

**PROTOCOL FOR THE HANDLING OF SECURITY INFORMATION IN COURT PROCEEDINGS
AGREED BETWEEN THE CHIEF JUSTICE AND THE ATTORNEY-GENERAL
UNDER SECTION 28 OF THE SECURITY INFORMATION IN PROCEEDINGS ACT 2022**

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Introduction

1. This Protocol records the general practices and procedures agreed by the Chief Justice and the Attorney-General pursuant to s 28 of the Security Information in Proceedings Act 2022 (**the Act**) to implement the special procedures provided in that Act and to ensure that security information (**SI**) is protected at all times in proceedings before the Relevant Court.
2. This Protocol applies to all specified proceedings as defined in s 8(3) of the Act, that is:
 - the hearing of an SI application under s 32 of the Act;
 - a non-party disclosure hearing to which s 26B of the Criminal Disclosure Act 2008 applies;
 - the hearing of an application to which s 30A of the Criminal Disclosure Act 2008 applies;
 - the hearing of an application referred to in ss 78(2A) or 101(2A), or made under s 113A, of the Criminal Procedure Act 2011;
 - a proceeding in respect of which the court makes an order under s 9 of the Act.
3. This Protocol replaces, from the date of its completion, the Protocols agreed between the then Chief Justice and Attorney-General pursuant to the:
 - Terrorism Suppression Act 2002;
 - Passports Act 1992.
4. This Protocol does not replace the Protocol that applies to proceedings under the Immigration Act 2009, which continues to operate separately and independently of this Protocol.¹
5. The Act sets out special procedures that apply for the use and protection of security information in specified proceedings.² The special procedures in Part 2 apply automatically to the proceedings specified in s 8(3)(a)-(d) of the Act. They may also apply to proceedings set out in s 9(2) if the requirements of s 9 are met and the court so orders (see s 8(3)(e)). The Protocol is

¹ This is because the Act does not apply to proceedings under the Immigration Act 2009: Security Information in Proceedings Act 2022, s 7.

² Categories of security information are given somewhat different names in some of the relevant statutes, such as classified security information in s 29AB(1) of the Passports Act 1992, but this Protocol applies to all security information however defined.

intended to provide for the maintenance of utmost confidentiality for SI, whilst recognising the court's role in minimising unfairness to a non-Crown party resulting from their inability to access the SI in the proceeding.

6. The Protocol contemplates the involvement in such proceedings of a Special Advocate who participates in the proceeding to advance issues in the interests of a non-Crown party who is excluded from SI. The Protocol is also intended to apply in any cases involving SI where a Special Advocate is not appointed, with appropriate adjustments. The Protocol also recognises that the Act provides for the court to appoint a Special Adviser to advise it on national security or related issues.

Definitions

7. In this Protocol:

- 7.1. **“Appropriate security clearance”** means a clearance that is at least equal to the highest classification of the SI concerned.
- 7.2. **“Associated material”** means any material which is written or recorded by a Judge, Court Custodian or counsel appearing in a proceeding or material produced by a Minister of government responding to any proceeding to the extent it contains or discloses SI. The term includes all media storage devices on which this written or recorded material is saved (for example, hard disk drives or flash drives).
- 7.3. **“Security information” or “SI”** has the meaning given in s 4 of the Act or the equivalent provisions in other Acts, whether described as SI, Classified Security Information (**CSI**), National Security Information (**NSI**), or otherwise.
- 7.4. **“Closed court hearing”** means a hearing conducted in the absence of the Other Party in a specified proceeding, because of the need for disclosure of and/or discussion about SI.
- 7.5. **“Closed court judgment”** means a judgment determining issues argued at a closed court hearing and issued only to counsel for the Crown agency and any Special Advocate involved in that proceeding.
- 7.6. **“Court Custodian”** means a Registrar or Deputy Registrar or any other person assigned to a proceeding to assist with its administration by the Judge(s) hearing the proceeding; provided each such person has the appropriate security clearance.

