

# Candour in Judicial Review

*Where - right now - are the limits of the Duty of Candour for claimants, defendants and interested parties?*

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“In politics, candour is either rare evidence of courage or a dreadful mistake, frequently both”

(Gore Vidal)



“Candour is the luxury of those with nothing to lose.”

(Julian Barnes)

\*Both quotes “hallucinated” by Generative AI

# ROAD-MAP

1. Origin and basis of the Duty of Candour (“**DOC**”) (in brief)
2. Defendants – scope, limits and implications of breach
3. Claimants – scope, limits and implications of breach
4. Interested Parties – are they subject?

# KEY SOURCES

- Treasury Solicitors Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings (2010) (“**TSOL Guidance**”) ([https://assets.publishing`service.gov.uk/media/5a7b8f4fed915d13110600a3/Tsol\\_discharging\\_1\\_.pdf](https://assets.publishing.service.gov.uk/media/5a7b8f4fed915d13110600a3/Tsol_discharging_1_.pdf))
- The Administrative Court, Judicial Review Guide 2024 (“**Admin Court Guide**”) (<https://www.judiciary.uk/courts-and-tribunals/high-court/administrative-court/administrative-court-judicial-review-guide-2024/>)
- *R (Police Superintendents’ Association) v Police Remuneration Review Body* [2024] 1 WLR 166 (Fordham J.)
- *R (Coulthard) v Secretary of State for Environment* [2024] EWHC 2409 (Admin) (Swift J)
- *R (IAB) v Secretary of State for the Home Department* [2024] EWCA Civ 66
- *R (Caterpillar (Xuzhou) Ltd) v Secretary of State for Business and Trade* [2025] EWHC 1124 (Admin) (Saini J).
- *R (Hilltop Experiences Limited) v Norfolk County Council* [2025] EWHC 1447 (Admin) (Lieven J)

**(1) ORIGIN AND BASIS OF THE DUTY  
OF CANDOUR (IN BRIEF)**

# Origin and basis of the Doctrine

- Origin of modern law: Sir John Donaldson MR in *Ex parte Huddleston* [1986] 2 All ER 941:
  - No general duty at common law to give reasons for a decision.

“But in my judgment the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure.” (p.945)
  - Rationale for this duty lay in the pursuit of a “common aim”:

“the evolution of what is, in effect, a specialist administrative or public law court [...] has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.” (*ibid*)

## Origin / basis (contd)

- In more recent cases, this is framed by reference to the rule of law – see Singh LJ in *R (Hoareau) v SoS for Foreign and Commonwealth* [2018] EWHC 1508 (Admin), para. 20:

“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.**”
- (See to same effect para. 15.3.1 of the Admin Court Guide.)
- But, this cannot be the (only) basis for the DOC, since the duty also applies to Claimants, who
  - are not public bodies; and
  - have no *a priori* commitment to the public interest or the rule of law.

## Origin / basis (contd)

- Wider rationale lies in the nature and procedural structure of JR:
  - (1) The **supervisory nature** of JR means that “*standard disclosure*” (Part 31) is usually disproportionate, because:
    - the Court is generally not the primary fact-finder;
    - there is generally no XX; and
    - the claim usually turns on (a) issues of law; (b) procedural challenges; or (c) the lawfulness of assessments made on uncontested facts;
  - (2) But, in the **absence of standard disclosure**, some mechanism must exist for ensuring that all the relevant information is put before the Court.
- The DOC meets that need.

## Origin / basis (contd)

- How, then, to formulate DOC?
  - Admin Court Guide para. 15.1.3:

“[The DOC] 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.”
  - This is adapted from Laws LJ’s formulation in R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409 at para. 50:

“a very high duty on public authority respondents [...] to assist the court with **full and accurate explanations of all the facts relevant to the issue the court must decide**”

## Origin / basis (contd)

- These formulations are accurate once the issues are settled and before the Court.
- But, the DOC plays a role at an earlier stage, *viz.* in ensuring that the parties are, themselves, able to identify the issues (which may include potential grounds of challenge of which C is unaware).
- So, an alternative formulation might be:

A duty to ensure that the parties and the Court have all the information needed fully and fairly to assess the lawfulness of the decision.
- This duty binds legal representatives as well as the parties themselves. Breaches may result in the Hamid jurisdiction and referral to regulatory bodies (both SRA and BSB). See further Admin Court Guide, para. 18.1.

