Government's Duty of Candour: On the Move?

E.A. O'Loughlin*

Abstract

The duty of candour is triggered if a person seeks judicial review of an administrative action or decision. It requires that both parties provide a full and accurate explanation of all the facts relevant to the review before a court or tribunal. There is ambiguity, according to the Society of Labour Lawyers' submission to the Independent Review of Administrative Law, over when the duty kicks in, how far it extends, and what type of disclosure is required. This article interrogates that claim. It argues that, while there is inherent flexibility in the duty's application in different contexts, the law on the duty of candour is not necessarily unclear. Rather, its functioning is under strain from changing litigation patterns, and new technologies altering how government decisions are made and records are kept. This article maps what we know about how the duty of candour operates, before considering its application to these complex and evolving dynamics. The first part provides an overview of the development of the duty, and its present form. The second part maps out the law on the timing of the duty, its scope, and the extent to which the duty requires disclosure of documents. The third part considers recent court treatment of the duty in relation to the following pressure points: a) the rise in the role of technology in government decision-making; and b) the apparent rise in disclosure applications, and government resistance to such disclosure.

A distinctive feature of public law adjudication in England, Wales, and Northern Ireland is its approach to evidence: rather than forcing disclosure between parties, there is reliance upon the duty of candour.[1] The duty of candour is triggered if a person seeks judicial review of an administrative action or decision. It requires that both parties provide a full and accurate explanation of all the facts relevant to the review before a court or tribunal. This duty operates as a "self-policing duty" and disclosure orders are left to judicial discretion. The duty therefore trusts all parties not to be "economical with the truth",[2] and is based on an understanding that public

* Assistant Professor in Public Law and Human Rights, Durham University. Much of the research in this article draws on the author's project entitled "Transparency and Judicial Review: An Empirical Account of the Duty of Candour". This project was funded by the Nuffield Foundation, but the views expressed are those of the author and not necessarily those of the Foundation. Thanks go to Tom Hickman KC, David Pievsky KC, Maria Moodie, Dimitrios Kagiaros, Gabriel Tan, Cassandra Somers-Joce, and the anonymous reviewer for helpful comments. The usual disclaimer applies.

[1] The focus of this paper will be England, Wales, and Northern Ireland. In Scotland, there is a requirement that parties disclose documents that they rely upon, and that there is an evidential basis for anything written in their pleadings. See R. Mcniven, "Right First Time: a practical guide for public authorities to decision-making and the law – Responding to challenge" (January 2021), https://www.gov.scot/publications/right-first-time-practical-guide-public-authorities-scotland-decision-making-law-second-edition/pages/9/.

[2] C. Harlow and R. Rawlings, *Law and Administration,* 1st edn (Cambridge: CUP, 2009) p.706.

authorities are "engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law".[3]

The type of disclosure required by parties to comply with the duty of candour will vary according to the context of the challenge. This gives rise to a degree of flexibility over the duty's requirements. The recent report of the Independent Review of Administrative Law (IRAL),[4] tasked with exploring "[w]hether procedural reforms to judicial review are necessary… in relation to the duty of candour"[5] drew attention to the level of disagreement that exists amongst practitioners on the parameters of the duty. There is ambiguity, according to the Society of Labour Lawyers' submission to the IRAL panel, over *when* the duty kicks in, *how far* it extends, and what *type* of disclosure is required.[6] This article interrogates those claims. It argues that, while there is inherent flexibility in the duty's application in different contexts, the law on the duty of candour is not necessarily unclear. Rather, its functioning is under strain from changing litigation patterns, and new technologies altering how government decisions are made and records are kept. Litigation practices are evolving; we are seeing a rise in systemic judicial review challenges scrutinising the operation of entire administrative systems,[7] and more searching disclosure applications by applicants during judicial review proceedings.[8] Digital technology and remote working have precipitated changes in government decision-making, with increased government communications via "self-deleting" technology platforms such as Whatsapp and Signal,[9] rising reliance upon complex decision-making models in public administration, and burgeoning evidence that public authorities are reluctant to disclose the values inputted into these models.[10] Such trends place new demands on what the duty requires.

This article maps what we know about how the duty of candour operates, before considering its application to these complex and evolving dynamics. There is very little academic commentary on

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[3] *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at [20].

[4] IRAL was launched in July 2020 to consider options for reform to the judicial review process: Ministry of Justice, "Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government? Call for Evidence" (September 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf.

[5] Ministry of Justice, "Terms of Reference – Independent Review of Administrative Law", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf, p.1.

[6] E. Faulks, C. Harlow, V. Sachdeva, A. Page, C. Colquhoun, and N.J. McBride, "The Independent Review of Administrative Law" (March 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf, para.4.115.

[7] A. Adams-Prassl and J. Adams-Prassl, "Systemic Unfairness, Access to Justice and Futility: A Framework" (2020) 40(3) O.J.L.S. 561.

[8] See, for example, *R (Gardner) v Secretary of State for Health and Social Care* [2021] EWHC 2422 (Admin), where the claimants sought specific disclosure of 132 documents.

[9] Foxglove, "We've brought the first- ever lawsuit over government use of WhatsApp and Signa to make key decisions" (July 2021), https://www.foxglove.org.uk/2021/07/16/weve -brought-the-first-ever-lawsuit-over-government-use-of-whatsapp-and-signal-to- make-key-decisions/; The Guardian, "Covid contracts: minister replaced phone before it could be searched" (August 2021), https://www.theguardian.com/politics/2021/aug/04/covid-contracts-minister-lord-bethell-replaced-phone-before-it-could-be-searched.

[10] J. Maxwell and J. Tomlinson, "Government Models, Decision-Making, and the Public Law Presumption of Disclosure" (2020) 25(4) J.R. 296.

the duty of candour,[11] and such a study has taken on a renewed importance in the wake of IRAL, which concluded that "there is a need to clarify the scope of the duty of candour" and recommended that "some revisiting of the [Treasury Solicitor] Guidance would result in a more proportionate approach to the duty without undermining the fundamental importance of candour".[12] The first part provides an overview of the development of the duty, and its present form. The second part maps out the law on the timing of the duty, its scope, and the extent to which the duty requires disclosure of documents. The third part considers recent court treatment of the duty in relation to the following pressure points: a) the rise in the role of technology, altering how government decisions are made and records are kept; and b) the apparent rise in disclosure applications, and government resistance to such disclosure.

The Evolution of the Duty

Development

Prior to the development of the duty of candour, access to government information was limited. Judicial review, as a supervisory form of review, did not require a significant evidence base, and discovery of documents was therefore not available in the old prerogative orders of certiorari, mandamus, and prohibition. Agreed facts were laid before the court, with information provided by way of affidavit, and permission for cross-examination was rarely granted.[13] While reforms to the Rules of the Supreme Court allowed for discovery of documents and cross-examination at judicial discretion,[14] the judicial review evidence base was slow to expand.[15] Judicial review defendants were encouraged to file written evidence in prerogative proceedings, but how commonly this was observed is difficult to ascertain.[16] This was resolved through a judicial articulation of a duty of candour in the seminal case of *Huddleston*. In this case, which concerned the decision of a council to refuse a discretionary award of a university grant to an applicant, counsel for the defendant public authority argued that it was undesirable for full reasons to be given to every applicant refused, and that it is not for the respondent authority to disclose such information that makes the case for the applicant.[17] While the claim ultimately failed, the court nonetheless stated that:

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[11] The duty receives some coverage in leading administrative law textbooks: see C. Harlow and R. Rawlings, *Law and Administration*, 4th edn (Cambridge: CUP, 2021) Ch. 19; H. Woolf, J. Jowell and C. Donnelly, *De Smith's Judicial Review*, 8th edn (Sweet & Maxwell, 2018) para.16-027; and C Lewis, *Judicial Remedies in Public Law*, 6th edn (Sweet & Maxwell, 2020) paras.9-097–9-099. The duty is given more focused attention in short practitioner articles.

[12] Faulks et al, "The Independent Review of Administrative Law" paras 4.130, 4.132.

