

## Fordham's Ten Principles of the Duty of Candour in Judicial Review

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### *Introduction*

The duty of candour is the pre-eminent procedural duty that governs the evidence base in judicial reviews. It requires all parties to assist the court with full and accurate explanations of all the facts relevant to the issue under review. The duty of candour is a common law duty. It has been helpfully summarised in several guides, including the [Treasury Solicitor Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings](#) (2010), which acts as practical guidance to government departments and lawyers, and the [Administrative Court Judicial Review Guide 2022](#). What will be required of parties to meet their duty of candour is highly context sensitive. Public law litigants must, at each stage of proceedings, be aware of the information and documents which might be relevant. In many judicial reviews, say those that involve a challenge to an administrative decision made against an individual claimant, for which there is a clear and concise paper trail, compliance with the duty of candour will usually be straightforward. Candid disclosure is, however, a thornier task in complex judicial reviews, such as policy or systemic challenges, where there might be extensive and sensitive documents to potentially consider, sometimes stretching across multiple government departments.

The Administrative Court has recently provided guidance on the duty of candour. In [R \(Police Superintendents' Association\) v Police Remuneration Review Body and Secretary of State for the Home Department \[2023\] EWHC 1838 \(Admin\)](#), Mr Justice Fordham sets out ten principles governing the duty of candour in judicial review. This decision is to be welcomed in so far as it clearly summarises the scope of the duty of candour. This blog post briefly introduces the case, before discussing two noteworthy aspects of the decision. First, the helpful underlining of the 'Permission Stage' Principle; and second, the interaction between the 'Best Evidence' Principle of candid disclosure, the Public Sector Equality Duty, and record-keeping by public bodies.

### *The case*

*Police Superintendents' Association* is a permission stage decision concerning a claim for judicial review of the Police Remuneration Review Body's recommendation of a flat-rate pay increase of £1,900 to all police officers, and the Home Secretary's decision to accept that recommendation. The claimants – the Police Superintendents' Association – argued: (1) that the Review Body had breached the Public Sector Equality Duty (PSED) in making the

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recommendation; (2) that the recommendation was unreasonable given that none who made representations supported it; (3) that the Home Secretary breached the PSED in accepting the recommendation; and (4) that the acceptance was unreasonable given that the recommendation in question was unlawful. [2].

In response to the filing of the claim, the Home Secretary's Summary Grounds of Resistance recorded that the Home Secretary's acceptance was arrived at after considering two Ministerial Submissions. The Home Secretary's lawyers declined to disclose those Ministerial Submissions and instead quoted from them. The claimant therefore made an application for permission stage specific disclosure of those documents [12].

In dealing with that application, Fordham J set about clarifying the question of whether compliance with the duty of candour at the permission stage required only the disclosure of 'the substance of the information' in relevant documents and not necessarily disclosure of the documents themselves [13]. In doing so, he took the opportunity to distil the myriad case law on candid disclosure into ten pithy and citeable principles. Those principles are:

1. the 'Standard Disclosure' Principle
2. the 'Just Disposal' Principle
3. the 'Candid Disclosure' Principle,
4. the 'Information-Too' Principle,
5. the 'Relevant Material' Principle,
6. the 'Non-Selectivity' Principle,
7. the 'Best Evidence' Principle,
8. the 'Redaction' Principle,
9. the 'Permission-Stage' principle,
10. and the 'Unpleaded-Grounds' Principle [15].

This blog will not discuss each of these principles in detail (a helpful summary is available [here](#)).

Fordham J held that the Home Secretary should have disclosed the Ministerial Submissions, and that the approach taken to the 'duty of candid disclosure was in error' [35]. However, he declined to order specific disclosure of the documents and defer his decision on permission for judicial review until after the disclosure had taken place, as requested by the claimant's legal representatives. He highlighted the 'special circumstances' of the case, including that there had been sufficient information provided for Fordham J to be confident that there was no viable claim for judicial review, allowing him to decline permission. He underlined that this outcome is 'not a vindication for the Home Secretary's approach to disclosure' [35].

### *The Permission-Stage Principle*

The judgment helpfully clarifies points raised by counsel for the Home Secretary in support of their position that the Ministerial Submissions were not required to be disclosed at permission-stage. They relied upon the recent cases of [R \(Gardner\) v SSHSC \[2021\] EWHC 2422 \(Admin\)](#), in which it was stated that '[t]he duty of candour does not... give rise to a

duty to disclose documents per se' [22]; and [R \(JM\) v SSHD \[2021\] EWHC 2514 \(Admin\)](#), a case involving Ministerial Submissions that had been disclosed, in which Farbey J noted that '[t]here was no duty on the defendant to provide... the ministerial submissions per se...but the substance of the information'[91].

