

DISCLOSURE FOR REGULATORS AND THE REGULATED

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Introduction

1. This paper focuses on the duties of disclosure on regulators in claims for judicial review. Once upon a time, there may have been a golden age. Orders for disclosure were viewed as unnecessary except in the rarest of cases. The duty of candour could be relied on to produce full and frank evidence setting out the relevant facts. The parties would conduct litigation “with all the cards face up on the table” and the Court would accept the contents of an affidavit from an official setting out the relevant events without question. If this golden age ever existed, it has now gone.

The Traditional Approach

2. The traditional approach to disclosure in judicial review had four elements:
 - (1) No duty of standard disclosure under CPR Part 31.
 - (2) But the regulator owes a duty of candour to give a “true and comprehensive” account of the decision making process. See **Quark Fishing** [2002] EWCA Civ 1409 at [50].
 - (3) Regulators must conduct judicial review proceedings with “all their cards up face up on the table” and having regard to the fact that “the vast majority of the cards will start in the authority’s hands”: **Huddleston** [1986] 2 All ER 941 at 945G.
 - (4) An order for specific disclosure will only be made where it can be shown that the Defendant’s evidence is inaccurate, inconsistent or incomplete. See **World Development Movement** [1995] 1 WLR 286.
3. There are many cases where the Courts have praised Defendants for their candour and openness in freely disclosing the most embarrassing material, applying these principles. See, for example, Laws LJ in **Bancoult** [2001] QB 1067 at [63]:

I wish to commend the wholly admirable conduct of the relevant government servants and counsel instructed for the respondents who have examined and then disclosed without cavil or argument all the material documents contained in the files of government departments, some of which (as will be obvious from the narrative I have given) are embarrassing and worse. This has exemplified a high tradition of co-operation between the executive and the judiciary in the doing of justice; and upholding the rule of law.

4. The traditional position had undoubted advantages: it is cheap, straightforward and worked well in the great majority of cases. But it has been undermined by a series of cases in the last decade in which the Courts have criticised the approach taken to disclosure by Defendants and reminded them of their obligations in the most forceful terms.

5. Examples include:

- (1) **Banks** [2004] EWHC 1031 (Admin): “obtaining information from the Department was like drawing teeth without an anaesthetic... simply inexcusable... far short of the standard which this court expects of public authorities”.
- (2) **Quark Fishing** at [55] “the Secretary of State in this case has fallen short of those high standards of candour which are routinely adhered to by government departments faced with proceedings for judicial review”, “... the material put forward by the Secretary of State... did not convey a fair and full picture of the decision-making process in the case...”
- (3) **Downes** [2006] NIQB 77 at [30-31]:

... there was a significant lack of candour. In consequence the court must approach the totality of the evidential basis of the respondent with considerable caution and parse the words used by the deponents with considerable care. While the normal approach is that in a judicial review application the affidavits of public officers will be interpreted *in bonam partem* that principle is based on the assumption that candour, openness and frankness are to be expected of public officials. If the trust of the court is broken then, as Laws LJ has pointed out in Quark, the court may have to draw inferences against the decision maker on points which remain obscure.

Before concluding this aspect of the case it is timely to forcefully remind parties of their duties of candour in relation to the provision of information to the court. The affidavits of all parties should be drafted in clear unambiguous language. The language must not deliberately or unintentionally obscure areas of central relevance and draftsmen should look carefully at the wording used in any draft to ensure that it does not contain any ambiguity or is economical with the truth of the situation. There can be no place in affidavits in judicial review applications for what in modern parlance is called “spin”. Public bodies and central government agencies in particular are involved in the provision of fair and just public administration and must present their cases dispassionately and in the public interest. Justice lies at the heart of public interest and can only be served by openness in assisting the court to arrive at a proper and just decision. The judicial restraints on matters such as discovery and cross-examination would not long survive if lack of frankness and openness were to become commonplace in judicial review applications.

