

# Duty of candour, disclosure and information in judicial review

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## Candour and disclosure in judicial review – key sources



1. The House of Lords decision in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 (“*Tweed*”) – leading case on disclosure in judicial review (“JR”);
2. *Guidance on discharging the duty of candour and disclosure in judicial review proceedings* (January 2010, Treasury Solicitor) (“the Tsol guidance”);
3. *Defendant’s duty of candour and disclosure in judicial review proceedings a discussion paper* (28 April 2016, Lord Chief Justice – written by Cranston and Lewis JJ) – recommendations for changes to CPR Part 54 not yet actioned (“the LCJ Discussion Paper”);
4. *The Administrative Court Judicial Review Guide* (July 2017, Administrative Court Office) – see especially sections 6 and 11 (“The JR Guide”).

## Duty of candour vs disclosure – reflects nature of JR



- DofC not necessarily the same as disclosure of documents – see below;
- CPR rules on disclosure of documents do not apply to JR, see Part 54A PD para. 12.1 *“Disclosure is not required unless the court orders otherwise”*; (and C still able to apply for specific disclosure)
- LCJ discussion paper (para. 10) – *“the courts need to be placed in a position where they can carry out their role of ensuring the lawfulness of the decision under challenge”*. This is said to be *“itself an element of the maintenance of the rule of law”*;
- ***R v Lancashire CC, ex p Huddleston*** [1986] 2 All ER 94 per Lord Donaldson MR describing the JR process as: *“one of partnership based on a common aim, namely the maintenance of the highest standards of public administration ...”*

## Duty of candour: the questions

1. What are Claimant's ("C") duties/consequences for C of non-compliance?
2. Interested parties ("I/P")?
3. The Defendant's ("D") duty of candour ("DofC"):
  - What is the scope of D's DofC?
  - Does the DofC extend to the provision of documents as well as information?
  - At what stage does D's DofC apply?
  - What are the consequences for D of non-compliance?

## What are a claimant's duties (1)?

- The DofC applies to C also; especially applicable in relation to:
  - the pleaded claim; and
  - any application for urgent consideration and/or interim relief;
- DofC includes duties:
  - (1) To set out all the relevant facts, including those which both support and undermine case – and give the Court the “*full picture*”: see the JR Guide at para 6.4 and 14.1.4;
  - (2) Sometimes not enough to comply with the duty to merely provide relevant documents, instead a specific explanation of a document or an inconsistency must be given in the pleaded claim or more usually in a witness statement: see the JR Guide at para 14.1.4 and also ***R (Khan) v SSHD*** [2016] EWCA Civ 416;

## What are a claimant's duties (2)?

- (3) A specific requirement exists to disclose any rights of appeal that exist, and whether they have been used, and any statutory provision that appears to exclude jurisdiction: see e.g. ***R v Humberside CC, ex p Bodgal*** (1992) 5 Admin LR 405;
- (4) DofC applies equally to litigants in person (see JR Guide para 3.2.2);
- (5) DofC on Cs are especially acute in respect of any application for interim relief and/or urgent consideration and where the Court may be required to act *ex parte* (see the JR Guide at section 14.1.1-2);

## What are a claimant's duties (3)?

- (6) Duty is a continuing one does not end on lodgement of permission/interim relief papers, if circumstances change duty to act immediately and inform other parties and Court: see e.g. ***R(Bilal) v SSHD*** [2014] UKUT 00329 (IAC)
- (7) Normal exceptions to disclosure apply – e.g. privilege. ***R (Wildbur) v MoD*** [2016] EWHC 821 (Admin) - two paragraphs in a C's reply in JR proceedings, which stated that the MoD had refused repeated offers to mediate and had only attended an informal meeting, were struck out as in breach of the rule preventing disclosure of without prejudice discussions (all that could properly be stated was that alternative dispute resolution had been attempted unsuccessfully).

