

## **PART 28 Production Of Documents**

### **PART 28**

#### **Meaning of document 28.1 - 28.2**

##### **28.1**

In this Part:

- (1) 'document' means anything in which information of any description is recorded; and
- (2) 'copy', in relation to a document , means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.

##### **28.2**

The definition of a document extends to electronic documents , including email and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been 'deleted'. It also extends to additional information stored and associated with electronic documents known as metadata.

#### **Production of copies 28.3 - 28.4**

##### **28.3**

A party need not produce more than one copy of a document .

##### **28.4**

A copy of a document must conform fully to the original. At the request of the Court, any original must be presented for inspection. A copy of a document that contains a modification, obliteration or other marking or feature shall be treated as a separate document . Parties should not redact documents which they produce without the agreement of the other parties or the permission of the Court.

#### **Documents referred to in statements of case, etc. 28.5 - 28.9**

**28.5**

A party may inspect a document mentioned in:

- (1) a statement of case ;
- (2) a witness statement;
- (3) a witness summary; or
- (4) an affidavit .

**28.6**

An application for an order requiring a party to produce a document referred to in RDC rule 28.5 should be made in accordance with Part 23.

**28.7**

If a party wishes to inspect documents referred to in the expert report of another party, before issuing an application he should request inspection of the documents informally, and inspection should be provided by agreement unless the request is unreasonable.

**28.8**

Subject to Rule 31.53, a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been produced in the proceedings.

**28.9**

Where an expert report refers to a large number or volume of documents and it would be burdensome to copy or collate them, the Court will only order inspection of such documents if it is satisfied that it is necessary for the just disposal of the proceedings and the party cannot reasonably obtain the documents from another source.

**Cooperation between the parties 28.10 - 28.14****28.10**

The parties should, prior to the first Case Management Conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents . This may involve the parties seeking and providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties, their document retention policies and the anticipated time and cost of carrying out any searches which might be requested.

**28.11**

Where the number or volume of documents to be searched is likely to be extensive, the parties should, where possible, seek to exchange preliminary production requests in draft form before standard production of documents takes place. Any such exchange shall not limit the parties' rights to submit further requests to produce after standard production in accordance with RDC 28.16.

**28.12**

The parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on production of documents .

**28.13**

If the physical structure of a file is or is claimed to be of evidential value:

- (1) Any such claim should be raised at the earliest opportunity; and
- (2) The legal representatives of the party holding the file should make one complete copy of the file in the form in which they received it before any documents are removed for the purpose of producing documents .

**28.14**

In the case of difficulty or disagreement on any of the matters referred to at RDC 28.10 to 28.13 above, the matter should be referred to a **Judge** for directions at the earliest practical date, if possible at the first Case Management Conference.

**Standard production of documents 28.15****28.15**

Within the time ordered by the Court , each party shall submit to the other parties:

- (1) all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another party; and
- (2) the documents which he is required to produce by any Law, Rule or Practice Direction.

**Request to produce 28.16 - 28.19****28.16**

Within the time ordered by the Court , any party may submit to the other party a Request to

Produce.

#### **28.17**

A Request to Produce shall contain:

- (1) a description of a requested document sufficient to identify it; or
- (2) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
- (3) a description of how the documents requested are relevant and material to the outcome of the case; and
- (4) a statement of the reason why that party believes the documents requested to be in the possession, custody or control of the other party and either:
  - (a) a statement that the documents requested are not in the possession, custody or control of the requesting party, or
  - (b) a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents.

#### **28.18**

A Request to Produce should be set out substantially in the form of Schedule A to this Part.

#### **28.19**

In the case of documents which are or which are likely to be maintained in electronic form, the requesting party may, or the Court may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner.

### **Production of documents as to which no objection is made 28.20 - 28.25**

#### **28.20**

Within the time ordered by the Court , the party to whom the Request to Produce is addressed shall:

- (1) Carry out a reasonable search for the documents in his possession, custody or control as to which no objection is made;
- (2) produce to the other parties all such requested documents which have been identified by such search as to which no objection is made;

(3) Provide to the other parties information about his document retention policy and the nature of the searches which have been undertaken; and

(4) State that, to the best of his knowledge, he has produced copies of all documents in his possession, custody and control which have been requested and to which no objection is raised. Such statement should be supported by a statement of truth.

#### **28.21**

The factors that may be relevant in deciding the reasonableness of a search for electronic documents include (but are not limited to) the following:

(1) the number of documents involved;

(2) the nature and complexity of the proceedings;

(3) the ease and expense of retrieval of any particular document . This includes:

(a) the accessibility of electronic documents or data including email communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the producing party and/or available to enable access to such documents ;

(b) the location of relevant electronic documents , data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents ;

(c) the likelihood of locating relevant data;

(d) the cost of recovering any electronic documents ;

(e) the cost of producing any relevant electronic documents ;

(f) the likelihood that electronic documents will be materially altered in the course of recovery, or production;

(4) the significance of any document which is likely to be located during the search.