[13] See *George v Secretary of State for the Environment* (1979) LGR 689; and discussion in: Harlow and Rawlings, *Law and Administration* (2021) p.850.

[14] RSC Ord. 53, r. 6(4), as inserted by SI 1980/2000, made provision for the filing and service of defendant's affidavits, following recommendations made in: Law Commission, *Report on Remedies in Administrative Law* (HMSO, 1976), Law Com No.73, Cm.6407. That is not to say that disclosure of documents did not occur in judicial proceedings prior to the 1977 reform of Ord. 53 of the Rules of the Supreme Court 1965. On this, see O. Sanders, "Disclosure of Documents in Claims for Judicial Review" (2006) 11(2) J.R. 194, 195.

[15] *O'Reilly v Mackman* [1983] 2 AC 237 at 282: "It will be only on rare occasions that the interests of justice will require that leave be given for cross-examinations in applications for judicial review. This is because of the nature of the issues that normally arise on judicial review. The facts… can seldom be a matter of relevant dispute…since… the authority's finding of fact are [generally] not open to review."

[16] See *R v Barnsley Metropolitan Borough Council ex p. Hook* [1976] 1WLR 1052 at 1058: "If the Divisional Court gives leave… the practice is for the respondent to put on affidavits the full facts as known to them" (per Denning MR); and Sanders, "Disclosure of Documents" 197.

[17] *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941.

> "[i]f and when an 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… [t]hen it becomes the duty of the respondent to make full and fair disclosure…[T]he wider remedy of judicial review and… the evolution of what is… 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…. [Judicial review] is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."[18]

The judicial review evidence base was therefore conclusively expanded in *Huddleston*. The obligation of candour and cooperation to the court is a "weighty responsibility" for public authority defendants.[19] The obligation's existence is, however, one of the reasons that standard disclosure rules do not normally apply in judicial review proceedings,[20] thereby requiring a measure of faith in public authority defendants to place their cards "upwards on the table".

The Duty

The duty of candour requires that all parties (claimants,[21] defendant public authorities, and sometimes third parties)[22] be open and honest by disclosing the facts and information needed for fair determination of the issue.[23] There is a "very high duty, on central government to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide".[24] This requires the defendant to "set out fully what they did and why so far as is necessary fully and fairly to meet the challenge".[25] The duty requires a public authority defendant to identify any relevant facts and the reasoning underlying an issue in respect of which permission has been granted in its detailed grounds or evidence.[26] If a public authority defendant is not in a financial

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[18] *Huddleston* at 945.

[19] Treasury Solicitor's Department, "Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings" (January 2010), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1_.pdf, para.1.2.

[20] For a recent iteration of this point, see: *R (1) v Secretary of State for the Home Department* [2010] EWCA Civ 727 at [55].

[21] See, for example, *R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416 (discussing the importance of claimant candour at permission stage); *R (SB (Afghanistan)) v Secretary of State for the Home Department* [2018] EWCA Civ 215 at [56]–[57] (on the importance of claimant candour in urgent applications for interim relief to prevent the removal of an immigrant, and the need to present unfavourable facts to the court, and to make necessary enquiries to ensure factual assertions are true); *R (Mohammad Shahzad Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416 at [45] (on the growing case-loads of courts and tribunals in immigration cases, requiring that sometimes claimant must do more than just furnish the relevant document).

[22] See *Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment* [2004] UKPC 6 at [87] (per Lord Walker of Gestingthorpe): the duty to make candid disclosure to the court extends to third parties where they are "partners in an important public works project". For an interesting discussion of this case, see N. Gray, "The Duty of Candour and Third Parties" (2010) 15(2) J.R. 149.

[23] *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.1)* [2002] EWCA Civ 1409.

[24] *Quark Fishing (No 1)* at [50].

[25] *Huddleston* at 947 (Purchas LJ).

[26] Practice Direction 54A, para.10.1. This was added into PD 54 on recommendation of a consultation exercise, to reflect practice. See Cranston and Lewis, "Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper" (UK Judiciary, 2016) pp.3-4, https://www.judiciary.uk/wp-content/uploads/2016/04/consultation-duty-of-candour-april-2016.pdf. Such an obligation is also required at acknowledgement of service stage, as advised by Cranston and Lewis JJ. See Practice Direction 54A, para.6.2, which

position to defend its position in judicial review proceedings, it should at least consider whether it has complied with its duty of candour and cooperation[27]. The defendant cannot mislead the court 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".[28] Witness statements filed on behalf of public authorities cannot obscure, and there is no place for "spin".[29]

The duty of candour therefore requires the disclosure of relevant facts and information. It does not, however, automatically require the disclosure of documents. Disclosure is not required in judicial review proceedings "unless the court orders otherwise".[30] This means that the Civil Procedure Rules (CPR) on standard disclosure[31] do not ordinarily apply in an application for judicial review. The Court may make an order for disclosure of specific documents, or for standard disclosure of documents,[32] though orders for standard disclosure are rare.[33] This approach to disclosure in judicial review rests on twin assertions. First, that the nature of judicial review means it is rare that the court will require access to documentary material to dispose of the issue.[34] Second, that in any event, the duty of candour operates to ensure that there is sufficient disclosure to resolve the matter.[35] The duty operates because proceedings in judicial review "should not be conducted in the same manner as hard-fought commercial litigation",[36] and the court:

> "as the guardian of the legal rights of the citizen should be able to rely on the integrity of the executive arm of government to accurately, fairly and dispassionately explain its decisions and actions".[37]

That provisions on disclosure and written evidence were included in the 1977 re-fashioned version of Order 53 of the Rules of the Supreme Court, and in part 54 of the CPR[38], does not prevent the

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states that: "[i]f a defendant chooses to file an Acknowledgement of Service, the Summary Grounds referred to in CPR 54.8(4)(a) 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."

[27] This may include at least the filing of a witness statement, and an acknowledgement of service with summary grounds to assist the court: *R (on the Application of Midcounties Co-operative Ltd) v Forest of Dean DC* [2015] EWHC 1251 (Admin) at [147]-[151].

[28] *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 at [106].

[29] *Citizens UK* at [106].

[30] Practice Direction 54A, para.10.2.

[31] Civil Procedure Rules, Part 31.

[32] Civil Procedure Rules, r.31.6 and r.31.12.

[33] *White Book 2022* (Volume 1) r.54.16.3.

[34] *O'Reilly* at 283: facts "can seldom be a matter of relevant dispute upon an application for judicial review".

[35] *R v Secretary of State for the Home Department ex p. Al-Fayed (No 1)* [1998] 1WLR 763 at 775: "[o]n an application for judicial review there is usually no discovery because discovery should be unnecessary because it is the obligation of the respondent public body in its evidence to make frank disclosure to the court of the decision-making process" (per Lord Woolf MR); *Hoareau* at [13]: "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."

[36] *Belize Alliance of Conservation Non-Governmental Organizations* at [86].

[37] *In the Matter of an Application by Brenda Downes for Judicial Review* [2006] NIQB 77 at [21] (per Girvan J).

[38] RSC Ord. 53 was replaced by Part 54 of the CPR, which was given effect from 2 October 2000. Part 54 CPR has governed all claims for judicial review since then. See SI 2000/2092. CPR Part 54.14 provides that "(1) A defendant and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve – (a) detailed grounds for contesting the claim or supporting it on additional grounds; and (b) any

"possibility of injustice arising out of non-disclosure on the part of defendants".[39] This depends, rather, on the extent to which defendants are required to give disclosure, either by a formal order of disclosure, or by their interpretation of the duty of candour. There have been several high-profile cases with significant criticism of public authority defendants by the courts for failing to discharge their duty of candour.[40] This does not necessarily mean that the duty is routinely ignored, but may instead show that the duty's application in different contexts gives rise to divergent practices.