## What are consequences for claimants if do not comply?

1. Adverse costs award, including wasted costs;
2. Refusal of permission to apply for JR the ultimate sanction:
  - see case-law discussed by Privy Council in ***Peerless Limited v Gambling Regulatory Authority (Mauritius)*** [2015] UKPC 29, especially ***R v Wirral MBC, ex p Bell*** (1994) 27 HLR 234;

*“If I were to have any doubt about my conclusions on either of the two grounds put forward by the applicant, I would, nevertheless have been influenced in deciding whether or not to exercise my discretion in this case by the non-disclosure of documents which occurred in the manner which I have described. Whilst, as I said, that is not a matter which would have made me dismiss the application out of hand without considering the merits of the application, it is a matter which I would have taken into account upon the general question of the exercise of my discretion.”*



## Interested Parties (1)

- What about I/Ps?
- Privy Council in ***Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment*** [2004] Env. L.R. 38 suggested same duties as a D in JR.
  - Belize case. JR of DoE decision to build dam; co-respondent was independent private company Belize Electricity Company Limited ("BECOL"), which was going to construct the dam pursuant to a franchise agreement with the Belize Government.
  - Lord Walker said *“there is a very close identity of interest between these parties. They are in effect partners in an important public works project ... its most important consequence is that BECOL was also, in my opinion, under a duty to make candid disclosure to the court”*
  - PC critical re non-disclosures by the Belize Government and BECOL.

## Interested Parties (2)

- Not much consideration of DofC applicable to I/Ps in English case-law, and not mentioned in LCJ discussion paper and recommendations.
- I/Ps will often have information relevant to a JR claim, e.g. (in planning cases) an I/P developer may have information which is of assistance to someone challenging a grant of planning permission; also challenges to procurement decisions where the winning party may possess information that would assist the losing party who is seeking JR.
- If I/P plays active role e.g. pleadings and evidence – then difficult to argue that DofC does not apply; however, I/P is not in same position re: costs – will not normally recover even if successful, so faces a possible unfair burden of DofC but no costs recovery.

## The D's duty of candour (1) – what is the scope of the duty?



- The scope of the duty is not set out in any rule or PD;
  - ***R v Lancashire CC, ex p Huddleston*** [1986] 2 All ER 94 per Lord Donaldson MR. JR is a process “*which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority’s hands*”;

## The D's duty of candour (2) – what is the scope of the duty?



- Because DofC derives from case-law, not rules or PD, the formulations of scope differ somewhat:
  - (1) **Huddleston**: “*explain fully what they have done and why they have done it*” and not be “*partisan in their own defence*”;
  - (2) **Tweed** per Lord Carswell at para. 31 “*the obligation resting on a public authority to make candid disclosure to the court of its decision making process, laying before it the relevant facts and the reasoning behind the decision challenged*”;
  - (3) **R (Quark) v Secretary of State for FCO** [2002] EWCA Civ 1409 per Laws LJ at para. 50 “*assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide.*”

# Does the DofC extend to the provision of documents as well as information? (1)



- This is a surprisingly difficult question to answer:
- (1) Part 54A PD: disclosure rules *not* applicable to JR unless Court so orders.
- (2) The formulations above on the scope of the duty (***Huddleston***, ***Tweed*** and ***Quark***) focus on identification of the relevant facts and reasoning rather than the actual disclosure of documents.

## Does the DofC extend to the provision of documents as well as information? (1)



- (3) On some occasions, however, courts have referred to the DofC as involving the D in explaining the relevant facts *and also disclosing relevant documents*, even though the issue did not need to be decided (see e.g. ***R (AHK) v SSHD*** [2012] EWHC 1117 (Admin) at para. 22
- ***Graham v Police Service Commission*** [2011] UKPC 46 at para 18; duty said to extend to disclosure of “*materials which are reasonably required for the court to arrive at an accurate decision*”
- This also appears to be view taken in Tsol guidance.
- Reference in ***Tweed*** to ‘best evidence’ rule – presumption that greatest weight to be attached to original document

