Landmark CHAMBERS

Where are the limits of disclosure - including confidential information – in judicial review, supported by case law and borderline examples?

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Recent statements of the principles (1)

- See Div Crt in ***R (Hoareau) v FCO*** [2018] EWHC 1508 (Admin) paras. 8 - 24, later approved by CA in ***R (Citizens UK) v Secretary of State for the Home Department*** [2018] 4 WLR 123 at paras. 105 - 106:

  - (1) "*One of the reasons why the ordinary rules about disclosure do not apply to judicial review proceedings is that there is a quite separate but very important duty which is imposed on public authorities which is not imposed on other litigants. This is the duty of candour and co-operation with the court, particularly after permission to bring a claim for judicial review has been granted.*" (***Hoareau*** para. 13, emphasis added)
  - (2) "*this is "a self-policing duty". A particular obligation falls upon both solicitors and barristers acting for public authorities to assist the court in ensuring that these high duties on public authorities are fulfilled*". (***Hoareau*** para. 18)

Recent statements of the principles (2)

- (3) In some cases it may not be enough to off-load a huge amount of documentation on the C *"It is the function of the public authority itself to draw the court's attention to relevant matters; … to identify "the good, the bad and the ugly". 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"*. (***Hoareau*** para. 20 and ***Citizens UK*** para 106(3)).
- (4) The witness statements filed on behalf of public authorities in a case such as this must not either deliberately or unintentionally obscure areas of central relevance; and those drafting them should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth. There can be no place in this context for "spin". (***Citizens UK*** para. 106(4)).
- (5) The duty of candour is a duty to disclose all material facts known to a party in JR proceedings. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact. (***Citizens UK*** para. 106(5)).

The new Part 54A PD (1)

- New PDs for Part 54 published 4 May – in force 31 May.
- Note:
  - (1) Relevant in a number of respects to the Duty of Candour and to disclosure in JR;
  - (2) Seems, at least in part, to give effect to some of the recommendations in the *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) ("the LCJ Discussion Paper");
  - (3) NB does not deal with pre-action procedure (see below)

The new Part 54A PD (2)

- Para 6.2 (2) "*The Summary Grounds should identify succinctly any relevant facts. Material matters of factual dispute (if any) should be highlighted. The Grounds should provide a brief summary of the reasoning underlying the measure in respect of which permission to apply for judicial review is sought unless the defendant gives reasons why the application for permission can be determined without that information*"
- Note:
  - (1) Long-standing debate: does the Duty of Candour apply pre-permission?
  - (2) No explicit mention in the PD of Duty of Candour at this pre-permission stage (contrast later paras. dealing with post permission);
  - (3) LCJ Discussion Paper recommended that if a party files summary grounds then they should *"provide a brief summary of the decision-making process, identifying the principal relevant facts and the principal reasons underlying its decision. That would assist the court in deciding whether or not there is an arguable case that the decision or measure under challenge is unlawful*" (see para. 33). The new PD reflects this recommendation;
  - (4) So, the obligation is: (i) identify succinctly the relevant facts; and (ii) provide a brief summary of the underlying reasoning *unless* reasons why permission can be determined without this.

The new Part 54A PD (3)

- *"10.1 In accordance with the duty of candour, the defendant 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."*
- *"10.2 Disclosure is not required unless the court orders otherwise."*
- So,
  - (1) For the first time have explicit reference to Duty of Candour in rules or PD;
  - (2) Suggests that the Duty of Candour obligation is most clearly engaged at the DGR/evidence stage, rather than pre-permission – see above;
  - (3) NB the way that the duty is expressed in para. 10.1 is focused on: (i) identifying the relevant facts; and (ii) any underlying reasoning, ***NOT*** the provision of documents. (This again reflects the LCJ Discussion Paper – see below).
  - (4) Para. 10.2 in itself not new, the previous version of the PD said precisely the same.

Does the Duty of Candour extend to the provision of documents as well as information? (1)

- This is a surprisingly difficult question to answer:
- (1) As noted above the Part 54A PD makes clear, as did the previous version, that the rules on disclosure of documents in the CPR are ***not*** applicable to JR unless Court so orders.
- (2) Many of the classic formulations on the scope of the duty (***R v Lancashire CC, ex p Huddleston*** [1986] 2 All ER 94***, Tweed v Parades Commission for Northern Ireland*** [2007] 1 AC 650 ***("Tweed")*** and ***R (Quark) v Secretary of State for FCO*** [2002] EWCA Civ 1409) focus on identification of the relevant facts and reasoning rather than the actual disclosure of documents. The ***Hoareau*** case – see above – seems more focussed on documents.
- (3) On some occasions, courts have referred to the Duty of Candour as involving *both* 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 and see the decision of Privy Council in ***Graham v Police Services Commission*** [2011] UKPC 46 at para. 18).