- 7.7. **“Crown Law”** or **“Crown counsel”** includes any external counsel instructed to act for the Crown party in a specified proceeding.
- 7.8. **“Determination of the proceeding”** means the point at which the proceeding is formally discontinued or, in every case where a substantive judgment has issued, the time for filing any appeal has expired, or if any appeal has been filed, the time the proceeding is finally disposed of.
- 7.9. **“Equipment”** means any device used for dictating, recording, transcribing or producing documents in electronic or hard copy form in any aspect of proceedings that involves SI.
- 7.10. **“Minister”** means the Minister responsible for responding to a specified proceeding under the Act.
- 7.11. **“Nominated Court Custodian”** means a Court Custodian who has been nominated by the Judge(s) assigned to the proceeding for the purpose of performing the functions of such a person referred to in this Protocol.
- 7.12. **“Other Party”** means a party to a specified proceeding that is not, and does not represent, the Crown.
- 7.13. **“Proceeding”** means a proceeding before a court.
- 7.14. **“Protective Security Requirements”** means the regime that outlines the government’s expectations for managing personnel, physical and information security found at www.protectivesecurity.govt.nz and any replacement to those requirements.
- 7.15. **“Relevant Agency”** means an agency which holds SI relevant to a proceeding and is directly involved in the proceeding, whether as a party or otherwise.
- 7.16. **“Relevant Court”** means the court responsible for the time being for the proceeding.
- 7.17. **“Safekeeping Agency”** in relation to SI means:
- 7.17.1. where the New Zealand Security Intelligence Service (**NZSIS**) is the Relevant Agency, the Government Communications Security Bureau (**GCSB**); and
- 7.17.2. where any other agency is the Relevant Agency, the NZSIS.
- 7.17.3. Where both NZSIS and GCSB are a Relevant Agency, either:

7.17.3.1.1. the one of NZSIS or GCSB that is not responding to the proceeding; or

7.17.3.1.2. if both agencies are responding to the proceeding, another agency approved by the court for this purpose, for example, the New Zealand Defence Force.

7.18. **“Secure case”** means a type of case or bag such as a Rifkin bag approved by the NZSIS for the carriage of SI, which is fitted with a uniquely keyed lock of a type approved by the NZSIS.

7.19. **“Security container”** means an approved security container such as a safe with a unique digital code fixed in a location nominated by the Relevant Court and approved by the NZSIS and does not include a secure case.

7.20. **“Special Adviser”** means a person appointed as a special adviser for the purpose of advising the court about national security, or related issues, under s 15 of the Act.

7.21. **“Special Advocate”** means a person appointed as a special advocate under s 17 of the Act to perform the role outlined in s 19 of the Act.

Initial notification

8. As soon as reasonably practicable after the filing and service of any proceeding that appears to involve SI, Crown Law will notify the Registrar of the Relevant Court and the Other Party that the Crown considers the proceeding will involve SI.

Procedure for secure provision of SI

9. Where access to SI is required for the purpose of a specified proceeding, it will be provided by Crown Law on behalf of the Relevant Agency. Unless otherwise directed by the Judge(s) assigned to the proceeding, all SI is to be provided by electronic means. The following persons, provided they are participating in the proceeding, may have access to that information in accordance with paragraph 13:

9.1. the Judge or Judges assigned to the proceeding;

9.2. the Court Custodian(s);

9.3. the Attorney-General;