Fordham J distinguishes *Gardner* and *JM*, and firmly asserts that:

*It is...wrong to conclude that it is or has become sufficient for public authority defendants in judicial review cases to communicate – whether in witness statements or grounds of defence – the ‘substance’ of undisclosed primary documents such as Ministerial Submissions, as an alternative to producing or exhibiting the primary documents themselves... If documents matter, they should be provided. If they matter prior to or at the permission stage, that is when they should be provided. Not gists. Nor summaries. Not descriptions of contents or features of the document. Not selected quotations. Instead, the documents themselves. This is proper candid disclosure. It is not the supply of material whose request would constitute ‘fishing’. It is not automatic disclosure of any document mentioned. It is to achieve ‘Candid Disclosure’ of ‘Relevant Material’ by ‘Best Evidence... subject to the ‘Redaction Principle’ ... Disclosure, and candid disclosure, should not be replaced by ‘further information’: the Principle is ‘Information-Too’... not ‘Information-Instead’. [17-18]*

*When the duty of candour applies: settled?*

The judgment provides a clear statement that the duty of candour applies prior to the grant of permission, and in some cases, it will be appropriate to disclose primary documents prior to permission stage. In this respect, the judgment reasserts a position found in earlier case law (see, for example, *R (Terra Services Ltd) v National Crime Agency [2019] EWHC 1933 (Admin)*, [9], [14]), and captured in various guidance documents (see para 15.3.2 of The Administrative Court Judicial Review Guide 2022; and the TSol Guidance, p4).

But how does this sit with previous – and conflicting - case law on the question of when the duty of candour applies? In [R \(British Gas Trading Ltd\) v Secretary of State for Energy Security and Net Zero \[2023\] EWHC 737 \(Admin\)](#), a Divisional Court judgment concerning decisions related to the transfer of the business of Bulb Energy Ltd to Octopus Energy Group Ltd, Singh LJ and Foxton J stated that ‘a claimant does not need to have full disclosure in order to launch judicial review proceedings. Indeed, it is usually the grant of permission which is the trigger for the duty of candour and cooperation with the Court to arise’ [145]. This can be reconciled with Fordham J’s ‘Permission-Stage’ Principle if we look at the wider context in which the comment was made. The case gave rise to a significant amount of disclosure, and one question for the court was the extent to which demands for pre-action disclosure interacted with the requirement that a claimant file sufficiently promptly. The judgment highlighted that while in some instances pre-action disclosure will be required for a claimant to sufficiently advance their claim for judicial review, ‘everything depends upon the context. In the present context...it was of the utmost importance that proceedings should be commenced very speedily’ [150]. The justices were particularly concerned that

several third parties were relying upon the decisions under review, and as such, an urgent application for judicial review would have been appropriate, with detailed grounds subsequently fleshed out [151].

Fordham J's 'Permission-Stage' Principle, then, does not answer the question of *when* it will be appropriate to disclose primary documents prior to the grant of permission. Sometimes, as in this case, it will be self-evident. The Ministerial Submissions in question were a very small pool of primary documents that were essential to the underlying facts needed to answer the issues before the court. A similar example can be found in the case of *R (Abdul Aziz Jalil) v Secretary of State for Justice* [2020] EWHC 1151 (Admin), where it was noted that a highly relevant email chain, central to understanding the approach to the decision under review, should have been disclosed 'at the very outset, soon after the pre-action protocol letter' [53]. *British Gas Trading Ltd* however demonstrates that, in judicial reviews with a more complex context and document-heavy nature, legal practitioners must carefully consider the extent of their requests for information at pre-action stage against a wider set of factors. Such factors include to what extent early sight of documents will adequately advance the statements of facts and grounds on the claim form, whether such requests will unduly impact the requirement to file the claim promptly, and the wider context of the claim, including potentially impacted third parties. While in some instances, it will be necessary to await adequate information to justify launching proceedings, in others, if the 'essential bases' for the complaint is known, it will be appropriate to issue, and await later disclosure. The application of the 'Permission-Stage' Principle, therefore, is far from clarified.

### *The Permission-Stage assurance*

Another interesting feature of this judgment was the reliance upon a Permission-Stage assurance. In correspondence, the GLD had told the Association that the full documents were not relevant to the issues before the court, and that the quotations provided gave all the relevant information. As Fordham J noted, this is in line with the 'Relevant Material' Principle, that candid disclosure is required of those materials reasonably required for the court to arrive at an accurate decision. The position did not, however, sit well with the 'Unpleaded-Grounds' Principle – that the duty of candour extends to documents and information which may give rise to further grounds of challenge. Rather than delay proceedings, Fordham J instead sought a Permission-Stage assurance from Counsel for the Home Secretary that they 'have read and reviewed the Ministerial Submissions – and other undisclosed materials – and can assure the Court that nothing within the undisclosed material would serve to assist the claim or give rise to any other additional ground for judicial review' [19].