# Does the DofC extend to the provision of documents as well as information? (1)



## What is the status of best evidence rule today?

- “...the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired...In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence.”: **Masquerade Music Ltd & Ors v Mr Bruce Springsteen** [2001] EWCA Civ 563 per Jonathan Parker LJ at [85]
- **R. (National Association of Health Stores) v Secretary of State for Health** [2005] EWCA Civ 154: “The best evidence rule is not simply a handy tool in the litigator's kit. It is a means by which the court tries to ensure that it is working on authentic materials. What a witness perfectly honestly makes of a document is frequently not what the court makes of it. In the absence of any public interest in non-disclosure, a policy of non-production becomes untenable if the state is allowed to waive it at will by tendering its own précis instead”.

## Does the DofC extend to the provision of documents as well as information? (2)



- Two key points:
  - (1) Public bodies may choose, and often do choose, to discharge the DofC by disclosing the relevant documents themselves;
  - (2) the Courts have generally *encouraged* the disclosure of relevant documents as good practice – Tweed at [4] and [39]; see summary of Irwin J in ***R (NAPO) v Secretary of State for Justice*** [2014] EWHC 4349 (Admin) at [15]
- E.g. ***R (Hoareau & Bancoult) v SSFCA*** [2019] EWHC 221 (Admin)



## Does the DofC extend to the provision of documents as well as information? (3)



- The LCJ discussion paper concluded in making its recommendations (see para. 19):
  - “ ... *the better approach at present is to express the content of the duty of candour simply by reference to the wording of existing case law dealing with the identification of relevant facts and the reasoning process*”.
  - “*That would leave the public body free to continue with the practice of voluntarily providing disclosure of relevant documents. If it is said that the disclosure of a particular document is necessarily for fairly dealing with an issue, that can be dealt with by means of an application for specific disclosure*”.
  - “*We would not, at present, consider it appropriate to particularise (and in our view, extend) the scope of the duty of candour on a defendant by incorporating specific disclosure obligations into the Practice Direction.*”

## Does the DofC extend to the provision of documents as well as information? (4)



- ***R. (Sustainable Development Capital LLP) v Secretary of State for BEIS*** [2017] EWHC 771 (Admin) per Lewis J - NB one of authors of LCJ Discussion Paper;
- A reference to a document in a witness statement filed in support of a claim for JR made under CPR 54 is *not* to be treated as disclosing the document for the purposes of CPR 31;
- *“The specific provisions of Practice Direction 54A contemplate that disclosure will only be required if the court so orders. A defendant public body may voluntarily provide copies of documents and is encouraged to do so (and it may be a method of discharging its duty of candour to ensure that a court is informed of the relevant facts underlying and the reasons for a decision). Until an order is made, however, a defendant is not required to disclose documents. In those circumstances, a reference to a document in a witness statement filed in the course of proceedings for judicial review would not amount to disclosure. Consequently, I ruled at the hearing that the Claimant had no right to inspect the document pursuant to CPR 31.3 ...”.*

## When does the D's DofC apply?

– Per the TSOL guidance:

*“The duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance witness statements and counsel’s written and oral submissions.”*

– But note:

- Ds are not actually *required* to file and serve an AoS and SGR, if D doesn't only sanction is: D cannot appear at oral permission hearing without leave of Court;
- Inconsistent with this to say DofC binding on D pre-permission?

## What are the consequences of non-compliance for a Defendant?



1. If there is no adequate identification of the reasoning underlying the decision, the court may draw inferences of fact. In circumstances where D “*fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a decision ... the basis for drawing adverse inferences of fact ... will be particularly strong*”: **R (Das) v SSHD** [2014] EWCA Civ 45
2. May provoke applications by C for specific disclosure, and risk these being granted by the Court, – see below;
3. May result in highly adverse costs awards including indemnity costs irrespective of outcome of JR: see **Al-Sweady** and **R (Shoemith) v Ofsted** [2010] EWHC 852 (Admin);
4. Could exceptionally result in (i) officials being ordered to attend for live evidence and cross-examination: **R (Abraha) v SSHD** [2015] EWHC 1980 (Admin) or (ii) a determined case being re-opened: see **R (Bancoult) v SSFCO** [2016] UKSC 35.