- (4) In **Downes 2** [2006] NIQB 79, Girvan J referred a large number of questions to the Attorney General for consideration as to whether Ministers had misled the Court and whether criminal action for an attempt to pervert the course of justice would be appropriate:

If the court is to perform its functions properly and if court decisions are to command respect it is imperative that its proceedings are conducted with conspicuous transparency, integrity, openness and fairness. Public authorities have a duty to ensure that the court can fulfil its functions properly. For this reason irregularities that affect its process should be properly investigated in a manner that can allay public concern and the concern of the court to ensure that its process is not abused. Any possible attempted interference with or obstruction of the course of justice is a grave matter which demands a proper investigation...

The Attorney General thus has the function of protecting the due administration of justice. I consider the proper course for this court to take is to refer the papers to him to decide what, if any, steps should be taken in the matter in the light of all the circumstances and in the light of all the papers before the court and any documents to which neither the court nor the applicant has access. In the Schedule I set out what appear to me to be the key questions which need to be addressed in a rigorous and searching investigation into the matter. The applicant who was the recipient of the misleading and incorrect information will of course have an interest in the proper conduct of the investigation. This court itself retains an interest in ensuring that this matter is properly investigated. I leave open for argument the question of what further or other powers are vested in this court as the court which was at the receiving end of the evidence adduced by the Secretary of State.

(5) **Actis** [2007] EWHC 2417 (Admin) at [D40]:

I am very sorry to have to record that, as I stated during the hearing, in my view there has been a failure by the Department and those advising it in this litigation to properly appreciate the seriousness and potentially far reaching effects of the allegations that the Department was facing and to deal with the issues, and in particular those arising from Mr Nawaz's evidence, fully and with proper regard to the duty of candour.

In my view the sorry state of affairs relating to the conduct of the Department in respect of the events that gave rise to this litigation and of the Department and its advisers in the litigation itself should be reviewed at a very senior level within the Department and the Treasury Solicitor.

In line with the approach in the *Rashid* case I have concluded that the manner in which the litigation has been conducted reinforces my view that the Department acted incompetently and with conspicuous unfairness in dealing with the matters that gave rise to this litigation.

(6) **Al-Sweady** [2009] EWHC 1687 (Admin):

22 ... the picture that emerges in the letter is, in our view, truly alarming... There have thus been both systemic and individual failures within the MOD on a substantial scale in this case. Put bluntly, the left hand did not know what the right hand had done, or was doing, and even when it did, nothing was done to seek to correct the situation, and in particular to inform the court, until very late indeed in the day.

23 In the result:-

i) The then MSAF signed a Certificate and Schedule asserting, in strong terms, the public interest in the non-disclosure of material which the wider MOD must have known was already in the public domain - whether because the MOD itself had volunteered its disclosure in the Payne Court Martial, or because its disclosure had been ordered in those proceedings after opposition by the MOD.

ii) Prior to the PII hearings in these proceedings in early May 2009, MOD officials took disclosure decisions in relation to the Baha Mousa Inquiry which were in direct conflict with the assertions in the then MSAF's Certificate and Schedule as to the public interest in the non-disclosure of the same material, and also realised that other material dealt with in the Certificate and the Schedule had been disclosed in the Payne Court Martial open hearings.

iii) Despite what was thus known at various stages to a number of officials and lawyers within the MOD, none of this was brought to the attention of the Court during the PII hearings, or until 1 July 2009.

iv) Therefore, as indicated above, the Court was misled into making a number of rulings on a false basis, all of which were wrong and should never have been made.

24 The steps that are currently being taken by the MOD, including the prospective detailed review of its PII process in this case, must ensure that false assertions are never again made in a Ministerial Certificate and Schedule. Indeed that in the future the whole content of such documents is scrupulously accurate whatever the workload at the MOD is. Until such time as the MOD has demonstrated this to be the case it will, in our view, be incumbent on the Courts to approach the content of any Ministerial Certificate and Schedule from the MOD with very considerable caution.

...

45 We have set out at length the lamentable history of what occurred in this case in order to ensure that nothing similar happens in future. The complete integrity of PII Certificates and the Schedules attached to them, signed by Ministers of the Crown, is absolutely essential in all cases in which they are put forward. The Courts must be able to have complete confidence in the credibility and reliability of such Certificates and Schedules. Nothing less is acceptable.