#### **28.22**

It may be reasonable to search some or all of the parties' electronic storage systems. In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches even where a full review of each and every document would be unreasonable. There may be other forms of electronic search that may be appropriate in particular circumstances.

#### **28.23**

The parties should seek to agree in advance the parameters of any search of electronic documents,

including:

- (1) The electronic databases to be searched; and
- (2) Any search terms to be used.

#### **28.24**

Where possible, any dispute about the parameters of any electronic search should be referred to the Court for determination before the relevant search is carried out. This is particularly important where the volume of documents to be searched is large or the searches are likely to be time consuming or expensive.

#### **28.25**

The Court may take into account any failure to comply with RDC 28.23 and 28.24 in any assessment of costs.

### **Objection to Request to Produce 28.26 - 28.27**

#### **28.26**

If the party to whom the Request to Produce is addressed has objections to the production of some or all of the documents requested, he shall state them in writing within the time ordered by the Court . The reasons for such objections shall be any of those set out in Rule 28.28.

#### **28.27**

A party's objections to production in accordance with RDC 28.16 should be recorded in a schedule substantially in the form of Schedule A to this Part.

### **Grounds for excluding documents from production 28.28 - 28.30**

#### **28.28**

The Court may, at the request of a party or on its own initiative, exclude from production any document for any of the following reasons:

- (1) lack of sufficient relevance or materiality;
- (2) legal impediment or **privilege** under the legal or ethical **rules** determined by the Court to be applicable;
- (3) unreasonable burden to produce the requested evidence;

- (4) loss or destruction of the document that has been reasonably shown to have occurred;
- (5) grounds of commercial or technical confidentiality that the Court determines to be compelling;
- (6) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Court determines to be compelling; or
- (7) considerations of procedural economy, proportionality, fairness or equality of the parties that the Court determines to be compelling.

**28.29**

A person who wishes to claim that he has a right or a duty to withhold production of a document , or part of a document , must state in writing—

- (1) that he has such a right or duty; and
- (2) the grounds on which he claims that right or duty.

**28.30**

A party may apply to the Court to decide whether a claim made under Rule 28.29 should be upheld.

**Public interest objection 28.31 - 28.35****28.31**

A person may apply, without notice, for an order permitting him to withhold production of a document on the ground that production would damage the public interest.

**28.32**

Unless the Court orders otherwise, an order of the Court under Rule 28.31—

- (1) must not be served on any other person; and
- (2) must not be open to inspection by any person.

**28.33**

For the purpose of deciding an application under Rule 28.29 (duty to withhold production) or Rule 28.31 (public interest objection) the Court may:

- (1) require the person seeking to withhold production of a document to produce that document to

the Court ; and

(2) invite any person, whether or not a party, to make representations.

#### **28.34**

An application under Rules 28.29 or 28.31:

(1) Should be made within the time ordered by the Court for objecting to the production of documents; and

(2) must be supported by evidence.

#### **28.35**

This Part does not affect any rule of law which permits or requires a document to be withheld from production on the ground that its production would damage the public interest.

### **Document Production Order 28.36 - 28.45**

#### **28.36**

Where a requesting party considers:

(1) That a responding party's objection to production is not justified; or

(2) That the responding party has failed to carry out a reasonable search for documents which have been requested or has otherwise failed, without objection, to produce such documents which are within his possession, custody or control,

the requesting party may apply to the Court for a Document Production Order.

#### **28.37**

An application for a Document Production Order should be supported by a schedule substantially in the form of Schedule A to this Part.

#### **28.38**

The Court may order the party to whom a Request to Produce is addressed to produce to the other parties those requested documents in its possession, custody or control (a "Document Production Order").

**28.39**

A Document Production Order will direct that a party must do one or more of the following things:

- (1) produce documents or classes of documents specified in the order;
- (2) carry out a search to the extent stated in the order;
- (3) produce any documents located as a result of that search;
- (4) identify documents or classes of documents which were, but are no longer, in the party's possession, custody and control and explain, to the best of the party's knowledge and belief, what has happened to them.

**28.40**

The party from whom a Document Production Order is sought should provide to the applicant and to the Court information as to the factors listed in Rule 28.21 and his document retention policy, to the extent such information is relevant to the application and has not already been provided. At the hearing of an application for a Document Production Order, the Court may take into account the factors listed in Rule 28.21 as well as the width of the request and the conduct of the parties.

**28.41**

If the propriety of an objection can only be determined by review of the document, the Judge hearing the objection may refer the objection to another Judge to review any such document and determine the objection. To the extent that the objection is upheld by the other Judge, the Court may determine that the other Judge will not disclose to the other parties the contents of the document reviewed and will take no further part in the case, either for the purpose of the hearing of applications or as the Judge at trial, unless the parties agree otherwise.

**28.42**

Compliance with a Document Production Order must be verified by a Document Production Statement in the form set out in Schedule B to this Part.

**28.43**

A Document Production Statement is a statement made by a party:

- (1) setting out the extent of the search that has been made to locate documents which he is required to produce;
- (2) certifying that he understands the duty to search for and produce documents; and
- (3) certifying that to the best of his knowledge he has carried out that duty.

