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# TO WHAT EXTENT IS THE DUTY OF CANDOUR NOW A WEAPON USED BY CLAIMANTS FOR DISCLOSURE AT EACH STAGE OF THE JUDICIAL REVIEW PROCESS?

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# WHAT IS CANDOUR? (1)

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- Judicial review: “*A process which falls to be conducted with all the cards face upwards on the table and [where] the vast majority of the cards will start in the [public] authority’s hands*”
- No ordinary disclosure in judicial review – duty of candour instead
- Must disclose:
  - All relevant evidence and material, even if prejudicial
  - Non-documented facts in the knowledge of the party
  - Documents created during proceedings (*R Tshikangu v Newlander BC* [2001] EWHC Admin 92)

## WHAT IS CANDOUR? (2)

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- Recent Singh J judgments:
  - *Abraha v Secretary of State for the Home Department* [2015] EWHC 1980 (Admin)
  - *R (on the application of Midcounties Co-operative Limited) v Forest of Dean District Council* [2015] EWHC 1251 at [148-151]
- Relevant for parties other than defendants:
  - **Interested parties:** *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6
  - **Claimants:** *Peerless Ltd v Gambling Regulation Authority* [2015] UKPC 29

# APPLICATIONS FOR DISCLOSURE (1)

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## General position

- Standard disclosure orders remain very rare
- Specific disclosure applications more likely
- Leading case on specific disclosure is *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53:
  - Disclosure should be governed by a flexible principle in accordance with the requirements and facts of a particular case
  - Even in proportionality cases, disclosure should be limited to specific issues

# APPLICATIONS FOR DISCLOSURE (2)

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## Dependent on nature of dispute

- Disclosure more likely if intensive review required (e.g. if proportionality in issue)
- Disclosure ordered in:
  - *R (on the application of Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin)
  - *R (on the application of the National Association of Probation Officers) v Secretary of State for Justice* [2014] EWHC 4349 (Admin)

## APPLICATIONS FOR DISCLOSURE (3)

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### Pre-permission (or even pre-action) disclosure?

- Generally:
  - No witness evidence or disclosure at permission stage
  - But: TSOA guidance refers to candour at all stages of process
- Possible (but difficult) to successfully apply for very early disclosure:
  - **No:** *British Union for the Abolition of Vivisection v Secretary of State for the Home Department* [2014] EWHC 43
  - **No:** *Sky Blue Sports and Leisure v Coventry City Council* [2013] EWHC 3366 (Admin)
  - **Yes:** *National Association of Probation Officers*

# FOIA/EIR – AN ALTERNATIVE WEAPON?

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- FOIA/EIR likely to be available to claimants
- The problems:
  - 1) **Timing**: 20 working days but extensions possible for “reasonable period” under FOIA and 40 working days under EIR
  - 2) **Different disclosure tests**: Court not persuaded by information commissioner decisions in separate forum
    - *R (Perry) v Hackney* [2014] EWHC 4349 (Admin)
    - *R (Equiom) v Croydon* [2014] EWHC 3660 (Admin)

# CONCLUSION

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- Successful use of candour as “*weapon*” is still rare
- Success depends less on stage of proceedings, more on grounds of review (or likely grounds of review)
- Claimants – consider putting in early FOIA/EIR requests
- Defendants – get advice early

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