

Review of Administrative Law: duty of candour & disclosure



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Disclosure obligations

- Normal rules of civil litigation do not apply
- PD CPR Part 54
- Obligation is to comply with the “duty of candour”

Issues

1) Timing

2) Scope

Timing

- Duty of candour has existed for a long time
- Pre-2000 caselaw: “the duty of the respondent to make full and fair disclosure” e.g. *Ex p Huddleston* [1986] 2 All ER 941, 945
- Note: does not refer to disclosure in the modern sense of disclosure of documents
- Questions of disclosure were usually post-permission

Timing

- Al Sweady [2009] EWHC 2387
- Catalogue of disclosure problems

→ TSol guidance: January 2010

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1_.pdf

“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...”

- It is arguable that this goes further than the state of the caselaw at the time
- From a public body perspective, one can see how this may be seen as a very demanding obligation
 - Administratively onerous before a case has even been launched;
 - ‘fishing expedition’ cf FOI
 - Not yet adjudicated to cross the arguability threshold

Scope

- Historically – evidence by affidavit
- Gradual evolution: e.g.
 - *R. (on the application of National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 15
 - *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 950

Scope

- One of the reason why the ordinary rules about disclosure of documents do not apply to judicial review proceedings is that there is a different and very important duty which is imposed on public authorities: the duty of candour and co-operation with the court.
- “It is the function of the public authority itself to draw the court’s attention to relevant matters... This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.”

R (Citizens UK) v Home Secretary [2018] 4 WLR 123 at [106].

Scope

- Critical importance of seeing underlying documents
- Onerous? May depend on nature of the case – but still low compared to civil litigation
- Embarrassing?

Thank you for listening

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