Timing, Scope, Type

Timing

The courts have made clear that "whatever the position may be at an earlier stage, once permission has been granted to apply for judicial review there in an obligation on the [defendant]… to make 'proper disclosure'".[41] This is reflected in the CPR, which require that a defendant who wishes to contest a claim must file and serve "detailed grounds for contesting the claim… and any written evidence, within 35 days after service of the order giving permission".[42] The IRAL report found that it was "incorrect to suggest that the duty of candour might only apply when permission for judicial review has been granted".[43] This mirrors common practice, and reflects changes made to Practice Direction 54A, which states that, if a defendant chooses to file an Acknowledgment of Service, 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."[44]

written evidence, within 35 days after service of the order giving permission." Written evidence by defendant public authorities was therefore provided for but does not deal explicitly with disclosure.

[39] Sanders, "Disclosure of Documents" 197.

[40] See, for example, *Quark Fishing (No.1)* at [49]-[55] (per Laws LJ); *R (Wandsworth London Borough Council) v Secretary of State for Transport* [2005] EWHC 20 at [250] (per Sullivan J) (note the costs penalty in the post-judgment discussion at para [71]); *R (Gilan) v Commissioner of Police of the Metropolis* [2004] EWCA 1067 [2005] QB 388 at [54]; and *R (Karas) v Secretary of State for the Home Department* [2006] EWHC 747 at [53]–[57] (per Munby J) (note adverse inferences drawn in the absence of countervailing defendant evidence at paras [63]–[65], [80]–[84] and [94]).

[41] *R (I) v Secretary of State for the Home Department* at [50]. See also *Hoareau* at [13]: "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."; and *Huddleston* at 945. In *R (Marshall) v Deputy Governor of Bermuda* [2010] UKPC 9, the claimant's lawyers, in contemplation of judicial review, wrote to respondents "posing a lengthy series of questions… It began by referring to the Government's "obligations" to provide information, as stated by Lord Donaldson in Huddleston. Mr Crow [for the claimant] accepts that this reference was premature as no judicial review proceedings had been commenced, but submits that the duty to respond to the questions raised in the letter arose when [the claimant] obtained permission to apply for judicial review" at [30].

[42] Civil Procedure Rules, r.54.14.

[43] Faulks et al, "The Independent Review of Administrative Law" para.4.116.

[44] Practice Direction 54A, para.6.2.

This demonstrates that it is expected that public authority defendants engage with the duty prior to permission being granted, and though an Acknowledgement of Service is not a requirement, it tends to be the case that a defendant will file one.[45]

The question is whether the duty bites before a court is engaged. Perhaps in a move to "play it safe" following a series of high-profile failures in relation to the duty,[46] the Treasury Solicitor (TSOL) Guidance, which provides a practical guide to public servants on how to assist the court, takes the position that 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 at every stage of the proceedings including letters or response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance, witness statements and counsel's written and oral submissions."[47]

In practice, then, government lawyers internally advise that the duty arises as soon as the department is aware that a decision may be tested, even though case law does not clearly reflect this. IRAL noted that "the duty of candour is owed to a court, so it is hard to see how the duty can arise before a court is engaged".[48] Practical considerations answer why public servants are advised to engage with the duty sooner than the law technically requires. First, the Pre-Action Protocol (PAP) for judicial review claims requires the defendant to explain the facts related to the proposed claim, and to engage in sharing "relevant information and documents".[49] Second, if a defendant public authority does not engage with duty at pre-action stage, this will adversely affect a prospective claimant's ability to explain the public authority's actions, and why they are unlawful.[50] Third, insufficient engagement with the duty of candour at pre-action stage might inadvertently lead a court to refuse permission to apply for judicial review absent knowledge of the existence of potentially relevant material.[51] The recent case of *HM, MA, and KH* underlines the importance of

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[45] On this, see M. Fraser, "Cards on the Table: LCJ Consults on the Duty of Candour Reshuffle" (2016) 21(2) J.R. 136, 139. The Administrative Court Judicial Review Guide underlines that "the duty of candour has been recognised as applying at, or even before, the permission stage": Courts and Tribunals Judiciary, "The Administrative Court Judicial Review Guide 2022" (October 2022), https://www.judiciary.uk/wp-content/uploads/2022/11/14.130_HMCTS_Administrative_Court_Guide_2022_FINAL_v06_WEB__2_.pdf, para.15.3.2.

[46] *Quark Fishing (No.1)*; *Wandsworth London Borough Council*; *Gillan*; *Karas*. The most notable case in this regard is *R (Al Sweady and others) v The Secretary of State for Defence* [2009] EWHC 2387, regarding the treatment of Iraqi nationals by British soldiers. The Court was required to make findings of fact to resolve the rights claims in question and made repeated requests for official documents. In a 21-day hearing, proceedings were stayed because the relevant minister could not guarantee that all material documents had been disclosed. The Treasury Solicitor Guidance on discharging the duty of candour was drafted in the wake of this case.

[47] Treasury Solicitor's Department, "Guidance on Discharging the Duty of Candour" para.1.2.

[48] Faulks et al, "The Independent Review of Administrative Law" para.4.117.

[49] Pre-Action Protocol for Judicial Review, para.3(a). It should be noted that the Civil Justice Council (CJC) is currently conducting a review of pre-action protocols, and as part of this work it has invited public consultation on the inclusion of a "good faith obligation" at pre-action stage in judicial review proceedings, including "good faith steps" that parties can engage in to encourage resolution at pre-action stage. In its interim report, the CJC underlined that "the consequence of the enhanced good faith obligation could be in cementing the recognition of the duty of candour and cooperation as applicable at pre-action stage": Civil Justice Council, "Review of Pre-Action Protocols: Interim Report" (November 2021), https://www.judiciary.uk/wp-content/uploads/2021/11/CJC-PAP-Interim-Report.pdf, p.153.

[50] Fraser, "Cards on the Table: LCJ Consults on the Duty of Candour Reshuffle" 139.

[51] Sullivan J drew attention to the risk during a preliminary directions hearing in the case of *R (Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin). The case concerned a British resident seeking information and documents in confidence from the FCO to aid his defence to charges before a Military

early engagement with the duty.[52] In this challenge to a Home Office policy of seizing and downloading data from the phones of those arriving by small boats, a serious breach of candour in the course of the proceedings culminated in a separate consequential judgment endorsing the TSOL Guidance's expansive approach to engagement with the duty as soon as a department is aware of a likely challenge.[53] There are therefore sound reasons for public authorities to take wider approach to the duty than is required by the law.

Scope

Case law has evolved on the question of whether the duty of candour requires details to be revealed that are relevant only to the ground of challenge in question, or whether it requires the revelation of information that could support additional grounds.[54] Older cases suggest that the duty does not grant a claimant the "license to fish for new and hitherto unperceived grounds of complaint".[55] More recently, however, the Supreme Court has confirmed the scope of the duty as including disclosure of relevant material or information "including on some as yet unpleaded ground".[56] Such a position reflects the Treasure Solicitor Guidance, which states that the duty "extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge."[57]

IRAL members were divided on whether the extension of the duty to cover unidentified grounds of challenge was "excessively onerous".[58] As Harlow and Rawlings note, this might be to the "detriment of the public interest in efficient and effective administration".[59] To the extent that views of central government departments were made available by the IRAL report, it seems some public authorities feel that the duty "remov[es] the safe space for policy development, for example to consider all options, as increasingly there is an expectation of disclosure of this advice."[60] Another stated that pre-action correspondence was being:

Commission in the US. The FCO resisted an application of *Norwich Pharmacal* relief, on the basis that it had no knowledge of the matters, as expressed in its Summary Grounds of Resistance. In the directions hearing, a letter was provided stating that this was no longer the Government's position, having found potentially exculpatory evidence after carrying out a review of all material they held. Sullivan J noted that "what I find very, very disturbing is that…had I been considering this application on the papers… I might have refused permission to apply for judicial review, not knowing that there was material because there would be a "no comment" effectively, neither confirm nor denying the summary grounds". The erroneous position on material in the SGR had occurred because the defendant public authority did not consider it necessary to conduct a detailed search at permission stage to answer the application for *Norwich Pharmacal* relief. I thank Tom Hickman for drawing this preliminary hearing to my attention: *R (B Mohammed) v Secretary of State for Commonwealth Affairs*, CO/4241/08 (20th June 2008) [on file with author].

[52] *R (HM, MA and KH) v Secretary of State for the Home Department* [2022] EWHC 695 (Admin).