46 We have already noted that as a result of events in this case a senior civil servant has now been given specific responsibility in the MOD for policy for PII, and that he is urgently considering the need for a written redaction policy. We find it astonishing that no such person was already in post, and this suggests a serious lack of oversight, or at the very least inadequate procedures, at a senior level in the MOD. The failures in the present case demonstrate an apparent inability in the MOD to understand the importance and significance of PII applications in the judicial process. The lack of internal co-ordination and communication within the MOD could have led to very much more serious consequences than in the event resulted in this case.

47 Not the least of our concerns is that even when it became apparent within the MOD that there were failures, nothing was done to put matters right until far too late in the day. Well before the end of May it was apparent to MOD officials that the original PII Certificate and Schedule could not be maintained and that the Court had been misled, and yet it was not until 1 July 2009 that the Court was told anything about the existence of a problem. When the Court has been misled, or even may have been misled, it should be notified immediately that there is a possible problem and that the matter is under investigation.

48 As we have said in paragraph 25, until such time as the MOD has demonstrated that its procedures have remedied the risk of the kind of errors occurring that occurred in this case it will, in our view, be incumbent on the Courts to approach the content of any Ministerial Certificate and Schedule from it with very considerable caution.

6. The Claimant owes the same duty. Failure to comply with it is treated with equal seriousness by the Courts.

Tweed – the new approach

7. Until recently, the practice of Defendants was not to exhibit many documents to witness statements, but simply to summarise events. This was particularly common in respect of submissions to decision makers by officials or other documents that are viewed as being particularly sensitive.
8. This was probably never the proper approach for public bodies to take. Sedley LJ criticised the practice in **National Association of Health Stores** [2005] EWCA Civ 154 at [46-49]:

Permission was not sought to appeal against this aspect of the decision. This court, however, raised it with counsel because it seemed to all three of us 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.

Mr Cavanagh confirmed that there was no question of public interest immunity. (If there had been, of course, secondary evidence would have been as inadmissible as primary evidence.) It was simply that it was contrary to policy to make voluntary disclosure of ministerial briefings. If that is so, then it seems to me entirely inconsistent to tender and rely on a secondary account instead. The courts would not allow a private litigant to do this, and in a legal system in which the state stands before the courts on an equal footing with its citizens there is no good reason to allow government to do it. Mr Cavanagh, having taken instructions, told us with complete candour that that if we were to order disclosure it would not be problematical, either because of volume or because part of the briefing had been oral...

But for this tactical consensus we were in agreement that we would have required the briefing to be produced. 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.

9. Sedley LJ's approach has now been approved by the House of Lords (albeit in less trenchant terms). Where documents are relied on by a party, the best evidence rule requires, ordinarily, that they should be exhibited to the witness statement, and not simply summarised: **Tweed v Parades Commission for Northern Ireland** [2007] 1 AC 650 at [4, 33]. Where disclosure is resisted on the basis of confidentiality, or the volume of the material in question, a judge considering an application for disclosure can rule on the issue: [4-5].
10. There is no longer any requirement that the party seeking disclosure should establish a prima facie case that the evidence relied on by the defendant is in some way inadequate or incorrect: **Tweed** (above) at [29-32] (cf. **Cityhook Ltd. v. OFT** [2006] CAT 32 at [17, 33]). The need for disclosure of documents will depend, instead, on the circumstances of the individual case. Although it will not be necessary or appropriate in most judicial review cases, there may be cases where the interests of justice require it. For example, the extent of disclosure required may be greater in a human rights case, where proportionality is at issue, than in basic judicial review applications, where the facts are not normally in issue. Defendants may therefore need to be more ready to make disclosure in human rights cases: see **Tweed** (above) at [3, 32, 57].
11. However, it is open to question whether **Tweed** has yet had a substantial effect. A table (prepared by James Maurici of Landmark Chambers) is annexed to this paper, summarising the cases where Tweed has been considered by the Courts and

reasoned decisions have been produced. In those cases, disclosure has generally been refused. However, our practical experience is that **Tweed** is being regularly cited and may make a difference in a number of cases at the margins.