Fordham J makes abundantly clear in this judgment that the duty of candour required the Home Secretary to disclose the Ministerial Submissions under discussion. In the absence of such disclosure, however, the Permission-Stage assurance was a neat case management tactic to move the case along, avoiding a deferral of the permission decision until after disclosure was provided and written submissions received. There remain aspects of the role of a Permission-Stage assurance that Fordham J did not clarify. For example, is there a place

for wider use of such assurances beyond the circumstances of this case? Is it only counsel that can provide such an assurance? † One assumes that Fordham J sought assurance from counsel so that the assurance would be made to him and before the court directly, rather than relying on the assurances made by the GLD in correspondence with the Association. Nonetheless, its use here serves as a helpful reminder that, in an environment where public authority resistance to disclosure is viewed with suspicion, it is legal professionals who bear the weightiest responsibility in respect of the duty. Practitioners take the duty of candour profoundly seriously, and the bench's capacity to place trust in counsel can go some way to alleviating the apparent breakdown in trust that is sometimes found between government departments and claimant teams.

## Record keeping

Fordham J articulated the 'Best Evidence' Principle in the terms that '[d]ocuments should be produced, not gisted or a secondary account given, since the document is the best evidence of what it says' [15]. He held that it is 'wrong to conclude that it is or has become sufficient for public authority defendants in judicial review cases to communicate – whether in witness statements or grounds of defence – the 'substance' of undisclosed primary documents such as Ministerial Submissions, as an alternative to producing or exhibiting the primary documents themselves' [17]. This principle is important: it allows the court to examine primary sources objectively, in full, and in their original context. The importance of the 'Best Evidence' Principle has been clear for some time: Fordham J cites the Court of Appeal judgment in [R \(National Association of Health Stores\) v Secretary of State for Health \[2005\] EWCA Civ 154](#), in which Sedley LJ held that 'what a witness perfectly honestly makes of a document is frequently not what the court makes of it' [49].

The 'Best Evidence' Principle has implications for the record-keeping duties which attach to a public body. The relationship between the duty of candour and governmental record-keeping practices has been a [feature of recent public law litigation](#). On the understanding that it will not be sufficient to simply disclose a summary of material to discharge the duty of candour, it is implicit that a public body should take care to retain the original record, rather than, for instance, a summary note, and/or ensure that it has access to relevant records. If the original record is not retained, it is difficult to see how a public authority could comply with the 'Best Evidence Principle' should they face litigation further down the line. In this way, the recognition of the 'Best Evidence Principle' in a candour context should facilitate better compliance with record-keeping obligations such as the [Public Records Act 1958](#).

Furthermore, this judgment raises an interesting question regarding the relationship between the 'Best Evidence' Principle in the candour context and the challenges which have faced modern record-keeping, such as the [governmental use of instant messaging technology](#). It may be the case that the 'Best Evidence' Principle is discordant with the construction of the obligation to preserve primary records seen for instance in the High Court decision in [All the Citizens](#) in contexts where primary records might be difficult to

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† We thank Jonathan Blunden for this point.

preserve, retain, and later disclose. The precise scope of the obligation under the 'Best Evidence' Principle, in this respect, may remain to be seen.

## PSED

The case was argued, although unsuccessfully, as a breach of the ('PSED'). The judgment demonstrates that compliance with the duty of candour and compliance with the PSED are interlinked. Under the PSED a public authority, or a non-public authority exercising a public function, has a duty to have due regard to the impact action, such as the formation of a policy, will have on protected characteristics [12]. Compliance with the duty of candour, and in particular with the 'Best Evidence' Principle, will enable a defendant in a PSED challenge to demonstrate that they have taken the necessary steps. The importance of retaining (and disclosing) records which demonstrate a PSED analysis having taken place is illustrated, for example, by the case of [\*R \(Good Law Project and Runnymede Trust\) v Prime Minister and Secretary of State for Health & Social Care \[2022\] EWHC 298\*](#), in which there was no contemporaneous evidence to demonstrate that the decision maker in question had complied with the PSED (see [114]-[116]). Fordham J noted that the Home Secretary's failure to comply with the 'Best Evidence' Principle with respect to the Ministerial Submissions impaired her ability to rely upon the submissions in support of her case that the PSED was complied with [27]. In this way, the judgment demonstrates that compliance with the duty of candour may be important for a party before the court to put their case at its best. This conceptualisation of the duty of candour is noteworthy. It has long been recognised that the duty of candour attaches to all parties to a judicial review, not just the defendant, but this case is an unusual example of the defendant's failure to comply with the duty being picked up as detrimental to their ability to substantiate their own case.

## Conclusion

Fordham J's ten principles present the main and sometimes competing considerations at play when assessing compliance with the duty of candour. The case builds upon the foundations of the duty set out in cases such as [\*Belize Alliance\*](#) and [\*Hoareau\*](#), and is a must-read for those seeking to understand the parameters of the duty.

Nonetheless, there are aspects of the duty that are not rendered clean by virtue of such an excellent judgment. Certain practices – such as a liberal approach to redactions by government departments - have persisted for some [time](#), and it is questionable whether Fordham J's summary of the 'Redaction' Principle will draw those habits to a close. As we have highlighted here, neat though the principles are, they are not always so easy to apply, and wider factors than those summarised in the ten principles impact upon the duty's operation. Fordham's ten principles, then, are not likely to stem the appetite for clearer rules on the scope of the duty of candour that exists amongst some [practitioners](#).