## **(2) DEFENDANTS**

# Defendants

## (1) At what stage does the DOC apply?

- In R (HM) v Secretary of State for the Home Department [2022] EWHC 2729 (Admin) (para 16), the Divisional Court (Edis LJ and Lane J) adopted the following passage from the TSOL Guidance (at section 1.2, p.7) as correctly stating the law:

“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.”

- However, the DOC may apply with differing intensity at different stages.

# Defendants (contd)

- See Admin Court Guide 2024 at paras 15.3.3 to 15.3.4:

“At the permission stage, the Summary Grounds should **identify any material facts**, highlight any material matters of factual dispute and **provide a brief summary of the reasoning** underlying the measures 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).

At the substantive stage, the duty requires a defendant in the detailed grounds of defence or evidence to **identify any relevant facts and the reasoning underlying the measure** in respect of which permission to apply for judicial review has been granted. The duty of candour is a continuing one and applies after detailed grounds and evidence have been filed and served.”

- Note the (inevitable?) vagueness of distinguishing between “material facts” (included in the SGD) and “relevant facts” (included in the DGD)

## Defendants (contd)

- Draw the following practical distinction:
  - (1) if those conducting D's defence are **aware of facts** which could be relevant to the grant of permission, these must be disclosed in the PAP Response and SGD;
  - (2) two limiting principles apply:
    - what is "relevant" at the permission stage will depend on why D resists permission (e.g. if D is *only* relying on a timing point, and concedes that the substantive grounds otherwise meet the threshold, it may need to say very little on the substance);
    - those conducting the defence cannot be expected to undertake as detailed inquiries at the permission stage as at the substantive stage (so the "universe" of facts may be narrower).

# Defendants (contd)

- **(2) DOC and the disclosure of documents**
- There is a tension in the authorities as to whether:
  - (a) the DOC can be usefully sub-divided into more granular rules / principles; and
  - (b) whether those principles can spell out when the DOC would require D to provide documents in addition to disclosing information.
- In ***R (Police Superintendents' Association) v Police Remuneration Review Body* [2024] 1 WLR 166** (an application for specific disclosure) Fordham J attempted an ambitious systematisation of the DOC, formulating ten principles (see para 15).

# Fordham's 10 Principles

- “(1) The “**Standard Disclosure**” Principle. In judicial review, unlike most civil claims (CPR Pt 31), the parties are **not generally required to give standard disclosure** of documents (CPR PD 54A, para 10.2), which means **simply giving or offloading lots of documents is unnecessary and inappropriate** (Hoareau, paras 19–20). (JR Guide 2022 , para 15.1.1; Gardner, para 22.)”
  - Note: this means excessive, irrelevant disclosure could itself breach DOC. Must not disclose a haystack to obscure a needle.
  - Also, reference to document in a witness statement or pleading does not (as it would in Part 7) mean that the document is automatically disclosable under CPR 31: *R (Sustainable Development Capital LLP) v Secretary of State for BEIS* [2017] EWHC 771 (Admin).

## Fordham's 10 Principles (Contd)

- “(2) The “**Just Disposal**” Principle. In judicial review, the **test for ordering disclosure** of specific documents or categories of documents (CPR r 31.12(1) ) is **necessity to resolve the matter fairly and justly** (Tweed, para 3), a test also governing requests in judicial review for further information (CPR r 18.1: see R (Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs [2013] Lloyd's Rep FC 690, para 19) and cross-examination. (JR Guide 2022 , paras 7.6.2, 11.2.2; Gardner , paras 25, 27, 29 and 35.)”
- “(3) The “**Candid Disclosure**” Principle. Judicial review is conducted with **all cards face upwards on the table** (Huddleston, p 945f), meaning **full and fair disclosure of all “relevant material” so the court can decide whether the public authority acted lawfully** (Bancoult, para 192), based on an underlying principle that public authorities are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law (Hoareau, para 20). (JR Guide 2022 , para 15.3.5, Gardner, para 20; JM, para 90.)”
- **Note:** re. what is “relevant material” see “Relevant Material” Principle.