**28.44**

Where the party making the Document Production Statement is a company, firm, association or other organisation, the statement must also:

- (1) identify the person making the statement; and
- (2) explain why he is considered an appropriate person to make the statement.

**28.45**

(1) The parties' obligation to produce documents in response to a Document Production Request or pursuant to a Document Production Order is a continuing one. Where a party subsequently comes into possession of further documents falling within the scope of such a request or order, the party must notify the requesting party of that fact and either produce the document or object to its production in accordance with RDC 28.26.

(2) This rule shall not apply where the party has previously objected to production on grounds which apply to the new document and such objection has not been challenged by the other parties or has been upheld by the Court.

**Production of documents in stages 28.46****28.46**

The parties may agree in writing, or the Court may direct, that production of documents shall take place in stages.

**Production of documents before proceedings start 28.47 - 28.50****28.47**

An application for production of documents before proceedings have started under these Rules must be made in accordance with Part 8 and supported by evidence.

**28.48**

The Court may only make an order where:

- (1) the respondent is likely to be a party to subsequent proceedings;
- (2) the applicant is also likely to be a party to those proceedings;
- (3) if proceedings had started, the Court would make a Document Production Order directing the production of the documents or classes of documents of which the applicant seeks production; and

(4) production before proceedings have started is desirable in order to:

- (a) dispose fairly of the anticipated proceedings;
- (b) assist the dispute to be resolved without proceedings; or
- (c) save costs.

#### **28.49**

An order under Rule 28.48 must:

- (1) specify the documents or the classes of documents which the respondent must produce; and
- (2) require him, when producing the documents , to specify any of those documents :
  - (a) which are no longer in his control; or
  - (b) in respect of which he claims a right or duty to withhold production.

#### **28.50**

Such an order may:

- (1) require the respondent to indicate what has happened to any documents which are no longer in his control; and
- (2) specify the time and place for production.

### **Orders for production of documents against a person not a party 28.51 - 28.54**

#### **28.51**

An application for production of documents by a person who is not a party to the proceedings must under these Rules be supported by evidence.

#### **28.52**

The Court may make an order under this rule only where:

- (1) the documents of which production is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(2) production is necessary in order to dispose fairly of the claim or to save costs.

**28.53**

An order under Rule 28.51 must:

(1) specify the documents or the classes of documents which the respondent must produce; and

(2) require the respondent, when producing the documents, to specify any of the documents which the Court has ordered should be produced:

(a) which are no longer in his control; or

(b) in respect of which he claims a right or duty to withhold production.

**28.54**

Such an order may:

(1) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(2) specify the time and place for production.

**Rules not to limit other powers of the Court to order production of documents  
28.55****28.55**

Rules 28.47 to 28.54 do not limit any other power which the Court may have to order:

(1) production of documents before proceedings have started; and

(2) production of documents against a person who is not a party to proceedings.

**Request to produce documents by the Court on its own initiative 28.56 - 28.58****28.56**

The Court may at any time request a party to produce to the Court and to the other parties any documents that it considers to be relevant and material to the outcome of the case.

**28.57**

A party may object to such a request based on any of the reasons set out in Rule 28.28 .

**28.58**

If a party raises such an objection, the Court shall decide whether to order the production of such documents based upon the considerations set out in Rule 28.28 and, if the Court considers it appropriate, through the use of the procedures set out in Rule 28.41.

**Additional documents 28.59****28.59**

Within the time ordered by the Court , the parties may produce to the other parties any additional documents which they believe have become relevant and material as a consequence of the issues raised in statements of case, documents , witness statements or expert reports submitted or produced by another party or in other submissions of the parties.

**Consequence of failure to produce documents 28.60 - 28.61****28.60**

A party may not rely on any document which he fails to produce unless the Court gives permission.

**28.61**

If a party fails without satisfactory explanation to produce any document requested in a Request to Produce to which he has not objected in due time or fails to produce any document ordered to be produced by the Court , the Court may infer that such document would be adverse to the interests of that party.

**False Document Production Statements 28.62 - 28.63****28.62**

Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false Document Production Statement, without an honest belief in its truth.

**28.63**

Proceedings under Rule 28.62 may be brought only with the permission of the Court .

## **Subsequent use of produced documents 28.64 - 28.66**

### **28.64**

A party to whom a document has been produced may use the document only for the purpose of the proceedings in which it has been produced, except where:

- (1) the document has been read to or by the Court , or referred to, at a hearing which has been held in public;
- (2) the Court gives permission; or
- (3) the party who produced the document and the person to whom the document belongs agree.

### **28.65**

The Court may make an order restricting or prohibiting the use of a document which has been produced, even where the document has been read to or by the Court , or referred to, at a hearing which has been held in public.

### **28.66**

An application for such an order may be made:

- (1) by a party; or
- (2) by any person to whom the document belongs.

## **Restriction on use of a privileged document inspection of which has been inadvertently allowed 28.67**

### **28.67**

Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the Court.

Schedule A to Part 28 Document Production Schedule

Schedule B to Part 28 Document Production Statement