

**What – right now – does the duty of candour require from defendants and interested parties?**

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**1. Lamentable failures leave the Court in a near impossible position**

From the High Court last year:

*“... the council has failed in that duty at every point ... there have been a series of lamentable failures ... and ... it has left both the claimant and the Court in a near impossible position ... I hope that the terms of this judgment will be drawn to the attention of those having responsibility for the operation of the Legal and Governance Department ... so as to ensure that the Council fully understands its duties to the court when it is engaged in public law litigation ...”*

DHCJ Lock QC in *R (Nur) v Birmingham City Council* [2020] EWHC 3526 (Admin)

**2. Defendant’s duty of candour and disclosure in Judicial Review proceedings, a discussion paper**

Recommended changes to clarify the scope of the duty of candour so that the necessary information would be provided in the vast majority of cases without any further order from the court.

The underlying concept is that 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, itself a key element of the maintenance of the rule of law.

- The touchstone - what does the court require in order justly to determine the lawfulness of a decision?

**3. Practice Direction 54A – Judicial Review**

Rule 54.8

Acknowledgement of Service 6.2

If a D chooses to file then the Summary Grounds then D should *“identify succinctly any relevant facts ... a brief summary of the reasoning underlying the measure ... unless the defendant gives reasons why the application for permission can be determined without that information ...”*

- Beyond doubt – duty of candour at the permission stage.
- But - to what extent is there a duty on D or IP which does not file Summary Grounds? In *R (Midcounties Co-Operative Ltd v Forest of Dean DC* [2015] EWHC 1251 (Admin) Singh J said D at least needed to consider whether it had complied with its duty of candour, and whether it was required to provide any information to the court.
- And – is it less than the duty post-permission? JUSTICE suggests that it should be that which, in accordance with the Pre-action Protocol “*is proportionate and properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues, unless there is good reason for it not do so.*”

Rule 54.16

#### 10.1 Evidence

*“In accordance with the duty of candour, the D should, in its Detailed Grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted.”*

*“Disclosure is not required unless the court orders otherwise.”*

- What is “*relevant*”?
- Does the duty include a requirement to give disclosure “*which is relevant or assists the claimant, including on some as yet unpleaded ground*” (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 4)* [2016] UKSC 35)?
- Not the same test as FOIA.

## 4. The Administrative Court Guide

### 7. Starting the Claim

...

#### 7.5 Duty of candour and cooperation with the Court

*7.5.1 There is a special duty – the duty of candour and cooperation with the Court – which applies to all parties to judicial review claims. Parties are obliged to ensure that all relevant information and all material facts are put before the Court. This means that all parties must disclose relevant information or material facts which either support or undermine their case. The duty of candour may require a party to disclose a document rather than simply summarising it.*

7.5.2 *It is very important that parties comply with the duty of candour.*

...

- The duty applies to interested parties and with the same intensity as claimants and defendants (see also below).

## 15. *The duty of candour and cooperation with the Court*

### 15.1

...

15.1.2 *... the “duty of candour” ... requires the parties to assist the Court by ensuring that information relevant to the issues in the claim is drawn to the Court’s attention, whether it supports or undermines their case.*

15.1.3 *Where a party relies on a document, it will be good practice to disclose the document rather than merely summarise it, because the document is the best evidence of what it says ... it may in practice be difficult to comply with the duty of candour without disclosing the document.*

15.1.4 *However, this may not be enough. The duty of candour may also require the party in its statements of case to identify and explain the significance of information and/or documents adverse to that party’s case.*

...

15.2.3 *... it applies with particular force to applications made in circumstances where the other party or parties will not have the opportunity to respond ... In this context, the claimant must: ... disclose any fact ... which it is material for the Court to know ... make the court aware of the issues that are likely to arise ... present the information in a fair and even-handed manner*

...

### 15.3 *The duty as it applies to defendant public authorities and their representatives*

15.3.1 *A public authority’s duty of candour and co-operation with the court is “self-policing”. There is a particular obligation on solicitors and barristers acting for public authorities to ensure that it is fulfilled. The duty arises because public authorities are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law. They are accordingly required to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide.*

- Specific reference to the obligations on lawyers: they cannot simply rely on their clients to provide all the evidence without themselves taking steps to “ensure” that the duty of candour is fulfilled (see *R (KI) v London Borough of Brent* [2018] EWHC 1068 (Admin) and below).

*15.3.2 The duty of candour has been recognised as applying at, or even before, the permission stage as well as at the substantive stage. However, what is required to discharge the duty at the substantive stage will be more extensive than what is required before permission has been granted.*

...

- Why is more required at the substantive stage and what will the differences be?