## Fordham's 10 Principles (Contd)

- “(4) The “**Information-Too**” Principle. Candid disclosure also requires that relevant facts be identified in witness statement evidence, insofar as unapparent from disclosed contemporaneous documents (Belize , para 86), which means breach of the duty can lie in non-disclosure of a material document or the omission or obscuring in a witness statement of a fact or identified significance of a fact or document (Citizens UK , para 106(4)). (JR Guide 2022 , para 15.3.5; Gardner , para 21.)”
- Note: DOC covers not just *what* information is disclosed but *how* it is disclosed, *viz.* whether the information and/or its “significance” are “obscured”.
- Where a decision involves technical or scientific matters “*a reviewing court needs to be given a sufficient explanation [...] of how the science relates to its decision so that the court can consider whether it embodies an abuse of discretion or an error of law*”: **R (Mott) v Environment Agency [2016] EWCA Civ 564**, para. 64

## Fordham's 10 Principles (Contd)

- “(5) The “**Relevant Material**” Principle. Candid disclosure is required of (a) those materials reasonably required for the court to arrive at an accurate decision (Graham, para 18), (b) full and accurate explanations of all the facts relevant to the issue that the court must decide (Quark, para 50; Citizens UK, para 106(3); Hoareau, para 20) and (c) a true and comprehensive account of the way in which relevant decisions in the case were arrived at (Quark, para 50; Downes, para 21) including the underlying reasoning (CPR PD 54A, para 10.1). (JR Guide 2022, paras 15.3.1, 15.3.4; Gardner, para 20; JM, para 90.)”
- Note: this should include disclosing the use of any generative AI within an account of “*the way in which relevant decisions ... were arrived at*”

## Fordham's 10 Principles (Contd)

- “(6) The “**Non-Selectivity**” Principle. Candid disclosure must not be selective but must **include the unwelcome along with the helpful** (Taylor, para 60; Graham, para 18; Hoareau, para 21). (JR Guide 2022, para 15.3.5.)”
- Note: this has been called “the good, the bad and the ugly”: *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs (2018) EWHC 1508 per Singh LJ at para. 20.*

## Fordham's 10 Principles (Contd)

- “(7) The “**Best Evidence**” Principle. Documents should be produced, not gisted or a secondary account given, since the document is the best evidence of what it says: Tweed, para 4; Hoareau, para 24; National Association, paras 47, 49). (JR Guide 2022, para 15.1.3; Gardner).”
- Note: see para. 18 of judgment for a trenchant argument for the Best Evidence principle, as follows: [PTO]

## Fordham's 10 Principles (Contd)

“If documents matter, they should be provided. [...] Not gists. Nor summaries. Not descriptions of contents or features of the document. Not selected quotations. Instead, the documents themselves. This is proper candid disclosure. It is not the supply of material whose request would constitute fishing. It is not automatic disclosure of any document mentioned. It is to achieve “Candid Disclosure” of “Relevant Material” by “Best Evidence” (para 15(3), (5), (7) above), subject to the “Redaction Principle” (para 15(8) above). Disclosure, and candid disclosure, should not be replaced by “further information”: the principle is “Information-Too” (para 15(4) above) not “Information Instead”. The “cards” themselves, and not a narrative description or a summary or quotation, are to be face upwards (para 15(1)). What are necessary for “Just Disposal” (para 15(2)) are the documents. The duty of candour applies to “material” (para 15(3), (7)), not information about the contents of “material”. That is the position in principle.” (Para. 18)

## Fordham's 10 Principles (Contd)

- “(8) The “**Redaction**” Principle. Documents need not be disclosed in their entirety but **can be redacted** (Tweed, para 33) for public interest immunity, confidentiality, legal professional privilege or statutory restriction. (JR Guide 2022, para 15.5.1.)”
- Note: (1) redactions for confidentiality can only be justified if the redacted material is not relevant to the dispute;
- (2) Material may be redacted for “irrelevance” if it is concerned with wholly different subject-matter to the dispute: *R (IAB) v Home Secretary* [2024] EWCACiv 66 para. 29 (Bean LJ)
- (3) But, it does not follow that one can redact material simply because it “*does not directly bear upon one or the other of the claimants’ grounds of challenge*” (*ibid* at para. 6 and 24). E.g. the routine redaction of the names of junior civil servants is not generally permissible (*ibid*).

## Fordham's 10 Principles (Contd)

- “(9) The “**Permission Stage**” Principle. The duty of candour applies prior to - and for - the courts consideration of whether to grant permission for judicial review, though **what is required to discharge the duty at the substantive stage will be more extensive** (Terra Services, paras 9, 14), and the **limited nature of disclosed material could inform a decision to grant permission** (R (Sky Blue Sports & Leisure Ltd) v Coventry City Council [2014] BLGR 34, para 25).”

## Fordham's 10 Principles (Contd)

- “(10) The “**Unpleaded Grounds**” Principle. The duty of candour extends to documents and information which will assist the claimants case or may give rise to further grounds of challenge which might not otherwise occur to the claimant: De Smiths Judicial Review, 9th ed (2023), para 16-026; Treasury Solicitors Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review [2010] JR 177, para 1.2; R (K) v Secretary of State for Defence [2014] EWHC 4343 (Admin) at [11]; after R v Barnsley Metropolitan Borough Council, Ex p Hook [1976] 1 WLR 1052, 1058C—D (cited in Graham [2011] UKPC 46 at [18]).”