Does the Duty of Candour 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 Duty of Candour by disclosing the revenant documents themselves; and
  - (2) the Courts have *encouraged* the disclosure of relevant documents as good practice – absent a good reason e.g. confidentiality – see e.g. ***Tweed*** per Lord Bingham at para. 4 "*[w]here a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says*" (emphasis added). This is the so-called best evidence rule.

Does the Duty of Candour extend to the provision of documents as well as information? (3)

- The best evidence rule:
  - Seen what was said in ***Tweed***;
  - A far stronger view – *obiter* – in ***R. (National Association of Health Stores) v Secretary of State for Health*** [2005] EWCA Civ 154 - Challenge to Ministerial decision; w/s summarising briefing to Ministers; document not disclosed; Judge at first instance refused specific disclosure; that not appealed:
    - However, Sedley LJ said *"[t]his court, however, raised it … because it seemed … that we were being required to ignore the best evidence rule by being made to rely on a second-hand account of a document of which the original was available".*
    - *"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 Duty of Candour extend to the provision of documents as well as information?

In ***Hoareau*** para. 24.

"In the skeleton arguments in the present case there appeared at one time to be some dispute between the parties as to whether the "best evidence" rule remains in this context. On behalf of the defendant it was submitted there is no such rule any longer in civil proceedings, let alone in judicial review cases (see ***Masquerade Music Ltd v Bruce Springsteen*** *[2001] EWCA Civ 563, [2001] CP Rep. 85, paras. 64, 65, 77 and 85 (Jonathan Parker LJ)). Nevertheless, it was accepted and, indeed, submitted on behalf of the defendant that where a public authority relies on a document as "significant" to its decision, it is ordinarily good practice to exhibit that document (see* ***R (On Application of National Association of Prison Officers) v Secretary of State for Justice*** *, para.15 (Irwin J, as he then was) citing* ***Tweed*** *at paras.4 (Lord Bingham) and 39 (Lord Carswell)). In the end we did not understand that proposition to be controversial."*

Does the Duty of Candour extend to the provision of documents as well as information? (4)

- 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*."
- The new PD (see above) seems to reflect this approach.

Does the Duty of Candour extend to the provision of documents as well as information? (5)

- Div Crt in ***R (Terra Services) v NCA*** [2019] EWHC 1933 (Admin), para. 19
- *"we would stress that disclosure, in the sense of disclosure of documents, is not automatic in judicial review proceedings, even after permission has been granted. What the court normally expects to happen, if permission is granted at all, is that the defendants will then set out fully and frankly an accurate description of what has happened so far as necessary to resolve the issues in the claim for judicial review in a witness statement. Guidance was given by Lord Bingham in* ***Tweed,*** *in particular at para. 4, as to what should happen in relation to documents. Very often, as he said, the appropriate course to take will be to exhibit the original documents rather than simply to try to summarise them. But there can be exceptions to that, for example, where confidentially requires otherwise."*

Does the Duty of Candour extend to the provision of documents as well as information? (6)

- ***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 ...".*

The basics: a quick reminder (1)

- The basics:
  - So as seen, Duty of Candour not the same as disclosure of documents – see above;
  - CPR rules on disclosure of documents do not apply to JR, see Part 54A PD para. 10.2 *"Disclosure is not required unless the court orders otherwise"*;
  - The Court may *"exceptionally"* order disclosure: see ***Tweed;***
  - JR Guide (2020) at para 6.5.3 *"In practice, orders for disclosure of documents are rarely necessary in judicial review claims. The disclosure of documents may not, in fact, be necessary to allow the Court to consider a particular issue"*
  - 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 to deal fairly and justly with a particular issue (see e.g. ***R v Secretary of State for the FCO, ex p WDM*** [1995] 1 WLR 386 at 396 – 397)

The basics: a quick reminder (2)

- 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 with the Duty of Candour 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)

Pre-action? (1)

- What about the Duty of Candour pre-action?
  - (i) Specific disclosure application is possible at pre-action stage but very rarely granted at such an early stage – see below;
  - (ii) Is Duty of Candour applicable?
    - LCJ Discussion Paper seemed to reject application of Duty of Candour pre-action – see para. 37.
    - Older *Guidance on discharging the duty of candour and disclosure in judicial review proceedings* (January 2010, Treasury Solicitor) ("the T Sols guidance") – a wider view – "*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.*"
    - I think this is wrong, and cases do not support it.