*15.3.5 The duty of candour means that:*

*15.3.5.1 the process of preparing statements of case and evidence must be conducted “with all the cards face upwards on the table”, public authorities must not be selective in their disclosure;*

*15.3.5.2 pleadings and evidence must be drafted in clear, unambiguous language, must not deliberately or unintentionally obscure areas of central relevance and must not be ambiguous or economical with the truth or contain “spin”; and*

*15.3.5.3 pleadings and evidence must not mislead by omission, for example by non-disclosure of a material document or fact or by failing to identify the significance of a document or fact.*

*15.3.6 The duty of co-operation ... [is] on-going ...*

- The duty of candour is “on-going” throughout the case even after all the evidence has been filed.

*15.4 Interested parties*

*15.4.1 The duty of candour applies to interested parties.*

*15.5 Redactions*

*15.5.1 Parts of a document which otherwise fall to be disclosed under the duty of candour may be redacted if those parts:*

*15.5.1.1 are confidential **and** irrelevant to the issues in the case; or*

*15.5.1.2 attract legal professional privilege; or*

*15.5.1.3 are subject to a statutory restriction on their disclosure.*

*15.5.2 However, the fact that information in a document is exempt from disclosure under the Freedom of Information Act 2000 does not, in and of itself, mean that the information is subject to a statutory restriction on its disclosure or can be properly withheld from disclosure in legal proceedings ...*

## **5. The Independent Review of Administrative Law**

Raised the question of whether the duty of candour had an adverse impact on Government Departments.

Clause 5 of the Judicial Review and Court Bill proposed a limit on the court ordering disclosure absent “*compelling reasons*” in order to “*tighten the judicial review process*”.

That provision does not form part of the final Act.

## **6. Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings**

Pre-dates the changes to the Practice Direction and Court Guide.

*“The duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them.”*

*“Where the case raises issues under the Human Rights Act this issue must be addressed by reference to the speeches of the House of Lords in Tweed v Parades Commission for Northern Ireland. In that case, the House of Lords emphasised that the relevant question is whether disclosure appears to be necessary in order to resolve the matter fairly and justly.”*

*“... it will be necessary for the solicitor with conduct of the case to have undertaken an exercise equivalent to the exercise that is described [below] ...*

*The solicitor’s duty on disclosure ... was summarised by the Court of Appeal in Hedrich v Standard Bank London Ltd ... explaining to his client the existence and precise scope of the disclosure obligation and the need to preserve documents. The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client ... The client should not be allowed to decide relevance ... A solicitor must not necessarily be satisfied by the statement of his client that he has no more documents or no more documents that he chooses to disclose. If he has reasonable grounds for suspecting that there are others, then he*

*must investigate the matter further, but he need not go beyond taking reasonable steps to ascertain the truth ... If the client is not prepared to give full disclosure, then the solicitor's duty to the court is to withdraw from the case."*

## **7. Orders for specific disclosure**

In the light of all of this, they are expected to be rare.

They must be highly specific or fall foul of the "fishing expedition" defence.

## **8. Publicly-available information**

C should not be left to search for the needle in a haystack. So – documents must be ordered and explained, and D may have to draw attention to material that is available online (*UB (Sri Lanka) v SSHD* [2017] EWCA Civ 85, [21]).

## **9. Potential consequences of failure to comply with the duty**

- Drawing of adverse inferences (*R (Quark) Fishing Ltd v SSFCA* [2002] EWCA Civ 1409, [50]).
- Refusal of admission of (expert) evidence obtained where the duty has not been complied with in the process of instruction and preparation of the report (*R (Good Law Project) v SoS Health and Social Care and Abingdon Health* [2021] EWHC 2595 (TCC)).
- Dismissal of a case, although not necessarily bearing in mind the interests of justice (*Peerless Limited v Gambling Regulatory Authority* [2015] UKPC 29).
- Reference to the AG for consideration of whether there should be criminal action for an attempt to pervert the course of justice (*Re Downes 2* [2006] NIQB 79).
- Reference (undertaking of self-reference) to a professional disciplinary body (*R (Sathivel v Secretary of State for the Home Department* [2018] EWHC 913 (Admin)).
- Direction for personal attendance (*R (Al-Sweady) v Secretary of State for the Defence* [2009] EWHC 1687 (Admin)).
- Costs on an indemnity basis (*Al-Sweady*) or wasted costs (*R (Shahina Begum) v Secretary of State for the Home Department* [1995] COD 176).

## **10. Practicalities**

- A thorough search right at the start.
- Led and directed by lawyers.

- Careful thought to ambit of search – is it relevant or might the court need it?
- Is it a proportionality case? More may be required.
- A confidentiality ring?
- Directions for the hearing to be in private even if the judgement is not?

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