[53] *R (HM, MA, and KH) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin) at [16]. See also E.A. O'Loughlin, G. Tan, and C. Somers-Joce, "The Duty of Candour in Judicial Review: The Case of the Lost Policy" (UKCLA Blog, 2022), https://ukconstitutionallaw.org/2022/12/07/elizabeth-a-oloughlin-gabriel-tan-and-cassandra-somers-joce-the-duty-of-candour-in-judicial-review-the-case-of-the-lost-policy/.

[54] I. Steele, "The Duty of Candour: Where are we now?" (2017) pp.4-5, https://publiclawproject.org.uk/content/uploads/2018/02/The-duty-of-candour-where-are-we-now.pdf; Sanders, "Disclosure of Documents" 208.

[55] *Huddleston* at 946 (per Donaldson MR).

[56] *R(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2016] UKSC 35 at [183].

[57] Treasury Solicitor's Department, "Guidance on Discharging the Duty of Candour" para.1.2.

[58] Faulks et al, "The Independent Review of Administrative Law" para.4.131.

[59] Harlow and Rawlings, *Law and Administration* (2021) p.857.

[60] Faulks et al, "The Independent Review of Administrative Law" para.4.128.

> "used [by prospective claimants] as a means of seeking further information from the Department, not in the context of the established statutory framework of [Freedom of Information], but in the context of the duty of candour. At worst these are fishing expeditions for evidence."[61]

The extension of the duty to unpleaded grounds potentially adds to the burdensome implications of the defendant search exercise, which will be particularly resource-intensive in complex policy challenges. For example, in a recent case challenging the Home Office's approach to an expedited process for assessing the eligibility of unaccompanied asylum-seeking children to be transferred to the UK from France, a defendant witness provided the following insight:

> "To provide additional reassurance to the Court, I have searched my inbox for the terms 'Calais', 'camp' and 'children'. Due to the high volume of matches (respectively, 26,000 emails, 30,000 emails and 43,000 emails) I have only re-read emails sent and received between the dates of 24 October 2016 and 16 December 2016 where the subject suggests the email relates to policy decision. I am fully content that my account of events is accurate."[62]

Concerns over the scope of the duty cause us to reflect on the purpose of the judicial review process. In the latest edition of their classic text, *Law and Administration*, Harlow and Rawlings expanded their list of the functions of judicial review to include its role as an "instrument of transparency" or judicial review as "tin-opener", in part shown by the level of factual evidence gathered and assessed in more systemic, policy-level judicial review litigation.[63] There are reasonable questions to be asked about whether such a function is appropriate for a reviewing court.[64] Such questions, however, cannot be divorced from a diagnosis of reasons why such challenges may be on the rise. The alternate routes to transparency are well-known: statutory rights to information exist in sources such as the Freedom of Information Act 2000, and the Environmental Information Regulations 2004. There is, however, growing concern over the utility of these avenues and their narrow application.[65] Limitations to these alternate routes are baked into the schemes, and their

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[61] Faulks et al, "The Independent Review of Administrative Law" para.4.128. A "fishing expedition" is a "request for information in which a party is trying to see if they can find a case, either of complaint or defence, of which they know nothing or which is not yet pleaded": *White Book* r.54.18.1.3. citing *Hennessy v Wright (No 2)* (1888) 24 QBD 445.

[62] *Citizens UK* at [141].

[63] Harlow and Rawlings, *Law and Administration* (2021) p.812. See also J. Tomlinson, K. Sheridan and A. Harkens, "Judicial Review Evidence in the Era of the Digital State" [2020] PL 740.

[64] In one of several challenges related to government procurement during the COVID-19 pandemic, disclosure ran to 8,600 pages of documents. In that context, Waksman J noted that "it is worth remembering that this claim is not a public inquiry…Nor is it an action in negligence. It is, as it must be, a highly specific and focused consideration of whether there has been unlawfulness… that sounds in judicial review": *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) at [54]-[55].

[65] For an excoriating criticism of current practice relating to the FOI Act mechanisms, see D.A. Green, "There cannot be 'Public Sector Reform' without genuine transparency and a general duty of candour" (2021), https://davidallengreen.com/2021/06/there-cannot-be-public-sector-reform-without-genuine-transparency-and-a-general-duty-of-candour/. Similar concerns have been expressed by a consortium of MPs, journalists, and campaigners over "misuse" of the exemptions contained in the act: M. Williams, "Editors and MPs urge watchdog to act over escalating government secrecy" (Open Democracy, April 2022), https://www.opendemocracy.net/en/freedom-of-information/information-commissioner-foi-open-letter-secrecy/. For an account of the challenges of access to administrative data via the FOI regime, see S. Aidinlis, "Beyond freedom of information legislation: navigating access to Government data for independent research in the UK" [2023] P.L. (Apr) 287.

use might undercut any future action in judicial review. For example, if a public authority uses s10(3) Freedom of Information Act, or Regulation 7(1) Environmental Information Regulations to extend the usual 20-day period required for a public authority response, and if the request is ultimately denied, the prospective claimant then has a shorter time window to bring a claim for judicial review, without the benefit of the information requested.[66] Any serious consideration of explicit reform of the scope of the duty, then, requires a holistic analysis of its functioning against the backdrop of the existing transparency architecture. Further, while there are legitimate concerns that the widening of the scope of the duty might lead to more "fishing expeditions", there remains evidence that the courts are still adept at spotting such efforts.[67]

Disclosure of documents?

The final puzzle piece relates to the question of the extent to which the duty of candour requires disclosure of documents. The limited approach to the judicial review evidence base has, over time, diminished. The problems the narrow base created were laid bare in *ex parte World Development Movement*.[68] At a time when the prevailing position was that the court would only order disclosure of documents where it could be shown that the respondent's evidence was false or inaccurate,[69] the court was not in a position to order disclosure even though the evidence that the secretary of state had provided was "economical to the point of being parsimonious".[70] In this case, the only reason that the advice that the Pergau Dam would be a "bad investment" saw the light of day was as a result of two House of Commons Committee investigations.[71]

The duty will now commonly require the disclosure of "materials which are reasonably required for the court to arrive at an accurate decision".[72] In practice, public bodies frequently choose to disclose relevant documents themselves in the discharge of their duty of candour, and the courts have encouraged the disclosure of relevant documents as a matter of good practice.[73] Part 31.14 of the CPR provides that "a party may inspect a document mentioned in – (a) a statement of case; (b) a witness statement; (c) a witness summary; or (d) an affidavit". Given that it is often necessary for defendant public authorities to refer to documents relevant to the decision or action under challenge in their witness statements, and claimants are entitled to inspect such documents under Part 31.14, while there is no formal disclosure exercise, disclosure of documents is usually a "live consideration".[74] On striking the balance between preparation of witness statements and the provision of documents, the TSOL Guidance offers that usually a "mix of explanation by way of witness statement, and exhibiting key documents will be appropriate".[75]

The extent of disclosure required to meet the duty will depend upon the context. The duty of candour may now require, or if candour is not forthcoming the courts have been known to order,

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[66] I. Buono, "All cards are on the table: disclosure obligations and the Independent Review of Administrative Law" (2021) *Freedom of Information* 17(5) 4, 6.
[67] See discussion at "Disclosure applications and orders: on the rise?".
[68] *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386.
[69] *R v Secretary of State for the Environment ex p Islington LBC* [1991] 7 WLUK 261.
[70] S. Grosz, "Pergau Be Dammed" (1994) 144 N.L.J. 1708, 1709.
[71] Grosz, "Pergau Be Dammed" 1710.
[72] *R (Graham) v Police Service Commission* [2011] UKPC 46 at [18].
[73] *R (NAPO) v Secretary of State for Justice* [2014] EWHC 4349 (Admin) at [15].
[74] Sanders, "Disclosure of Documents" 199.
[75] Treasury Solicitor's Department, "Guidance on Discharging the Duty of Candour" para.1.2.