Pre-action? (2)

- The new Part 54A PD does not deal with pre-action;
- NB the JR Pre-action Protocol:
  - Says one of aims is to "*understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents*" (para. 3(a));
  - Para 13 says:
    - (i) Requests for information and documents made at the pre-action stage should be proportionate and limited to what is properly necessary for C to understand why decision taken and/or to present the claim in a manner that will properly identify the issues.
    - (ii) D should comply with any request which meets these requirements *"unless there is good reason for it not to do so*".
    - (iii) Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions.
  - Para 23 says D response should: (i) enclose any relevant documentation requested by C, or explain why the documents are not being enclosed; and (ii) where documents cannot be provided within the time scales required, then give a clear timescale for provision.

When can and should specific disclosure be sought by a C? (1)

1. Clear that generally Courts view is should come *after* D filed and served DGR and evidence – see e.g. ***R (Waltham Forest) v SSCSF*** [2010] EWHC 3358 and also the decision of Gilbart J. in ***Richborough Estates v SSCLG*** (2017, unreported);
2. Can be sought pre-permission but very rarely granted:
   - ***Sky Blue Sports & Leisure Ltd v Arena Coventry Ltd*** [2013] EWHC 3366 (Admin). C refused permission on papers, and renews. Then applies for specific disclosure of documents referred to in D's summary grounds. The basis for the application was that the disclosure was necessary for the determination of the permission. Application refused. Disclosure restrictive in JR; C had much documentation already. If C were unsuccessful in the instant disclosure application, there was no reason why they could not point to the fact that they had not had full disclosure so as to strengthen their contention that they should be granted permission. That could be a persuasive or a decisive argument on the permission hearing and undermined C's case that the disclosure sought was necessary at the instant stage

When can and should specific disclosure be sought by a C? (2)

3. Can be sought, and ordered at any stage, including pre-action in JR but such applications very, very rarely successful: see e.g. ***BUAV v Secretary of State for the Home Department*** [2014] EWHC 43 (Admin) and ***K v Secretary of State for Defence*** [2014] EWHC 4343 (Admin):
   - In ***BUAV*** Court said no examples of successful applications, but soon after ***R. (National Association of Probation Officers) v Secretary of State for Justice*** [2014] EWHC 4349 (Admin): rare example of grant of pre-action disclosure for proposed JR of plan to restructure probation services. Disclosure ordered of certain documents relating to test reports on the proposed restructure.
4. See also ***Terra*** where Div Crt record common ground that Duty of Candour "*not confined exclusively to cases in which permission has been granted and may well be applicable, depending on the context, at or even before the permission stage*" (para. 14).
5. More generally, the right time for disclosure applications by C is post- D's DGR and evidence. Need some really very good reason for applying before that stage reached.

What are the consequences of non-compliance?

1. If there is no adequate identification of the reasoning underlying the decision, the court may infer that no adequate or valid reason exists (see, e.g. Laws L.J. in ***Quark*** at para. 50, and ***R v Secretary of State for Trade and Industry ex p. Lonrho*** [1989] 1 W.L.R. 525).
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 (Shoesmith) v Ofsted*** [2010] EWHC 852 (Admin);
4. May result in on-going judicial investigations: see ***Shoesmith*** requiring evidence of what happened;
5. Could exceptionally result in a determined case being re-opened: see ***R (Bancoult) v SSFCO*** [2016] 3 WLR 157.

When will disclosure be ordered/refused? (1)

- (1) Specific disclosure *"rare"* (see the JR Guide) and case-law supports that this is so, see e.g. the Privy Council in ***Save Guana Cay Reef Association v R*** [2009] UKPC 44 at para. 47;
- (2) In some types of cases it has been suggested that specific disclosure more likely e.g. where jurisdictional fact in issue, human rights cases (see ***Tweed*** at para.3 and ***Al-Sweady***) and where proportionality is in issue. **But, NB**: LCJ Discussion Paper proposed no special rules for such cases as *"very much the minority of cases"*;
- (3) Disclosure can be refused if:
  - A) Court considers it not necessary for fair and just resolution of proceedings – something that will be judged against: (i) the particular issues raised; (ii) the extent of disclosure already made, or (if application pre DGR/evidence) the disclosure likely to be made; and (iii) the desire of the Courts to avoid "*fishing expeditions*";

When will disclosure be ordered/refused? (2)

Other possible bases for refusal:

- B) the volume of material: see ***Tweed*** at paras. 4, 33 and 37;
- C) Confidentiality: see ***Tweed*** at paras. 33, 37 and 57;
- D) Public Interest Immunity: see ***Tweed*** at paras. 5, 25, 33, 41 and 58 and ***R(A) v Chief Constable of B Constabulary*** [2013] EWHC 4120 (Admin);
- E) Legal professional privilege: see the ***Richborough*** case referred to above;

- (4) Looking at cases the most common basis for refusal is A) above namely not necessary for fair and just resolution of proceedings.