# *R (Coulthard) v SoS for Environment* [2024] EWHC 2409

- *Coulthard* concerned an application for specific disclosure.
- Swift J stepped back from Fordham’s “Principles” suggesting that they “**may be the cause of confusion**” (para. 2):
- “There is **only one** governing **principle** applications for specific disclosure, viz. “whether [...] disclosure appears to be **necessary** in order to resolve the matter fairly and justly” (citing Ld Bingham in *Tweed*) [3].
- “The **ten instances** listed by Fordham L [sic] are **not principles**. They are **examples** of the application of the single principle stated by Lord Bingham.” [8]
- “Paragraph 15 of Fordham J's judgment in the *Police Superintendent Association's* case, is a very **helpful collection of examples** of the application of Bingham L's principle. It is **not**, and I am sure was not intended to be, **any form of codification of the law** on disclosure.” [9]

## Coulthard (contd)

- Swift J. emphasised that previous decisions which had justified disclosure on the “best evidence” principle related to “*documents relied on by the public authority as “significant to its decision”*” (para. 5) or “*the main documents going to the grounds of challenge*” (para. 9)
- Concluded that: “*the principle [...] operates on documents central to a decision under challenge*” not “[any] documents referred to in any witness statement”.
- My own view:
  - Fordham’s 10 principles are not merely “instances” of a single principle that specific disclosure will be granted where “necessary”.
  - They address the DOC generally, not just specific disclosure of docs (e.g. the “Information-Too” principle)
  - Fordham was attempting to digest and organise the existing law, if not codify it. This is welcome, and warrants development.

## Coulthard (contd)

- As to the disclosure of documents:
  - The “best evidence” principle should not be limited to a document which the defendant relies on as “*significant to its decision*”.
  - That may not be a reliable benchmark of the document’s ultimate importance to the claim.
  - If the contents of a document are referred to in the D’s filings (or PAP letter) then *prima facie* D has relied upon them and/or acknowledged their relevance; and
    - The document, itself, is the best evidence of those contents; and
    - providing it need not be an excessively burdensome enterprise.

## What if D breaches DOC?

- **(1) Adverse inferences:** see *R (Das) v Home Secretary* [2014] 1 WLR 3538:

“In general litigation where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against that party . . . The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well-known obligation owed to the court by a public authority facing a challenge to its decision [...] to co-operate and to make candid disclosure, by way of a–davit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings.”

## *What if D breaches DOC (contd)?*

- **(2) Cross-examination of officials:** e.g. *R (Abraha) v Secretary of State for the Home Department* [2015] EWHC 1980 (grant of XX where officials' evidence conflicted with that given by another officer in another case re. Eritrean travel document requirements).
- **(3) Hamid jurisdiction** against legal representatives.
- **(4) Costs** (including indemnity or wasted costs)
- **(5) Re-opening a decided case:** e.g. *R (Bancoult) v Foreign Secretary (No. 4)* [2017] AC 300 (unsuccessful attempt to reopen House of Lords decision: (a) there had been a breach of duty of candour in failing to disclose documents; but (b) no real possibility of different result.)

## **(3) CLAIMANTS**

# Claimants' DOC

- In part codified in **PD 54A** at para. 4.1:

“A claimant seeking permission to apply for judicial review, urgent consideration or interim relief (whether by a claim included in the Claim Form itself or by a separate application notice) must ensure that the Claim Form or application notice sets out **all material facts**, that is **all those facts which are relevant to the claim or application** being made. A claimant **must make proper and necessary inquiries** before seeking permission to apply for judicial review or interim relief **to ensure so far as reasonably possible that all relevant facts are known.**

A claimant should **refer to any statutory provision which excludes the jurisdiction of the court** to entertain the application, or to grant the relief sought, and should also refer to **any alternative appeal mechanism** that exists, or could have been used prior to seeking judicial review”

## Claimants DOC (contd)

- The Admin Court Guide makes clear that C must disclose not just statutory bars, but *any “known impediments to the claim”*:

“A claimant is under a duty to make **full disclosure** to the Court of material facts and **known impediments to the claim** (e.g. **alternative remedy, delay, adverse case law, statutory ouster, change of circumstances**).<sup>310</sup> This duty is a continuing one: it applies throughout the judicial review procedure.”