disclosure of documents to assist in the following ways: to determine the existence of "jurisdictional" or "precedent" fact,[76] to establish past practice giving rise to a legitimate expectation,[77] to assess the procedural fairness of a consultation exercise, including to help assess the knowledge or expertise of the relevant decision-maker.[78] The *Tweed* case set out that, while disclosure orders should not be automatic, and though the duty of candour had been fulfilled in the summaries provided, "there is force in this view and that in order to assess the difficult issues of proportionality in this case the court should have access as far as possible to the original documents".[79] This was expanded upon in *Al-Sweady*, which provided that 1) urgent consideration should be given to ordering disclosure and cross-examination when it is clear that the judicial review outcome will depend upon the determination of a factual dispute; and 2) disclosure obligations are "heightened" where the application concerns the "most important and basic rights under the ECHR".[80] The duty of disclosure is therefore more "acute" where the court needs to apply intense scrutiny.[81] It is not, however, appropriate, for a public authority defendant to "off-load a huge amount of documentation on the claimant and ask it, as it were, to find the 'needle in the haystack'".[82] Indeed, the exhibition of documents without sufficient explanation or contextualisation of their significance by way of witness statement may give a court cause to draw adverse inferences.[83]

What the foregoing analysis reveals, then, is that the parameters of the duty of candour are not all that unclear. The duty is, however, context-sensitive, and the key challenge for a defendant in any judicial review proceedings will be the application of these context-driven principles to increasingly complex litigation contexts and modes of decision-making that bear on the duty's operation.

Old Duty, New Pressures

Technology in Decision-making

There is a growing willingness on the part of courts to request complex scientific and technical sources be placed before them. As early as 2005, on the extent to which the Minister for Health had considered the expert view of a leading psychopharmacological authority in their move to

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[76] R *v Arts Council for England ex p. Women's Playhouse Trust* [1998] COD 175 (per Laws J.)

[77] R *v Inland Revenue Commissioners ex p. J Rothschild Holdings plc* [1986] STC 410; [1987] STC 163.

[78] R *(Bushell) v Secretary of State for the Environment* [1981] AC 75; R *(Hindley) v Secretary of State for Work and Pensions* [2005] UKHL 16; and R *(National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154. In these cases, the determination of the presence of relevant/irrelevant considerations in the process required disclosure of ministerial briefing and information packs. In R *(Evans) v The Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1146 (Admin), the disclosure of email records of meetings between Ministry of Defence ministers and Ministry of Justice officials underlined that amendments to the Legal Services Commission Funding Code 2010 had been made on the basis of irrelevant considerations, at [29].

[79] R *(Tweed) v Parade Commission for Northern Ireland* [2006] UKHL 53 at [38]-[39].

[80] *Al Sweady* at [18], [26], [28].

[81] See also R *(I) v Secretary of State for the Home Department* at [54]: "Where liberty is in issue the court should not be left to try and make findings as best it can on inadequate evidence".

[82] *Hoareau* at [20].

[83] R *(NB and Others) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin) at [29]: "these omissions indicated to me that the Defendant's witnesses found it difficult to defend aspects of the decisions which were taken whilst, at the same time, complying with their duties to the court and to the public. This approach also affected the weight which could be given to some aspects of the Defendant's evidence and it meant that in some instances there was no witness evidence to contextualise or contradict the story which certain documents appeared to tell" (per Linden J).

prohibit the sale of kava-kava for medicinal purposes, the Court of Appeal made clear that it "would have required the briefing to be produced…What a witness perfectly honestly makes of a document is frequently not what the court makes of it."[84] While the courts afford a wide margin of appreciation to decisions based on expert, scientific, or predictive assessments, the corollary of that deference is a heightened duty of candour: "it is necessary for the decision-maker [when relying on technical expertise]… to provide a clear explanation to the court".[85] The variable standards of disclosure that exist, then, also extend to a wider range of evidence, including expert scientific, socio-economic, and statistical evidence.[86]

It is not unreasonable to assume that this evidence base might grow yet wider. The increasing use of automated-decision-making systems in the public sector, particularly those employing machine-learning algorithms (MLAs), gives rise to particular pressures on the duty of candour.[87] Automated decision-making (ADM) systems have a number of potential benefits in governance, including cost efficiency and the capacity to improve consistency and transparency.[88] Risk of error through automation bias has, however, been highlighted by a number of scholars, noting the particular risk where the input data includes variables which are protected characteristics, or variables from which protected characteristics could be inferred.[89] Should the lawfulness of such systems be challenged in judicial review, it may be particularly difficult for public officials to offer an account of the decision-making process for the purposes of complying with the duty of candour, where the operator of the system may only know the input and output data that goes into the system, and not the "black box" process which the machine learning algorithm applies.

Further, there is some evidence of unwillingness on the part of public authorities to reveal the code behind the MLA.[90] For example, Hackney Council declined to provide details on an MLA designed to identify children at risk of maltreatment, citing damage to the private contractors' commercial interests.[91] Even where access to the underlying algorithm is provided, it is not a given that this would aid a reviewing court, as the material could be incomprehensible without the relevant "training data" that built it (and which might have been subsequently destroyed for data

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[84] *National Association of Health Stores* at [49] (per Sedley LJ).

[85] *R (Moti) v Environment Agency* [2016] EWCA Civ 564 at [64] (per Beatson LJ). This case concerned measures taken by the Environment Agency to protect salmon fisheries in the River Wye. The consequence of the agency insufficiently explaining the technical expertise upon which it has relied resulted in the High Court drawing adverse inferences and finding against the agency.

[86] See, for example, *R (UNISON) v Lord Chancellor* [2017] UKSC 51. For an overview of the diverse array of evidence with which a reviewing court has engaged, see also Tomlinson, Sheridan and Harkens, "Judicial Review Evidence in the Era of the Digital State".

[87] MLAs have been implemented across a range of policy areas, including child safeguarding, welfare fraud identification, and policing. See: L. Dencik, A. Hintz, J. Redden, and H. Warne, "'Data Scores as Governance': Investigating use of citizen scoring in public services" (December 2018), https://datajustice.files.wordpress.com/2018/12/data-scores-as-governance-project-report2.pdf.

[88] M. Zalnieriute, L.B Moses, and G. Williams, "The Rule of Law and Automation of Government Decision-Making" (2019) M.L.R. 425.

[89] On this, see A. Chauhan, "Towards the Systemic Review of Automated Decision-Making Systems" (2020) 35(4) J.R. 285, 287. See also J. Tomlinson, "Justice in Automated Administration" (2020) 40 O.J.L.S. 708.

[90] On the Department for Work and Pensions' unwillingness to disclose details of the algorithm assessing possible fraud in benefit claimants, see: M. Savage, "DWP urged to reveal algorithm that 'targets' disabled for benefit fraud" (*The Guardian*, 2021), https://www.theguardian.com/society/2021/nov/21/dwp-urged-to-reveal-algorithm-that-targets-disabled-for-benefit.

[91] Dencik, Hintz, Redden, and Warne, "'Data Scores as Governance': Investigating use of citizen scoring in public services".

protection or commercial sensitivity reasons), and the operation of the MLA might not even be understood by experts, due to the complexity and sheer volume of data being processed.[92] A number of commentators have advocated for ADM systems to be subject to "systemic review", in line with the courts' willingness to review, in the last two decades, not just individual decisions undertaken by public officials, but also the operation of a decision-making system to identify sources of error which create an unacceptable risk of unlawful individual decisions.[93] It is, however, questionable whether the laws of evidence in judicial review are capable of accommodating such complex decision-making systems.[94] Nonetheless, early engagement with the duty of candour might still help. For example, the Home Office recently disclosed sufficient information at pre-action stage regarding its "visa streaming tool" to indicate a substantial risk of race discrimination, causing the department to suspend its use of the algorithm in question, avoiding costly judicial review litigation.[95]

Informal Communications in Decision-making

The TSOL Guidance dictates that "document" means "anything in which information of any description is recorded".[96] This includes informal communications, such as private emails, and communications on instant messaging apps such as WhatsApp and Signal. The courts have already been tasked with considering the relationship between candour and digital messaging platforms. In a recent case challenging policies relating to the transfer of care home residents during the pandemic, which the claimants argued did not lawfully address the risk of COVID-19 transmission, the Secretary of State for Health and Social Care and Public Health England were directed to prepare statements clarifying steps taken regarding the duty of candour, particular in relation to "less formal" means of communication.[97] An interlocutory judgment in different proceedings, challenging the contracts awarded for provision of COVID-19 antibody tests, ordered that repositories of the Secretary of State for Health and Social Care's communications be searched, including private email accounts and WhatsApp messages used during an agreed period, given their central involvement in the decisions under scrutiny.[98]

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[92] The Law Society, "Algorithms in the Criminal Justice System" (2019) 21; Chauhan, "Towards the Systemic Review of Automated Decision-Making Systems" 288. Data scientists have argued for greater algorithmic transparency and explainability: "a trustworthy algorithm shouldbe able to 'show its working' to those who want to understand how it came to its conclusions": D. Spiegelhalter, "Should We Trust Algorithms?" (2020) 2(1) *Harvard Data Science Review* 1, 7.

