Blackstone
CHAMBERS

DISCLOSURE PRINCIPLES

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Here are some suggested principles relating to the question of disclosure to be made when responding to a claim for judicial review.

1. A defendant to a judicial review claim owes a very high duty to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide: *R (Quark Fishing) v SS Foreign & Commonwealth Affairs* [2002] EWCA Civ 1409 at [50] (Laws LJ). That means candid disclosure of the relevant facts and, insofar as not apparent from the contemporaneous documents disclosed, the reasoning behind the decision challenged: *Belize Alliance v Department of the Environment* [2004] UKPC 6 at [86] (Lord Walker). Lack of cooperation and candour is strongly deprecated: *R (Rashid) v SSHD* [2005] EWCA Civ 744 [2005] INLR 550 at [52]; *Central Broadcasting Services Ltd v AG Trinidad & Tobago* [2006] UKPC 35 [2006] 1 WLR 2891 at [26]-[27], [36].

2. Although the starting-point is to consider the grounds which have been pleaded, it must be remembered that the claimant may not be on notice of an arguable basis for the claim and is reliant on materials held by the defendant in order to make an informed – if necessary, amended – claim: see e.g. *R v Barnsley MBC, ex p Hook* [1976] 1 WLR 1052, 1058C-D. It is right for the defendant to respond to the claim by making available information which would enable the claimant to raise further issues: *R v Waltham Forest LBC, ex p Baxter* [1988] QB 419, 422A-B (Sir John Donaldson MR). The question for the defendant and its representatives is not whether they consider such an issue is currently being advanced, or would succeed if

advanced; rather, it is whether the material could assist a claimant to make a point which could properly be advanced. The public law defendant should be no less scrupulous than a public law prosecutor.

3. The rules provide for the defendant's detailed evidence to be provided after permission has been considered and granted: CPR54.14. It would not be proper, however, for a defendant to both (a) hold back material which would support or strengthen the claim and (b) resist the grant of permission. In circumstances where material is held, which it is known could assist the claimant, the defendant should elect, to either (a) provide the material at the permission stage or (b) invite the grant of permission and respond thereafter.

4. The defendant cannot be selective in the material which it provides. At least absent a confidentiality or public interest immunity justification, the defendant should exhibit as primary evidence the documents to which it refers and not summarise them: *Tweed v Parades Commission* [2006] UKHL 5 [2007] 1 AC 650 at [4] (Lord Bingham), [33] (Lord Carswell), [57] (Lord Brown). Thus, for example, Government should not withhold a ministerial briefing and instead give a secondary account of it: *R (NAHS) v SS Health* [2005] EWCA Civ 154 at [47]. A defendant cannot tell an incomplete or one-sided story. So for example, where a defendant has readier access to materials and searches out material to assist its defence of a claim, it must identify and disclose the unwelcome along with the helpful: *Lancashire County Council v Taylor* [2005] EWCA Civ 284 [2005] 1 WLR 266 at [60].

5. An equivalent duty of candour arises on the part of an interested party served with a judicial review claim, who holds relevant material through its involvement in the impugned decision: *Belize Alliance* at [87] (Lord Walker).

6. Since the duty of disclosure is self-policing, it requires internal due diligence by the relevant parties and their advisers. That means disclosure must be the product of both (a) an inquiry to gather relevant material which is in the party's possession and (b) an evaluation of that material by

a legal representative. The following guiding principles can be suggested (see *Advising in Consultation*, see [2007] JR):

(1) ***Lawyers assisting a public authority in a decision-making context should take proactive steps to satisfy themselves that the appropriate public law standards are being, will be, and have been genuinely adhered to.***

(2) ***In a litigation context (whether claim or pre-claim correspondence) the discharge of public law standards should be investigated, including any internal document which might shed light on the position. No assertion of public law propriety should be advanced without first discharging that duty of due diligence, and never inconsistently with internal documentation remaining undisclosed.***

(3) ***It is never the role of the lawyer, through the drafting of a decision document or witness evidence, to initiate by putting into the mouth of the decision-maker such a description of the decision-making process as would successfully resist the claim.***

7. For the future, it would be helpful to have a certification mechanism. Initially it could be voluntary from the relevant party, or requested by the claimant. But it could usefully be required by the CPR, as follows (see *How to Make the Administrative Court a Better Place: Some Procedural Suggestions* [2006] JR: see §§6-7):

> ***N462 (Acknowledgment of Service) Candour Certification.***
> ***Form N462 should need an authorised certification along these lines (required wherever permission is contested):***
>
> > ***I certify that I have satisfied myself that – save for any documents lodged with this Acknowledgment of Service – there is no further document which is favourable to the claimant and whose disclosure at a substantive hearing would be necessary for a full and accurate explanation of the relevant facts and a true and comprehensive account of the way relevant decisions were arrived at.***
>
> ***Detailed Grounds Candour Certification.***
> ***The detailed grounds (CPR 54.14) should also need an authorised certification along these lines:***

I certify that I have satisfied myself that there are no further documents – beyond those served on the claimant - whose disclosure is necessary for a full and accurate explanation of the relevant facts and a true and comprehensive account of the way relevant decisions were arrived at.

This is a paper for the Public Law Project conference, *Judicial Review: Trends & Forecasts* on 9th October 2007. It will in due course be published in the journal *Judicial Review*.