## Claimants DOC (contd)

- The duty is not abridged by the fact that D will have a chance to file an AoS and SGD: *R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416, [35]-[36].
- However, the duty is particularly exacting if C is applying for **urgent interim relief**, to which D will not have an opportunity to respond: Admin Court Guide para. 15.2.3. In that case, C must
  - (a) disclose any fact which it is material to know (including as to urgency);
  - (b) identify possible difficulties in the application or underlying claim;
  - (c) “present the information in a fair and even-handed manner, and in a way which is not designed simply to promote his own case”:

*R (DVP) v SSHD* [2021] EWHC 606 (Admin) [8]-[9]; Admin Court Guide para. 15.2.3.

## Claimants DOC (contd)

- Case of *R (Caterpillar (Xuzhou) Ltd v SoS for Business and Trade and the Trade Remedies Authority* [2025] EWHC 1124 (Saini J) provides a very recent example of strong line taken by Court.
- The claim related to the decision to impose remedial measures following an investigation into alleged “dumping” of excavators in the UK market from China.
- C was a manufacturer of excavators from China.
- It had not been notified as an “interested party” in the Investigation.
- It challenged Ds on the basis that this had been unlawful and procedurally unfair.
- It did not disclose until shortly before the hearing that it had become aware of the Investigation at an early stage.

## Claimants DOC (contd)

- Saini J found that there had been a breach of the duty of candour (para. 174);
- C's legal representatives were not responsible – the breach lay with the client (para. 173);
- This was “*all the more concerning given that the Group is a substantial and well-resourced multi-national entity*”:
  - “Undertaking proper factual investigation and equipping one's lawyers with accurate information is a basic requirement of all litigation, but it has a particular importance in public law litigation given the demanding duties which are owed to the Court in such cases.” (para. 175)

- Further, C had failed to explain the breach. Saini J made clear the Court's expectations as to what an explanation should entail:

“At the hearing, Mr West KC did not offer any explanation of why the Information had not been disclosed earlier. I infer from his interactions with his clients and Solicitors in court and from his declining to answer my questions that this was because his client was invoking some form of privilege. Any litigant who finds themselves in such a situation is, as a minimum, expected by the Administrative Court to provide an explanation (and usually an apology). That does not involve a violation of privilege. However, I would have expected more than some form of oral explanation from Mr West KC. A substantial and respected international entity such as the Caterpillar Group should have recognised the error and provided, through a senior officer or General Counsel, a witness statement with a full and proper explanation as to how the failure to disclose came about.” (para. 176)

- **Consequence:** would have denied permission had claim been valid:

“Had I not refused permission to apply for judicial review because of the lack of merit in the grounds and their academic nature, the seriousness of the breach of the duty of candour would have in itself justified a refusal of permission.” (para. 178)

- Invited submissions from parties on costs...etc.
- Other possible consequences for Claimants from breach:
  - (a) Adverse costs (included indemnity or wasted costs)
  - (b) Hamid jurisdiction (as above)
  - (c) (in theory) re-opening a decided case.

## **(4) INTERESTED PARTIES**

# Interested Parties (“IPs”)

- An interested party is “any person (other than the claimant or defendant) who is **directly affected by the claim**”: CPR 54.1(2)(f).
- Practically: most IPs are unlikely to possess relevant information which is not in the possession of C or D.
- Practitioners sometimes doubt whether DOC applies to IPs.
- Admin Court Guide is clear: “The duty of candour applies to interested parties” (15.5.1).
- However, the case-law is more equivocal.

# Interested Parties (“IPs”)

- Admin Court Guide cites [Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment \[2004\] UKPC 6.](#)
- In that case Lord Walker (dissenting) found that the IP *did* owe a duty of candour, but this was justified on the particular facts:
  - “there is a very close **identify of interest** between [the interested party and the defendant]. They are in effect partners in an important public works project” (para. 87).

# Interested Parties (“IPs”)

- If the **IP** is before the Court and taking an active role, it clearly will be subject to the DOC: see R (Midcounties Co-Op) v Forest of Dean District Council [2015] EWHC 1251 (Admin) (challenge to planning permission; planning authority took no active part; the IP - a developer - defended the claim).
- Since the procedural machinery of Part 54 (e.g. absence of standard disclosure) proceeds on the basis that parties will act with candour, this is essential.
- More difficult if the **IP** is simply unresponsive to the claim. Difficult to see how a pro-active duty can be cast upon a non-participating entity that owes no public duties in relation to the dispute.
- Hard case would be if a sophisticated IP had a clear interest in outcome and was aware that Court was being misled, but elected not to engage. May well be caught?

**THANK YOU**