Confidentiality (1)

- Seen what said by the HL in ***Tweed*** that confidentiality can be a basis for the Court refusing to order specific disclosure.
- **EXAMPLES:**
- (1) Disclosure refused: ***R (Perry) v Hackney*** [2014] 1721 (Admin):
  - Application for disclosure of developer's financial viability assessment for a development and related documents;
  - Argued that were it to be disclosed it could give rise to financial embarrassment as it sets out the assumptions adopted which would undermine the ability of the developer to negotiate in the market;
  - Pointed out that in planning system such information often not made public;
  - Court refused to order;
  - NB generally thinking on public access to such information moved on: see: ***Holborn Studios*** [2020] EWHC 1509 (Admin)

Confidentiality (2)

- Where confidential can mean no disclosure of documents, see above but:
  - (1) Under Duty of Candour may still need to set out the position, see ***Terra*** para. 19; or
  - (2) Also Court can order disclosure subject to a confidentiality ring and subject to confidentiality undertakings: see ***R (Good Law Project) v Secretary of State for Social Care*** [2021] EWHC 1223 (TCC) "*That is to ensure that those who are responsible for directing and conducting the proceedings have access to all relevant information in unredacted form, but also to ensure that the information that is made public does not trespass on issues of commercial sensitivity, national security or other sensitive issues*".

Confidentiality (3)

- ***R (Good Law Project) v Secretary of State for Social Care***
- Case concerning the D's awarding of personal protective equipment (PPE) contracts supplied in April and May 2020 during the COVID-19 pandemic and alleged advantages to suppliers as a result of them using the so-called “high priority lane” for VIPs e.g. those with political connections;
- (1) [2021] EWHC 1223 (TC):
  - orders sought: (i) DGR and evidence filed without redacting names of individuals concerned; and (ii) w/s filed explaining disclosure exercise carried out by D.
  - Court refuses:
  - (i): unredacted disclosure instead to the confidentiality ring;
  - (ii): explanation given of disclosure exercise sufficient.

Confidentiality (4)

- (2) [2021] 4 WLUK 377:
  - Seek disclosure of:
    - (i) relevant WhatsApp and text messages concerning the supply of PPE that evidenced any advantages to suppliers as a result of them using the high priority lane – **granted, as likely to be relevant**;
    - (ii) communications with ministers about the establishment and operation of the PPE cell including the priority lane – **granted as relevant**;
    - (iii) communications relating to specific orders to supply – **refused, sufficient material already to make case**;
    - (iv) evidence that the priority lane was widely advertised as a way of more quickly triaging offers from suppliers – **refused too wide**.

Confidentiality (5)

- (3) [2021] 5 WLUK 226:
  - Seek order to allow release of disclosed information from the confidentiality ring;
  - Relating to: precise pricing, pre-payments made, amount spent on PPE not fit for purpose and also names of individuals;
  - **Refused:** (i) much of this not relevant to claim; (ii) prices paid commercially confidential; and (iii) confidentiality ring allowed access to information.

Interested Parties (1)

- Focussed on D's.
- 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 Duty of Candour applicable to I/Ps in English case-law, and not mentioned in LCJ discussion paper and recommendations.
- Is reasoning on Duty of Candour in ***Belize*** case limited to I/Ps in close partnership with a public authority as BECOL were? Probably not. Just a clear example of where Duty of Candour on I/P.
- I/Ps will often have information relevant to a JR claim, so an I/P developer may have information which is of assistance to someone challenging a grant of planning permission, and 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 Duty of Candour probably applies.

Interested Parties (3)

- But what if I/P chooses not to play active role?
- Plus I/P not in same position re: costs – will not normally recover even if successful, so faces a possible unfair burden of Duty of Candour but no costs recovery.
- In the new Part 54A PD the guidance on content of SGR and DGR and evidence equally applicable to IPs, albeit much of it in terms of e.g. explaining reasoning for decision can only really apply to the D.