[93] Chauhan, "Towards the Systemic Review of Automated Decision-Making Systems"; Lord Sales, "Algorithms, Artificial Intelligence and the Law" (2020) 25(1) J.R. 46; Tomlinson, Sheridan and Harkens, "Judicial Review Evidence in the Era of the Digital State".

[94] Tomlinson, Sheridan and Harkens, "Judicial Review Evidence in the Era of the Digital State"; J. Cobbe, "Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making" (2019) 39 L.S. 636.

[95] JCWI, "Response to Independent Review of Administrative Law" (October 2020), https://www.jcwi.org.uk/Handlers/Download.ashx?IDMF=c184d812-136e-4a7c-9b53-14450d696429, pp.4-5.

[96] Treasury Solicitor's Department, "Guidance on Discharging the Duty of Candour" para.1.4.

[97] *Gardner* [2021] EWHC 2422 (Admin) at [39].

[98] *R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 2595 (TCC) at [8]-[9]. The courts are not always willing to go as far. In a separate claim run by the Good Law Project, the court considered a challenge to the defendant disclosure exercise, as it did not include searches of relevant WhatsApp and text message conversations. The court in this instance was satisfied that the defendant had sufficiently explained its disclosure exercise to satisfy the duty of candour: *R (Good Law Project and Anor) v Secretary of State for Health and Social Care* [2021] EWHC 1223 (TTC) at [43].

The courts are therefore willing to engage with complex questions around when searches of private messaging platforms are appropriate. The issue, then, is less about the capacity for the duty to apply to such communications, but rather ensuring that there are avenues for regulating the preservation of their record to meet the duty. There is, as is well known, evidence that officials might in some instances be unable to locate a record of communications.[99] A recent Institute for Government study found that the use of communication apps in government hindered transparency and made it more difficult for the government to explain its decision making, as there is often no formal process for checking government WhatsApp conversations to see what requires to be recorded. While WhatsApp and similar messaging tools are widely used in government, the Institute for Government, via a series of FOI requests, found that in some departments WhatsApp is permitted on work phones, and the availability of guidance on the use of such communication technology and record keeping requirements varied.[100] A recent challenge to the use of private communication systems for Government business, including email accounts and instant messaging platforms, contended that such systems, and the use of their auto-delete function, was incompatible with the statutory duty under s.3(1) and (2) of the Public Records Act 1958. The challenge was unsuccessful, the Divisional Court emphasising that the duty was "to make arrangements" for the "selection" of certain records and was not a duty to preserve records as such.[101] On appeal, the Court of Appeal agreed, finding that the duty did not extend to making arrangements "for the preservation of records before they are selected".[102] While the challenge was unsuccessful, the case demonstrates that there are questions regarding the strength and consistency of the arrangements in place to select records on such communication platforms for preservation.

Complexities about the application of the duty of candour, therefore, intersect with the duty to maintain the public record. There have been instances where an inconsistent or inadequate approach to record-keeping gave rise to serious issues of candour.[103] In an era where instant messaging technologies with auto-delete functions are widely used within the UK Government, processes for tracking policy decisions and implementation become more complex. There are obvious advantages to the use of such technologies in government, such as enhancing the speed and convenience of communication and information sharing. However, where these communication systems are used in lieu of official paper trails, such as documented meetings and emails, there may be implications for the capacity of the UK Government to comply with its duty of candour, its ability to observe the duty to preserve the public record, and the need to collate information for the freedom of information process.[104] A recent Information Commissioner

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[99] The Guardian, "Covid contracts: minister replaced phone before it could be searched".

[100] T. Durrant, A. Lilly, and P. Tingay, "WhatsApp in government: How ministers and officials should use messaging apps - and how they shouldn't" (Institute for Government, 2022), https://www.instituteforgovernment.org.uk/sites/default/files/publications/whatsapp-in-government.pdf. Several departments declined to answer, citing sections 24 and 31 of the FOI Act, withholding for security concerns.

[101] *R (All the Citizens) v Secretary of State Digital, Culture, Media and Sport* [2022] EWHC 960 (Admin) at [54]-[61]. Permission to appeal has been given in this case.

[102] *R (Good Law Project) v Prime Minister* [2022] EWCA Civ 1580 at [9].

[103] See, for example, *HM, MA, and KH* [2022] EWHC 2729 (Admin) at [13]; and discussion in O'Loughlin, Tan and Somers-Joce, "The Duty of Candour in Judicial Review: The Case of the Lost Policy". See also *R (MD) v Secretary of State for the Home Department* [2021] EWHC 1370 (Admin) at [124]; and *R (AM and others) v Secretary of State for the Home Department* [2017] UKUT 00372 (IAC) at [26].

[104] The Information Commissioner, on his announcement of an investigation into the use of private communication channels in the Department for Health and Social Care, noted that the use of such platforms "does not in itself break freedom of information or data protection rules. But my worry is that information in private email accounts or

investigation into the use of private correspondence channels for official business by Ministers in the Department for Health and Social Care found that the scale of the use of such channels created a risk that mistakes had been made by individuals in the preservation of parts of the public record.[105] Highlighting wider inconsistencies in record-keeping policies across government departments, the report recommended that the Government establish a review into the use of private communication channels across Government.[106] More systematic thinking is therefore required on how the use of such technology can balance recording-keeping with the demands of fast-paced modern government.[107]

Disclosure applications and orders: on the rise?

It is difficult to determine if applications and orders for disclosure are on the rise. If they are, there are sound reasons to be concerned. Rising disclosure disputes means bigger bundles overburdening the court, longer preparation time and hearings, increased costs, and delays.[108] Applications for disclosure do, however, serve a purpose. For example, sometimes an application for disclosure might be the only means of uncovering the unlawful nature of a policy.[109]

While it is difficult to ascertain the scale of their use, some recent case law has underlined the impact of disclosure disputes on the management of case proceedings. In a challenge to the award of contracts to produce COVID-19 antibody tests, in which the Secretary of State for Health and Social Care applied unsuccessfully - for a second time - to adduce evidence of an economist, Fraser J took the opportunity to "urge greater co-operation upon the parties. Matters that ought to be agreed are being contested, and this can only vastly increase these parties' collective expenditure on legal costs."[110] Similarly, in a challenge to the direct award of contracts for the provision of personal protective equipment (PPE) by the Secretary of State, in which the claimants requested that the defendant file all written evidence in unredacted form within 48 hours, O'Farrell J reminded the parties that if they "think that disclosure is likely to be a significant issue, as it very often is, it is incumbent on them to start discussing that as soon as possible."[111] Such remarks

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messaging services is forgotten, overlooked, autodeleted or otherwise not available when a freedom of information request is later made. This frustrates the freedom of information process, and puts at risk the preservation of official records of decision making": E. Denham, "Blog: ICO Launches investigation into the use of private correspondence channels at the Department of Health and Social Care" (Information Commissioner's Office, July 2021), https://ico.org.uk/about-the-ico/media-centre/blog-ico-launches-investigation-into-the-use-of-private-correspondence-channels/. See J. Tomlinson and C. Somers-Joce, "For the Record: Self-Deleting Messaging Systems and Compliance with Public Law Duties" (2022) P.L. (Jul) 368.