For Regulators

12. The consequences of getting it wrong are likely to be catastrophic. Where the court concludes that there has been a failure by a regulator to put relevant matters before the court it may consider it appropriate to draw inferences against that body in relation to any points which are not clearly-settled: **Quark** [50]; **Downes** [30] (“the court must approach the evidential basis of the respondent with considerable caution and parse the words used by the deponents with considerable care”). In extreme cases it may even lead to a reference by the court to the Attorney-General for consideration of whether it amounts to an attempted interference with the administration of justice: **Downes 2** [2006] NIQB 79. In **Al-Sweady** the Divisional Court was so troubled by serious failures in disclosure by the Treasury Solicitor’s Department and the Royal Military Police that it directed that the Treasury Solicitor personally attend and give evidence. A full review of disclosure obligations in public interest immunity cases was promised, and the Court ordered that the Defendant pay costs on an indemnity basis, including an interim payment on account of £1 million.
13. The duty applies at all stages of proceedings, from the response to the pre-action protocol letter through to service of detailed grounds of resistance and evidence. The best way to approach disclosure issues is as follows:
 - (1) Carry out a proper search for relevant documents at an early stage. In a simple immigration case, this may be a case of requesting the file. In a complex human rights and national security case, this may require having teams of security cleared lawyers carrying out extensive computerised searches. A failure to do a proper search will lead to errors in Summary and Detailed Grounds and the risk of adverse inferences being drawn. Such errors occurred in the **Binyam Mohamed** series of cases, and led to the new **Treasury Solicitor Guidance on Candour and the Duty of Disclosure**.
 - (2) The duty to get disclosure correct is on the solicitor, who should request all relevant files and not let the client make a decision as to relevance or potential relevance.
 - (3) The duty of candour extends to disclosure of information (not just documents) and of evidence that would give rise to additional grounds of challenge of which the Claimants may not be aware. It is not sufficient to only disclose materials that relate to the pleaded case, especially where the Claimant may not have a full understanding of the decision making process, or the extent of the information or documents available to the Defendants.
 - (4) Witness evidence should be drafted in clear, unambiguous language. To the extent there is embarrassing material to get out, do so unhesitatingly and openly. Don’t try and obfuscate or finesse: “there can be no place in

[statements] in judicial review application for what in modern parlance is called “spin”: **Downes** at [31].

- (5) The test for disclosure of actual documents is one of relevance and necessity. Don’t participate in fishing expeditions, but do find out why material is being sought. Disclosure is much more likely to be necessary in cases where the facts are in issue or there are proportionality issues where the Court has a more interventionist stance.
- (6) One solution to a request for disclosure of confidential material may be to set up a confidentiality ring. This approach is the established practice of the Competition Appeal Tribunal: **CAT Guide to Proceedings**, para. 13.10; **Claymore Dairies v DGFT** [2003] CAT 12; **Genzyme v OFT** [2003] CAT 7. This type of procedure was recognised by the House of Lords in **Secretary of State for the Home Department, ex parte MB** [2007] UKHL 46 at [58] (per Baroness Hale, referring to the provisions of the Mental Health Tribunal Rules 1983). There may be different confidentiality rings within the same case for different types of material, and they may extend to solicitors, or even to experts, depending on the circumstances.
- (7) Another solution to confidentiality problems can be to provide a gist or use redaction of documents. However, it is important to ensure that the redaction or gist does not mislead. Provide the source material to the Court and ask for approval of the gist.
- (8) Consider whether it would be useful to make a voluntary disclosure statement, along the lines of those used in ordinary civil proceedings. In a complex case, it concentrates the minds of lawyers and clients to ensure that nothing relevant is missed.