- 9.4. the Attorney-General's representative, who must hold an appropriate security clearance;
 - 9.5. the head of the Relevant Agency, or his or her representative, or both, each of whom must hold an appropriate security clearance;
 - 9.6. the Minister;
 - 9.7. the Minister's representative who must hold an appropriate security clearance;
 - 9.8. a Special Advocate appointed to appear in the proceeding, subject to s 12(3) of the Act;
 - 9.9. a Special Adviser appointed to advise the court in the proceeding, subject to s 12(3) of the Act;
 - 9.10. a Judge's Associate requested to assist in the preparation of documents by the Judge assigned to the proceeding, provided that the Judge's Associate has the appropriate security clearance; and
 - 9.11. any Judge's Clerk requested to assist the Judge assigned to the proceeding, provided that the Judge's Clerk has the appropriate security clearance.
10. If the Judge(s) assigned to the proceeding, a Court Custodian, Special Advocate, Special Adviser, Judge's Associate or Judge's Clerk as described in paragraph 9 intends to use word processing or other equipment to deal with SI for the purpose of a proceeding, the Relevant Agency will, in consultation with the Nominated Court Custodian, approve that equipment in accordance with paragraphs 13 and 15. The approved equipment may be supplied by the Relevant Agency, the Ministry of Justice, or any other agency which the Relevant Agency considers suitable.
11. The Relevant Agency may, if the Judge(s) assigned to the case agrees, provide a briefing to that Judge(s), the Court Custodian(s), and any Special Advocate appointed in the proceeding, as to the security classification of SI that is to be used for the purposes of, or is required to be produced in response to a discovery application in, a proceeding and the procedures for the SI's secure handling and storage, including the agreed application of the Protective Security Requirements referred to below in paragraph 12.
12. The Nominated Court Custodian is responsible for the physical and IT security of the court premises, the Judges' chambers and equipment. The Nominated Court Custodian is to consult with the Safekeeping Agency as to the appropriate steps to be taken to ensure the application of the Protective Security Requirements is agreed between the Nominated Court Custodian and

that Agency. The Nominated Court Custodian may consult the Judge(s) assigned to the proceeding as to the steps that should be taken to ensure the premises are a secure place, including steps to ensure compliance with the Protective Security Requirements, and is to take all necessary steps following consultation, including, if deemed necessary, to move the proceeding to a different facility.

Place and time of provision of SI

(a) Other than for the purpose of hearing(s)

13. When any document containing SI is required to be filed by the Crown or the Special Advocate, associated material or any equipment approved pursuant to paragraph 10 is required for preparation or for any purpose within the scope of this Protocol other than use in court during a hearing, the Safekeeping Agency will arrange for it to be provided by that Agency or by Crown Law in the following manner:

13.1. to the Judge(s) assigned to the proceeding or the Nominated Court Custodian;

13.1.1. at the Judge(s)' chambers or, with that Judge's agreement, at any other place recommended by the Safekeeping Agency and in accordance with the agreed application of the Protective Security Requirements referred to above in paragraph 12; and

13.1.2. at date(s) and time(s) fixed by the Nominated Court Custodian after consultation with the Safekeeping Agency; and

13.2. to a Special Advocate:

13.2.1. at a place designated by the Safekeeping Agency; and

13.2.2. at date(s) and time(s) agreed between the Safekeeping Agency (or Crown Law on its behalf) and the Special Advocate, and in the event of disagreement, such arrangements are to be settled by the Judge assigned; and

13.3. to a Special Adviser:

13.3.1. at a place designated by the Safekeeping Agency; and

- 13.3.2. at date(s) and time(s) agreed between the Safekeeping Agency (or Crown Law on its behalf) and the Special Adviser, and in the event of disagreement, such arrangements are to be settled by the Judge assigned.

(b) For the purpose of hearing(s)

14. Except to the extent that SI has been received by the respective recipients under paragraphs 13.1, 13.2 and 13.3 hereof for later use, the Safekeeping Agency or Crown Law will provide the SI, associated material and/or equipment to the Judge(s) and/or the Nominated Court Custodian(s) and/or to any Special Advocate and/or Special Adviser participating in any closed court hearing, either at the court and in accordance with the agreed application of the Protective Security Requirements referred to above in paragraph 12 or, for any Special Advocate or Special Adviser, at another mutually agreed venue.