# Disclosure



- The Court may “*exceptionally*” order disclosure: see ***Tweed*** and the JR Guide at para 6.5.1, so an application can be made in a JR for disclosure of specific documents or documents of a particular type and Court may (under CPR 31.12(1)) order disclosure where this is “*necessary in order to resolve the matter fairly and justly*”
- But such orders are very much the exception rather than the norm

## Timing of specific disclosure applications

- Specific disclosure applications:
  - normally *after* D filed and served DGR and evidence
  - most common reason for refusal: not necessary for fair and just resolution of proceedings;
- Can be ordered pre-permission: rare, should usually wait until D's DGR and evidence before applying, see e.g. decision of Gilbert J. in ***Richborough Estates v SSCLG*** (2017, unreported) – disclosure application in context of multi-developer claimant challenge to a Written Ministerial Statement amending planning policy. (NB Court *did* order disclosure of matters put before minister – relevant to allegation of irrationality. Refused disclosure of advice to minister on need for consultation (and other legal advice) – said to be relevant to alleged legal error in consultation).

## Disclosure v Duty of candour



- Such disclosure orders are rare because:
  - (1) JR concerned with legality – so issues raised are legal issues – JR generally not appropriate for disputed facts;
  - (2) Compliance by D with DofC means generally no need for orders for disclosure; and
  - (3) Court will not tolerate “*“fishing expeditions”, where an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of turning up something out of which to fashion a possible challenge*” (***Tweed***, per Lord Carswell)
- NB in Jackson review on costs it was noted JR costs generally much lower than other HC litigation and one of reasons for that was that disclosure of documents as per CPR Part 31 generally not applicable.

## Disclosure in JR proceedings: countervailing public interests



- NB situations where material would fall to be disclosed under D's duty of candour but there is a countervailing public interest:
  - D may apply for **public interest immunity**; e.g. where material is sensitive on basis of international relations; PII certificate must be signed by a minister – if application is successful, material not disclosed; but not a binary option: confidentiality rings, gisting
  - **Closed Material Procedure (CMP)** under the Justice and Security Act 2013: under CMP, one or more parties may be excluded from proceedings; court views material and excluded parties 'represented' by special advocates; national security grounds only



# Information: statutory rights to access government information



- Statutory rights to access government information can be deployed effectively to access information that might be pertinent to judicial review:
  - Freedom of Information Act 2000:
    - Right to be informed whether a public body holds information requested and to have information communicated;
    - Response must be made promptly and normally within 20 days of receipt;
    - There are a number of exemptions;
  - Data Protection Act 1998:
    - grants right to data subjects to access personal data held by ‘data controllers’, including public authorities
  - More specific rights: e.g. under the Environmental Information Regulations 2004
  - NB ECtHR decision in **Magyar Helsinki Bizottsag v Hungary** (2016) (18030/11): “*in circumstances where access to information is instrumental for the exercise of the applicant’s right to receive and impart information, its denial may constitute an interference with [article 10 ECHR]”*.

## Key points to note

- DofC applies to both claimants and defendants
- Extends to highlighting key documents and information that undermines party's own case
- Better view is that it applies from the pre-action stage onwards
- Legal principles re whether *documents* need to be disclosed (rather than information as to decision-making process provided) leave significant room for argument, but better (and usual) practice is for documents to be disclosed
- Specific disclosure applications will only rarely be granted; need a good argument that the documents are necessary for fair and just resolution and not a “fishing expedition”; prospects may be better where question of jurisdictional fact or proportionality is at play
- Consider whether Art.10/statutory rights to information could play a role