For Claimants

14. A well-directed disclosure application can reveal information that is fundamental to the Claimant’s case. A poorly-directed or over-broad application is likely to make the judge think you are scrabbling round on a fishing expedition and your case is in desperate need of support. Some ideas:
 - (1) Get your own duty of candour right. A failure by the Claimant to disclose a relevant fact is likely to be fatal to prospects of success. This is particularly necessary when dealing with ancillary matters such as applications for Protective Costs Orders (see **Corner House** [2005] 1 WLR 2600). Have you made full and comprehensive disclosure of your client’s actual financial position and other potential sources of funding? Does the witness statement accurately convey what your client will do if funding is withdrawn?
 - (2) Make a narrow, targeted request for disclosure, identifying what you want at the earliest possible stage. A short shopping list served at the pre-action stage, repeated throughout, is an effective technique.

- (3) Claims that require the Court to carry out a proportionality balance are more likely to require disclosure than a traditional judicial review claim.
- (4) If you have the luxury of time, make a FOIA request. The scope of FOIA is often wider than the duty of disclosure. In particular there is no restriction on a fishing expedition. But the appellate process is so slow that often a judicial review will be finished before the Information Commissioner even looks at a complaint.
- (5) Use Special Advocates in disclosure disputes. It is increasingly common for the government to rely on Public Interest Immunity or a claim to secrecy or national security to justify a refusal to disclose material. In days gone by, this would have been fatal to a claim for judicial review. See **Hosenball** [1977] 1 WLR 766 per Lord Denning MR at [778]: (“But this is no ordinary case. It is a case in which national security is involved: and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a set-back”). Now the Courts are willing and able to appoint Special Advocates in appropriate claims for judicial review (**AHK** [2009] EWCA Civ 287). Whilst the system is imperfect, it has often led to information becoming available to Claimants that would never previously have seen the light of day. The important recent judgment of the Court of Appeal in **Al-Rawi v Security Service** [2010] EWCA Civ 482 does not appear to prevent the continued use of special advocates in judicial review proceedings, or to assist the Court in resolving disclosure issues.

Post-Tweed table of cases

This table was prepared by James Maurici of Landmark Chambers for a talk at the ALBA Summer Conference. James has very kindly given permission for the table to be reproduced here. His article on the effect of Tweed has now been published in *Judicial Review*.

CASE & DATE	FACTS	DISCLOSURE	NOTES
<i>R (Actis SA) v Secretary of State for Communities & Local Government</i> [2007] EWHC 344 (Admin) 5/2/2007	<p>Application for further disclosure of documents in JR.</p> <p>Challenge to Approved Documents laying down detailed specifications for multi-foil insulation products under Building Regulations.</p> <p>One of grounds legitimate expectation on basis of a letter written by DCLG following an earlier meeting.</p> <p>A FOIA request revealed that there were e-mail exchanges between those attending meeting and drafts of the letter in issue which had not been disclosed.</p>	<p>SSCLG no objection to disclosure in respect of documents relating to meeting and drafting of letter (save those which were legally privileged).</p> <p>Applicant though also sought disclosure in relation to events surrounding the issue of a later circular which made reference to the subject matter of the JR claim.</p> <p>Judge refuses to order such disclosure "I do not see that it would be right, let alone necessary, for the fair disposal of the case to make a sweeping order requiring the production of internal document beyond what has already been produced in correspondence in this litigation or in answer to the Freedom of Information Act response."</p>	<p>Bean J. said (see para. 13)</p> <p>"The test in judicial review remains, as their Lordships made clear in Tweed, more restrictive than in an ordinary claim in the Queen's Bench or Chancery Division general lists, where there is a presumption in favour of disclosure of all unprivileged documents relevant to the issues in the case. The claimants either have a case based on the early dealings between the parties or they do not. I make no order for disclosure beyond the limited one [the SSCLG agreed to]."</p> <p>At end of later substantive hearing in <i>Actis</i> ([2007] EWHC 2417 (Admin)) Charles J. said "in my view there has been a failure by the Department and those advising it in this litigation to properly appreciate the seriousness and potentially far reaching effects of the allegations the Department was facing and to deal with the issues ... fully and with proper regard to the duty of candour".</p>
<i>R (AA, CK) v Secretary of State for</i>	Claimants Iraqi nationals working for British authorities in Iraq.	Mitting J. refuses disclosure	Mitting J.: Accepts the appropriate test is that stated by Lord