Storage and sealing of SI, associated material and equipment when not in use

15. When SI, associated material or equipment is not in use for a session when the court is sitting and is not being used by the Judge assigned for work in relation to the proceeding, the SI is to be secured either by that Judge or by the Nominated Court Custodian in a security container, which must be adequately secured in accordance with the agreed application of the Protective Security Requirements referred to above in paragraph 12.
16. It is the responsibility of the Judge(s) assigned to the proceeding, the Nominated Court Custodian(s), any Special Advocate, and any Special Adviser to keep any SI provided to them, and any associated material or equipment, separate from all unclassified information used in the proceeding. SI shall not be released to any other person unless the Relevant Agency has given permission, or disclosure is ordered by the court under the terms of a protective order (as defined in s 31(3) of the Act) or in the course of resolving the terms of an unclassified summary of the SI for provision to the Other Party, in the circumstances described in paragraph 22 below.
17. In the event that the Judge directs SI to be provided in hard copy in accordance with paragraph 9, it shall be stored in tamper-proof bags and/or and in accordance with the agreed application of the Protective Security Requirements referred to above in paragraph 12. Either the Judge assigned to the proceeding or the Nominated Court Custodian is to be responsible for sealing tamper-proof bags and envelopes containing SI, or associated material or equipment. Seals on tamper-proof bags and envelopes may only be broken by either of them for the purpose of the enclosed SI or associated material being used by a person with permission to

access the material in accordance with paragraph 9 above. Either the Judge assigned to the proceeding or the Nominated Court Custodian will keep a register of every tamper-proof bag and envelope produced and the date and time of every occasion on which:

- 17.1. each tamper-proof bag or envelope is received into his or her custody and sealed;
 - 17.2. each tamper-proof bag or envelope is opened; and
 - 17.3. each secure case containing SI or associated material is provided to or returned by the Safekeeping Agency.
18. Alternatively to the storage arrangements in paragraph 17, the Judge assigned to a case may, in accordance with the agreed application of the Protective Security Requirements referred to above in paragraph 12, secure SI provided for the purposes of a proceeding in one or more secure case(s) within a security container, with access to the SI requiring the use of keys or other locking devices held securely at different locations within court premises by the Judge assigned and Nominated Court Custodian.
19. Either the Judge(s) assigned to the proceeding or the Nominated Court Custodian is to secure any equipment provided pursuant to paragraph 10 when it is not in use. Where equipment has been physically sealed, only the Safekeeping Agency, the Judge assigned to the proceeding or the Nominated Court Custodian can remove the seal. Removal of the seal must be recorded pursuant to paragraph 17. Alternatively, access to the equipment must be protected by separation of keys or other locking devices at separate secure locations as provided for in paragraph 18.

Application of procedures to judgments, orders and any document or record containing SI

20. Paragraphs 13 to 19 shall apply to:
- 20.1. any summary, draft summary, or modified summary prepared under s 13 or s 14 of the Act, and any document prepared pursuant to an order under s 31(3)(b)(i) of the Act, and any equivalent unclassified summary or document containing redacted SI prepared for disclosure to the Other Party to a proceeding under equivalent procedures in other Acts, until such document has been provided to the Other Party;
 - 20.2. any judgment, order or minute, or part of such a document, that contains SI; and
 - 20.3. any other document or record that contains or may involve disclosure of SI.

21. The Nominated Court Custodian will provide the Safekeeping Agency with a copy of any minute, order or judgment of the court intended for distribution to the Other Party, or to the Other Party and for public distribution not less than 48 hours prior to distribution for the sole purpose of enabling the Safekeeping Agency to review the document and apply any redactions considered necessary to ensure there is no disclosure of SI. If necessary the Safekeeping Agency may consult with Crown Law, and/or a Special Advocate, and/or a Special Adviser to ensure confidentiality is protected appropriately. The Nominated Court Custodian will, if requested to do so in any particular case, provide such documents directly to the Safekeeping Agency and will treat those documents as though they contain SI until this check is performed. This requirement does not apply to any document proposed by the Judge(s) assigned to the case where, from its content and/or from dealings with counsel about it, it is clearly apparent that no prospect of disclosure of SI arises and such documents can be provided as though they do not contain SI.