[105] Information Commissioner's Office, "Behind the screens -maintaining government transparency and data security in the age of messaging apps" (Report of the Information Commissioner to Parliament, July 2022), https://ico.org.uk/media/about-the-ico/documents/4020886/behind-the-screens.pdf, p.7.

[106] Information Commissioner's Office, "Behind the screens -maintaining government transparency and data security in the age of messaging apps" p.4.

[107] Tomlinson and Somers-Joce note that the relevant Cabinet Office policy requires an official record to be subsequently written up if it is required to be recorded as a matter of law, and question whether such a policy might be unduly onerous for officials: "For the Record: Self-Deleting Messaging Systems and Compliance with Public Law Duties" 374-5.

[108] See *R (Prokopp) v London Underground Ltd* [2003] EWCA Civ 961 at [52], per Schiemann LJ calling a "grotesque waste of environmental assets such as trees but an equally grotesque waste of public money and judicial time and energy in laying one's hands on the few documents and authorities which are relevant".

[109] *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin).

[110] *Good Law Project* [2021] EWHC 2595 (TCC) at [5].

[111] *Good Law Project and Anor* [2021] EWHC 1223 (TTC) at [44].

remind us that greater cooperation and proactivity between parties on the matter of disclosure would be in the interests of all.

The latter case also calls to attention the use of "confidentiality rings" in judicial review. Confidentiality rings limit access to sensitive material to designated members of the ring, who give undertakings on its restricted use and dissemination. In public procurement challenges, it is common for issues of confidentiality and commercial sensitivity to arise. Where such material falls within the scope of the duty of candour, the TCC Guidance Note on Procedures for Public Procurement Cases offers guidance on the use of confidentiality rings to control the handling, storing, and accessing of sensitive material.[112] This can include the use of "two tier" rings, offering different levels of access to materials between external legal representatives and employee representatives.[113] While the confidentiality ring model is well-established in the procurement context, there is growing evidence of its translation to other areas of public law litigation.[114] In litigation involving material that might risk damaging the public interest if disclosed, a party can put a certificate to the court explaining the reasons for withholding material under the principle of "Public Interest Immunity" (PII).[115] Some recent case law suggests that the court should consider the use of confidentiality rings for relevant documents in a public interest immunity claim as an alternative to a binary decision to uphold or reject the claim.[116] Their use does not appear to be acceptable if the material under discussion relates to matters of national security.[117] Outside of this context, confidentiality rings have been used, for example, for the disclosure of documents relating to the resettlement of the Chagos Islands,[118] and for material relating to the Home Office "pushback" policy concerning migrant crossings in the English Channel.[119] Of particular note is the use of a "named counsel only" ring in the Chagos Island litigation. This is perhaps surprising, given past case law highlighting the serious problems lawyer-only rings can cause between client

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[112] Courts and Tribunals Judiciary, "The Technology and Construction Court Guide" (October 2022), Appendix H, paras.34-48.

[113] A "two tier" structure was adopted in the challenge to "VIP lane" for PPE contracts. See *Good Law Project and Anor v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC) at [260].

[114] N. Jackson, "'One Confidentiality Ring to Rule Them All': Reflections on Confidential and Sensitive Information and the Open Justice Principle Following the *Good Law Project and Eveready Doctor* Case" (2022) 27(1) J.R. 16, 21.

[115] *R v Chief Constable of the West Midlands ex p. Wiley* [1995] 1 AC 274.

[116] *R (Serdar Mohammed) v Secretary of State for Defence* [2012] EWHC 3454 (Admin) at [15]: confidentiality rings should be considered where "the public interest demands not complete immunity but rather can be protected by a more limited form of confidentiality" (per Moses LJ).

[117] In *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin), Ouseley J listed the following concerns in his rejection of a confidentiality ring: risk of inadvertent disclosure; risk that if inadvertent disclosure did take place, suspicion could fall on all in the ring; and the challenge of determining the ring's membership, at [23]-[25]. The Closed Material Procedure process now operates for material sensitive to national security, allowing a litigant to submit evidence without its disclosure to other parties, and the appointment of a Special Advocate to represent parties not privy to the evidence: Justice and Security Act 2013, ss 6-11.

[118] *R (Hoareau and Anor) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 3825 (Admin) at [39], [45]. The material under issue would result in serious harm to the UK's international relations, and harm to the principle of collective cabinet responsibility.

[119] *R (Public and Commercial Services Union and Ors) v Secretary of State for the Home Department* [2022] EWHC 823 (Admin) at [58], [60], [61]. The court accepted that a risk of serious harm to the public interest existed if details of the Home Office's tactical plan was disclosed, as this would increase the likelihood of organised criminal gangs using the information to defeat the tactics, putting lives in greater jeopardy. The court accepted the defendant proposal that the risk of harm could be mitigated through restricted disclosure to a confidentiality ring. The Court widened the proposed ring to include lawyers and clients, at [63].

and lawyer.[120] The court in the Chagos Island litigation was motivated by the case's unusual litigation history - which included inadvertent disclosure by past solicitors - to take all steps to avoid the risk of inadvertent disclosure; and the court considered that the material under issue was unlikely to require counsel to take instructions from claimants on its contents.[121] Lawyer-only confidentiality rings are therefore not likely to become common practice in public law litigation. Nonetheless, and as shown by interlocutory proceedings in the challenge to the lawfulness of the policy for removing asylum claimants to Rwanda, courts will now consider, where disclosure would cause harm to the public interest, whether other methods such as disclosure to a confidentiality ring could mitigate that harm.[122] It is therefore likely that this emerging practice will lead to greater satellite litigation over the operation of such arrangements. The courts should continue to carefully consider that derogation from the fundamental principle of open justice should only be permitted where it is necessary for the administration of justice.[123]

There is also evidence that public law litigants are widening their toolkit in respect of seeking further information in judicial review proceedings. While the position is that CPR Part 18 Requests for Further Information "are very rarely sought" and should "remain exceptional" in judicial review,[124] there has been a recent flurry of litigation in which judicial review claimants have had some success in using this interim step. In *KBL*, a prominent women's rights defender, now in hiding in Afghanistan with her family, challenged refusal decisions received through various schemes set up by the UK Government following the rapid withdrawal of international forces from Afghanistan.[125] The claimant sought further information from the Home Office to support their grounds of review, which was resisted on the basis that the Detailed Grounds of Defence provided sufficient evidence to meet the department's duty of candour, and so the claimant made an application under CPR Part 18 to the Court.[126] Lang J accepted that further information was required to support some of the grounds, in particular on the functioning of the Afghan Relocation and Assistance Policy (ARAP) and the scheme for granting Leave Outside the Rules (LOTR) for those chosen for emergency evacuation during Operation Pitting in August 2021. For example, central to one of the claimant's grounds was that there had been inconsistent and arbitrary decision-making, and further information on the decision-making process for women's rights activists who were approved for Pitting LOTR, in a similar situation to the claimant, was required to support this. Lang J assessed each request in turn, sometimes refining the request in order that it not be cast unreasonably widely, affirming that Part 18 applications are "one of the ways in which a claimant may legitimately seek to give effect to the duty of candour owed by a public authority, along with applications for specific disclosure".[127] A similar approach to interim

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[120] In *Somerville v Scottish Ministers* [2007] 1 WLR 2734 at [203]-[204], Lord Mance noted that lawyer-only rings create an "invidious and unsustainable position" for legal representatives.
[121] *Hoareau* [2018] EWHC 3825 (Admin) at [41].
[122] *R (AAA and Ors) v Secretary of State for the Home Department and Ors* [2022] EWHC 2191 (Admin) at [38].
[123] *R (Guardian Newspapers and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 at [4].
[124] *R (on the application of Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 2480 (Admin) at [18],[20]. Dingemans J nonetheless noted that the information will be ordered where required to "resolve the matter fairly and justly" at [19].
[125] *R (KBL) v Secretary of State for the Home Department and Ors* [2022] EWHC 1545 (Admin).
[126] *KBL* at [18].
[127] *KBL* at [36].

applications of this nature has been adopted in other cases.[128] These cases highlight that, while the use of Part 18 applications should remain "exceptional", to avoid "time-consuming and expensive interim steps"[129], the duty of candour requires public authorities to remedy circumstances where the judge is "left guessing at some material aspect of the decision making process".[130] Judges are prepared to use all tools available to them to assess the proportionality of such requests where fair disposal of the issue requires it.