<p><i>Foreign and Commonwealth Affairs, Secretary of State for Defence</i> [2008] EWHC 2292 (Admin) 18/7/2008</p>	<p>Government announce scheme of assistance for such persons. Scheme subject of JR alleging it irrational, unfair and disproportionate.</p> <p>Disclosure sought (relying on <i>Tweed</i>) pre-permission of advice given to ministers about devising the scheme.</p>		<p>Bingham in <i>Tweed</i> namely “whether ... disclosure appears to be necessary in order to resolve the matter fairly and justly”</p> <p>“Applying that test at this stage of these proceedings, it is in my judgment not necessary for the disclosure of documents relating to advice given to ministers about this scheme. The claimants can argue ... that the scheme is irrational because it places inadequate weight on the risk to individuals, that it is over rigid for the same reason and that it may not therefore have been applied fairly in the case of these individuals ... [the claimants do] not need the prior disclosure of documents to advance them. Accordingly, applying Lord Bingham's test, there is no need to resolve the application for permission fairly and justly for disclosure of these documents”.</p>
<p><i>R (BMA) v GMC</i> [2008] EWHC 2602 (Admin) (3/10/2008)</p>	<p>Application for permission to apply for JR of GMC decision to end concession to doctors 65+ that need not pay annual retention fee to remain on medical register. This action was taken because the GMC concluded on leading counsel's advice that concession was in breach of the Employment Equality (Age) Regulations 2006 and was not justified.</p> <p>The BMA relying on <i>Tweed</i> sought disclosure of “further material. That includes a preliminary</p>	<p>Disclosure refused. Permission granted.</p>	<p>Burnett J.</p> <p>“Given the nature of the challenge mounted by the BMA and the detailed material put before the court by the GMC in particular, I am quite unpersuaded that the GMC should properly have disclosed more background material”</p>

	<p>written advice from leading counsel, instructions given to her and notes and the like evidencing discussions within the GMC concerning this topic".</p> <p>The claimants wanted "to explore the depth of discussion within the GMC of the question of justification ..." which matters were summarized in the GMC's evidence</p>		
<p>R (FoE) v SSBERR [2008] EWHC 2983 (Admin) (6/10/2008)</p>	<p>JR by FoE and Help the Aged alleging failure to comply with duties under Warm Homes and energy Conservation Act 2000 by not ending "fuel poverty"</p> <p>Seek disclosure of 3 categories of document: (i) all records of, meetings of the Ministerial Group and the Fuel Poverty PSA Management Board between certain dates; (ii) reports to such meetings, agendas of such meetings, and minutes of such meetings; and (iii) such other documents as have not been disclosed in these proceedings, which evidence a decision making process leading to the final decision of the defendant that it was not reasonably practicable to take any measures other than those that were already being taken to meet the 2010 and 2016 targets.</p> <p>Claim based on: (i) statutory interpretation; and (ii) <i>Wednesbury</i> unreasonableness.</p> <p>Claimant says "disclosure is needed here to get a true and comprehensive</p>	<p>McCombe J. refuses disclosure</p>	<p>Judge says "the primary thrust of these proceedings is for the court to consider and decide the issue of statutory interpretation that arises under the Act" and "[i]n the circumstances, I am not satisfied that it is necessary in order to deal with that main issue, to order the disclosure that is now sought"</p> <p>Notes submission of defendant that "notwithstanding the potential relevance of documents, I should be wary of disclosing documents at high levels of Government which, at first sight, may well attract considerations of confidentiality"</p> <p>The Judge said he would bear that in mind, but noted that the defendant accepted "that there is no claim to public interest immunity and it is a question of balance for me to decide on the one hand the relevance of the documents, and to bear in mind the need for disclosure in the face of</p>

	<p>account of the way in which relevant decisions have been taken.</p>		<p>the general principle of confidentiality. Confidentiality is a recognised feature of the limitation of discovery in all civil proceedings. For example, the court is always anxious to protect trade secrets from disclosure in litigation, save insofar as such disclosure is necessary to achieve justice”.</p>
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