

# Answering a witness summons in a restraining order case

This infosheet provides information about answering a witness summons in restraining order proceedings in the Magistrates Court. Restraining orders are protective orders obtained from the court. There are three types of orders – family violence restraining orders (FVROs), violence restraining orders (VROs) and misconduct restraining orders (MROs). Another infosheet is available on summoning witnesses which includes information on summoning a police officer and getting police and telephone records.

## What is a witness summons?

A witness summons is a court document that orders a person, agency or organisation to give evidence at a trial and/or produce a record or thing ('evidentiary material') to the court for use in the trial.

You should seek legal advice before asking the court to issue a summons.

A witness summons is sometimes called a 'subpoena'.

Courts hearing restraining order cases make their decisions based on evidence. The parties to the cases gather their evidence for use in the case to prove their positions. A party may wish to rely on evidence held by another person, agency or organisation. Witness summonses are used by the parties in the case to make other parties produce evidence they have to the court.

This infosheet focuses on witness summonses to produce a record or thing.

## Who can ask for a witness summons in court proceedings?

Any party in the restraining order proceeding can file a request for a witness summons ('request') with the court.

The request must be filed in the court hearing the restraining order proceedings. In this infosheet the

person filing the request will be called the 'lodging party'. The person, agency or organisation receiving the witness summons will be called the 'recipient'.

Once filed, the court will decide whether to approve the request. If the court refuses the request, it will notify the lodging party. If the court approves the request, it will stamp the forms and return the service copy to the lodging party. This copy will have to be served on the relevant recipient.

Witness summonses must be served on the recipient personally by the lodging party or their agent **no less than 14 days prior** to the hearing date or earlier if directed by the court.

In addition to service on the recipient, the lodging party must generally pay the recipient conduct money. Conduct money is the amount of money that is likely to be sufficient to cover the reasonable expenses for the witness to attend and/or produce the record or thing requested.

After service, the lodging party must serve a copy of the witness summons on the other party in the case as soon as practicable. Also, an Affidavit of Service – Form 11, must be completed and filed with the court to confirm service of the witness summons.

## Do I have to comply with a witness summons?

A witness summons that is made by the court and correctly served, creates a legal obligation on the recipient to comply with attendance and/or production to the court of the requested material.

If you fail to comply with a summons without reasonable excuse, you may be found in contempt of court. Being found guilty of a contempt of court is a very serious matter and may result in punishment which can be a fine and/or imprisonment.

## How to comply with a witness summons?

You should carefully read any witness summons to understand what is required of you. For example, who is the summons addressed to? Are records or things required to be produced, or is a person required to give oral evidence (or both)? What deadline is provided for compliance?

Where a witness summons requires the production of records or things, that material is to be delivered or sent (along with a copy of the witness summons) to the court at the date, time and place specified in the witness summons. You do not have to give that material directly to the lodging party. The lodging party has to follow a separate court process to inspect or obtain copies of the materials at court.

## What if I do not have or no longer have the record or thing sought in the witness summons?

If the witness summons relates to a record and/or thing that you never had in your possession, or that is no longer in your possession, let the court know in writing why you are unable to produce the requested material.

## Can I object to complying with a witness summons?

A party to the case or the recipient of the witness summons can apply to cancel the summons if there is a valid legal basis to object to compliance.

An application to cancel is lodged using a Form 23 – Application to the Court and an accompanying general form affidavit.

After the lodgement of the application, the court will usually list the application for a hearing. The parties to the proceeding and the person who has applied to cancel the summons will have the opportunity to come to court and make submissions as to whether the summons should be cancelled.

Determining whether there is a valid legal basis to apply to cancel a summons may involve consideration of complex legal issues. You should obtain independent legal advice prior to filing any application to cancel the summons.

Some of the legal reasons for cancelling a witness summons may include that the evidentiary material sought:

- is not relevant to the case;
- is subject to a 'privilege' or 'immunity'. For instance, the material contains records of communications between a lawyer and client that are subject to legal professional privilege;
- contains confidential communications between a client and a professional adviser (such as between a patient and doctor or psychologist, or client and social worker); and/or
- is so broad that it would be too burdensome for the recipient to comply.

Before lodging any application to cancel a witness summons, you should consider talking with the lodging party to see if any concerns you have with the witness summons can be resolved without applying to the court to cancel the summons. For example, if the documents sought in the summons are too broad, you may be able to agree on a narrower range of documents.

Given that a witness summons is an order of the court, any agreement reached with the lodging

party to the scope of the summons should be formalised by the lodging party (for example, by having them cancelling the witness summons and requesting the making of a new one).

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If there is a valid legal basis to object to compliance with a witness summons, a party to the case or the recipient of the witness summons can apply to cancel the summons.

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## What if I am a professional and receive a summons to produce information about a service?

Do not panic! Carefully read the summons to understand what you have to do.

If the summons relates to a service provided to a current or former client, you may contact the client and inform them about the summons. Your contact with the client will not be for the purpose of getting their consent to produce the materials, however, they may do so. In many instances, it is not legally relevant whether the client consents to the release of the materials.


If you have concerns about complying with the summons, get legal advice on whether an application to cancel should be lodged.


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### LEGAL AID WA CONTACTS

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