These trends demonstrate that the courts are adept at weighing up the proportionality of such requests and weeding out unnecessary applications for disclosure and information. In *R (Bullock) v Director of Public Prosecutions*, for example, the claimants made an application for disclosure of documents related to a decision not to prosecute. The claimants had sought to rely on the authority in *Tweed* that disclosure of documents are more likely required if Convention rights are engaged, and the court considered this an "artificial" argument.[131] Further, the courts continue to take a circumscribed approach to disclosure.[132] In *Gardner*, for example, the court declined 132 requests for specific disclosure as the claimants had not shown it was required to determine the claim fairly and justly.[133] The defendants had disclosed over 5000 pages of evidence. The court considered that oral evidence and cross-examination were not necessary, as questions of "hard edged fact" would not arise as they had in *Al-Sweady*,[134] that the evidence the defendants had provided was extensive, that there was no evidence they had breached their duty of candour, and that consideration of the 132 requests made by the claimants would have been disproportionate, drawing the court into a "broad range of enquiry that went beyond its task in review".[135] In later proceedings in this case, a divisional court refused the claimants' application to adduce further expert witness evidence, noting the third expert witness statement sought consisted little of data and mostly of criticisms of the defendants' experts. The court sought to "draw a line" under the issue, as there was "no

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[128] See *R (JZ) v Secretary of State for the Home Department* [2022] EWHC 1708 (Admin), a challenge brought by an Afghan judge to a refusal of their application to ARAP, and to the decision not to call them forward for evacuation as part of Operation Pitting. Unusually, Hill J gave written judgment on the Part 18 application after the judicial review had been heard, as the application to the court had only been issued at the beginning of the hearing. Information sought on the operation of the schemes was "manifestly relevant" to the examination of a ground on inconsistency in decision making, and the defendants should have provided further information in accordance with the duty of candour, at [32]. See also *R (S and AZ) v Secretary of State for the Home Department and Others* [2022] EWHC 1402 (Admin) where Lang J required further information at the end of the hearing, although not by way of Part 18 order, at [49]. Further information from the defendant was also requested by Lane J during *R (CX1 and others) v Secretary of Defence and Another* [2023] EHWC 284 (Admin). The High Court quashed refusals to relocate Afghan journalists working for the BBC under ARAP on the basis that the BBC is not part of the UK Government. The defendants accepted caseworker notes explaining decisions in relation to claimants "should have been served earlier in these proceedings, pursuant to the defendants' duty of candour", for which a witness for the defence offered and "unreserved apology" for the "mistakes" at [27].

[129] *KBL* at [29]; *JZ* at [26].

[130] *R (Abraha) v Secretary of State for the Home Department* [2015] EWHC 1980 (Admin) at [114].

[131] *R (Bullock) v DPP* [2020] EWHC 2259 (Admin) at [15]. See also *R (QX) v SSHD* [2020] EWHC 1221 (Admin), where as part of a wider successful JR application, the court dismissed several disclosure requests as "broad and untargeted", some of which amounted to a "fishing exercise", at [87]-[89].

[132] In *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2014] EWHC 43 (Admin) at [57], the court declined an application for pre-action disclosure. It was noted that neither r31.16 nor Part 54 CPR explicitly stated that pre-action disclosure could not be applied in judicial review proceedings, but to do so would be a "remarkable departure" from ordinary judicial review procedure.

[133] *Gardner* [2021] EWHC 2422 (Admin).

[134] *Al Sweady*.

[135] *Gardner* [2021] EWHC 2422 (Admin) at [38].

shortage of material", evidencing the court's desire to avoid being further drawn into weighing up competing evidence, and ending back-and-forth satellite litigation on the matter.[136]

While such examples show the considerable case management skill that judges have, they also expose the extent to which court time can be taken up with complex deliberations over the evidence base for a judicial review hearing. If satellite disclosure disputes become commonplace in judicial review proceedings, this is an indication that the duty of candour – as understood by both claimants and defendant public authorities – might not be operating as effectively as it should.

Conclusion

Several submissions to IRAL expressed views on whether the duty of candour is operating effectively, and a number suggested reform. The Constitutional and Administrative Law Bar Association argued that public authority defendants, on current operation of the duty, are "placed in the extremely privileged position of being able to police their own disclosure and candour obligations"[137] and note that, provided there is a proper "evidential basis" and a paper trail for government decisions and policies, the burden of complying should not be "onerous".[138] The answer therefore lies, not in a review of the duty of candour, but improved record-keeping practices.[139] The Bar Council endorsed suggestions made by a Bingham Centre Report to encourage early engagement by amending form N462 to require legal representatives of defendants to certify that they have complied with the duty of candour where they are resisting disclosure. [140] If it becomes clear that evidence is disclosed in the form that should have been disclosed at PAP stage, even if permission is ultimately refused, the courts could then exercise discretion to disallow the costs of the form.[141] Contrast such suggestions with the view of the Richard Ekins, who called for reform of evidence rules:

> "which force government to release much information that should not be made public and which changes the character of judicial review proceedings, with judges often ending up considering in detail the inner workings of government. There may need to be provision

[136] *R (Gardner) v Secretary of State for Health and Social Care* [2021] EWHC 2946 (Admin) at [15].
[137] Constitutional and Administrative Law Bar Association, "The Independent Review of Administrative Law Call for Evidence: Response on behalf of the Constitutional and Administrative Law Bar Association" (October 2020), https://adminlaw.org.uk/wp-content/uploads/ALBA-Response-to-Call-for-Evidence-FINAL-19.10.20.pdf, para.92.
[138] Constitutional and Administrative Law Bar Association, "The Independent Review of Administrative Law Call for Evidence: Response on behalf of the Constitutional and Administrative Law Bar Association" para.95.
[139] The Public Law Project also call for stronger record-keeping practices to facilitate compliance with the duty of candour: Public Law Project, "Submission to the Independent Review of Administrative Law" (October 2020), https://publiclawproject.org.uk/content/uploads/2020/10/201020-PLP-Submission-to-IRAL-FINAL.pdf, p.15.
[140] The Bar Council, "Bar Council Response to the Independent Review of Administrative Law Call for Evidence" (October 2020), https://www.barcouncil.org.uk/uploads/assets/d0bf3966-9772-4205-81c63d3bb91cc188/Bar-Council-IRAL-response.pdf, para.63.
[141] M. Fordham, M. Chamberlain, I. Steele and Z. Al-Rikabi, "Streamlining Judicial Review in a Manner Consistent with the Rule of Law" (February 2014), https://binghamcentre.biicl.org/documents/53_streamlining_judicial_review_in_a_manner_consistant_with_the_rule_of_law.pdf, para.4.3.

> made in litigation by analogy to the protections that government enjoys under the Freedom of Information Act."[142]

Each of these suggestions require serious consideration. As this paper has shown, the contours of the duty are not all that unclear. It is, however, evident that the present operation of the duty is under growing pressures in relation to changing litigation patterns, and new technologies altering how government decisions are made and records are kept. In an environment where there appears to be an appetite for reform, such considerations cannot take place in a vacuum: patterns in practice relating to the duty of candour must be considered in the context of the functioning of the wider government transparency and record-keeping architecture. Further, policymakers should be conscious that the operation of the duty cuts across wider questions about good government decision-making practices, and the extent to which courts can and should scrutinise those practices. The duty of candour is therefore a site of wider and more fundamental contestation over questions of government transparency, maintenance of the public record, and the outer reaches of the judicial review jurisdiction itself.

[142] R. Ekins, "The Case for Reforming Judicial Review" (Policy Exchange, 2020), https://policyexchange.org.uk/wp-content/uploads/2022/10/The-Case-for-Reforming-Judicial-Review.pdf, p.32.