documents which are unlikely to be necessary or relevant. Recovery is sought because the party is just hoping or speculating that the documents will contain some information to help their case. In our cases such diligence should be opposed until it has been clearly demonstrated that either
 - (i) there is a connection with a supporting fact or with a clear line of evidence that another party intends to pursue in the case, or
 - (ii) the specification is not unreasonably wide in its terms i.e. is restricted to a reasonable time frame or to a relevant type of document.
- c) The material is confidential
There are a number of situations where the haver of a document may claim that the material being sought is confidential and should not be released. The major reasons for such a claim are:
 - The material relates to the relationship between a solicitor and their client.
 - The material relates to the relationship between a medical practitioner and their patient.
 - An individual is contractually bound to keep information confidential.
 - The material being sought falls into a particular category such as business books, income tax documentation, personal diaries or writings.

In adjudicating on this issue the Sheriff will require to balance competing interests before ordering such material to be produced. In addition, it is open to the Sheriff to appoint an independent person – a commissioner – to look at such documents to consider whether they should be released, and if so, released in a partial or redacted manner. Such an appointment is considered in Appendix 1 at paragraph 5.9.

- d) The material is covered by public interest privilege
In one sense, a claim of confidentiality is a claim that relies very much on notions of what is in the public interest. However, in this context, public interest privilege is taken in its narrower sense and refers to the privilege afforded to government documents. The privilege can be claimed only by the Lord Advocate or by a government minister.
- e) The material is *post litem motam*
The basis for this objection is that the material was created, or relates to events, in the period **after** proceedings commenced, so the material cannot be said to be relevant to the matters that are referred to in the supporting facts.¹³ The reporter's specification should give a clear indication of the range of dates of the material to be recovered and such dates will usually only be up to a point that is relevant to the supporting facts. Note that in some cases the nature of the ground or the terms of the supporting facts may make events after proceedings commenced relevant, whether or not any amendment of the grounds is likely to be proposed.

Where the reporter is considering another party's specification, particular attention should be paid to such dates to ensure that this range of dates is appropriate.

The possibility exists that the supporting facts in the statement of grounds will be subject to amendment to reflect circumstances that have arisen in the period after proceedings commenced. In such a case the reporter may wish to recover material relating to this period but should make clear, in the event of a challenge to the terms of the specification, just what amendment is proposed.

- f) Disclosure will incriminate the haver
The general principle is that Scottish courts will not order disclosure of material where (i) within the supporting facts it is alleged that the haver has committed an offence, and (ii) disclosure will result in the haver being incriminated in the commission of that offence. However, in the context of children's hearing cases, where the interests of children are paramount, it is unlikely that an objection based on this general principle would succeed.