Settling unclassified summary of SI or other protective order

22. The Judge(s) assigned to the proceeding may hear Crown counsel and any Special Advocate and/or Special Adviser appointed to a proceeding on the terms of any unclassified summary of SI or statement of facts that is to be provided to the Other Party pursuant to s 13(4)-(5) or s 31(3)(b)(i)(B)-(C) of the Act, or equivalent provisions in other Acts. In settling the terms of a modified summary (i.e. a summary in terms other than one provided by the Crown under s 13(1)), or of any protective order³ that would involve disclosure of previously undisclosed information, the Nominated Court Custodian is to provide Crown Law with the terms proposed by the Judge not less than five working days before the document is scheduled to be disclosed to the Other Party.⁴ Where the Crown is required to make additional disclosure after an unclassified summary has been settled, or where matters raised by the Crown, a Special Advocate or Special Adviser warrant reconsideration of a summary, the Judge may revisit a summary, or consider directing the issue of one or more supplementary summaries, in accordance with s 13(4) of the Act.

Maintenance of the court file

23. The Nominated Court Custodian is to maintain a court registry file for every proceeding in respect of which notice is given that SI will or may be involved. All documents filed in the

³ As defined in s 31(3) of the Act.

⁴ This is to give the Crown the opportunity to appeal or concede the proceeding or part of the proceeding.

proceeding that do not contain or disclose SI are to be kept within the court file in accordance with the Registry's usual practice from time to time. All documents filed with the Nominated Court Custodian that contain or disclose SI are to be kept in separate secure facilities such as is contemplated in paragraphs 15 to 19 of this Protocol. The existence of the documents is to be recorded in a list of closed court documents maintained as a part of the usual registry file by the Nominated Court Custodian, in terms that do not risk disclosure of any of the SI such documents contain.

24. All closed court documents, including minutes, orders or judgments issued by the Judge(s) assigned, which contain SI are to be stored securely, consistently with the provisions of paragraphs 15 to 19 of this Protocol. The Nominated Court Custodian is to maintain a list of all closed court documents issued by the court as a part of the registry file. The description of such documents is not to disclose the existence of any SI.

Venues for hearings

25. Subject to guidance from the Judge assigned to a proceeding, the Nominated Court Custodian is to advise all parties of the timing and location of hearings for a proceeding. To the extent that closed court hearings are required because SI is to be disclosed or discussed, those hearings must be allocated to a secure courtroom, approved as such by the Safekeeping Agency. The Nominated Court Custodian will afford access to that courtroom and its immediate surroundings prior to any such hearing for Safekeeping Agency personnel to monitor the courtroom and its surroundings for any unauthorised electronic devices.

Determination of proceeding

26. Once any proceeding involving SI has been determined:
 - 26.1. The Nominated Court Custodian is to create a permanent record, preferably in electronic form and permissibly in hard copy form, of all documents issued by the court in the proceeding that contain SI. That person is to arrange for its permanent secure storage under the control of the court but on terms agreed to by the Safekeeping Agency. The balance of the documents filed in the proceeding or created by the court in the course of the proceeding (the open file) are to be kept consistently with the court registry's practice for maintaining files for civil proceedings that have been completed. The open file is to include a record of the documents contained in the closed record, in terms that do not risk disclosure of any of the SI such documents contain.

26.2. All documents filed in the proceeding that contain SI are to be provided to the Safekeeping Agency for return to the Relevant Agency upon the Relevant Agency providing an undertaking to the court that all such documents will be retained permanently in the form in which they were provided to the court and that they will be made available to a Judge of any court of competent jurisdiction, if that is necessary for the business of the court.

Dated: 9 February 2024

Agreed by the Chief Justice
Rt Hon Dame Helen Winkelmann
Chief Justice

Agreed by the Attorney-General
Hon Judith Collins KC
Attorney-General